The University of the State of New York

The State Education Department
State Review Officer
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No. 18-001

Application of the BOARD OF EDUCATION OF THE WILLIAMSVILLE CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student suspected of having a disability

Appearances:
Hodgson Russ LLP, attorneys for petitioner, by Andrew J. Freedman, Esq.

Kenney Shelton Liptak Nowak LPP, attorneys for respondents, by Patrick M. McNelis, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the nonpublic school (NPS) for half of the 2016-17 school year and for the 2017-18 school year. 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 has attended general education classes in district schools since kindergarten (Dist. Exs. 16-20, 22-24; Joint Exs. 14-18; see Tr. pp. 43-44). In elementary school, the student's teachers noted that she required frequent reinforcement of math concepts and had difficulty with math fluency; needed to apply spelling, capitalization, and punctuation skills; worked quickly and made careless errors, and needed to improve her work habits, including neatness and listening (Dist. Exs. 17-20). The student's teachers also reported that she got along well with others and worked well in group situations, was a conscientious student, and a pleasure to have in class (id.). Overall the student's elementary school teachers reported that she was performing at grade level and making satisfactory progress (id.). The student consistently performed at a level 3 (meets proficiency standard) on the New York State testing program assessment for English language arts (ELA) (Dist. Exs. 8; 10). However, the student dropped from a level 4 (exceeds proficiency

standard) in third and fourth grades to a level 2 (meets basic standard) in fifth grade on the New York State testing program for mathematics (Dist. Exs. 9; 11). The student's attendance varied during elementary school; in kindergarten she was absent for 10 days and tardy for 15; in second grade she was absent 7 days and tardy 4 days. (Dist. Exs. 16, 19).

In sixth grade the student's final grade averages for academic classes ranged from a 78 in math to a 91 in reading (Joint Ex. 15). The student received academic intervention services (AIS) to monitor her performance in mathematics (Joint Ex. 18). While several teachers commented on the student's positive attitude, others noted that she did not consistently work to the best of her ability, needed to review and study daily classwork, and was frequently late with her homework assignments (Joint Ex. 15). The student performed similarly in seventh grade, where her final grade averages for academic classes ranged from a 79 in math to an 88 in social studies (Joint Ex. 16). Again, numerous teachers described the student as a "pleasure to have in class"; however, several teachers noted that the quality of the student's work was inconsistent or poor and that she needed to improve her work effort and quality (id.). By parent report, a series of incidents occurred between the student and her math teacher in fall of seventh grade, which the student interpreted as bullying (Tr. pp. 578-82, 660-64). Around this same time the parent testified that the student started to develop an "attitude at home and was a little bit more disrespectful" (Tr. p. 579). For sixth and seventh grade, the student performed at a level 3 on the New York State testing program assessment for English language arts (ELA) and a level 2 for mathematics (Dist. Exs. 12-15). The student's attendance was better in sixth and seventh grade than in prior school years (compare Dist. Exs. 16-20, with Joint Exs. 15-16).

For eighth grade (2014-15) the student attended an inclusion class as a general education student (Tr. pp. 289-90, 374, 580-82).[1] She also received AIS for math, 10 times per month for 45 minutes (Dist. Ex. 18). The student's cumulative average at the end of the first quarter was an 81; however, by the end of the fourth quarter it had dropped to 64 (Joint Ex. 17). The student was absent for 15 days and tardy on 18 days (id.).[2] According to district attendance records, the majority of the student's absences were unexcused and the student's tardiness was primarily due to oversleeping (Joint Ex. 25 at p. 5). Teacher comments on the student's final report card indicated that the student's poor attendance had affected her overall performance, that the student did not consistently work to the best of her ability, that her work was incomplete or not turned in, and that she did not take advantage of the assistance provided in AIS (Dist. Ex. 17). At the end of eighth grade the parents pursued a private psychological evaluation of the student (Joint Ex. 27).

Although the student began her ninth-grade school year (2015-16) at a private school, she returned to the district on or around September 17, 2015 (Joint Ex. 19 at pp. 1, 3). At the request of the parents, the student was placed in an academic study hall every other day; however, the student refused to attend, and the study hall was removed from the student's schedule two weeks

[1] The school psychologist reported that the student was placed in the inclusion class by chance, while the student's mother reported that the student was placed in the inclusion class for AIS (Tr. pp. 341, 58-82).

[2] The attendance record for the 2014-15 school year indicated that the student was tardy 21 times that year (Joint Ex. 25 at p. 5). Further, the student was absent ten times from January 2015 to June 2015 (Joint Exs. 17; 25 at p. 5).

later, also at the parents' request (Tr. pp. 270-71, 430-31). Around this same time the student began seeing a certified social worker who specialized in treating adolescent girls (Tr. p. 604).

In a letter to the parents dated October 6, 2015, the psychologist who evaluated the student at the end of the 2014-15 school year detailed the parents' concerns regarding the student's academic difficulties and behavior and reported the results of her evaluation (Joint Ex. 27). The private psychologist detailed the behavioral issues that were interfering at home and school, specifically, the student was extremely disorganized, did not take responsibility for her behaviors, was often late for school and other appointments, and was often absent from school (id. at p. 1). The psychologist also noted concerns regarding the student's self-esteem and that the student showed poor judgment (id.). According to the psychologist, the student performed in the average range overall on tests of cognitive and academic abilities (id. at pp. 1-2). However, the student demonstrated significant inconsistencies in academic testing, which "might suggest some variation in [the student's] effort, motivation, or attention" (id. at p. 2). The psychologist also noted that her assessment of the student's memory and learning suggested that the student may have "some difficulty with short-term memory mediated possibly by attention issues," and further, that much of the student's distraction was due to her primary focus on social issues (id.). The psychologist opined that the student had some attentional issues that interfered in the classroom setting and recommended that the student be provided with accommodations through a "504 Plan" (id.).[3]

On October 7, 2015, the student was referred to the district's child study team (CST) due to her attendance (Joint Ex. 19 at p. 1). The referral indicated that the student had accrued 10 unexcused absences since she returned to the district school, and that the absences had begun to affect the student's grades (id.). The referral further noted that the student had refused to attend academic study hall and had also left school without permission (id.). Additionally, the referral indicated that the student's parents were concerned about her lack of maturity and motivation and that the student was possibly anxious about school (id.).[4]

The CST met on October 27, 2015 and concluded that the student was difficult to assess due to her attendance (Tr. p. 272; Joint Ex. 21 at p. 2). However, as a result of the meeting, the CST reinstated an academic study hall and provided the student with access to the guidance counselor and district social worker, along with preferential seating (Tr. pp. 272-73).

The CST summary provided a description of the student's performance by her ninth grade teachers (Joint Ex. 21 at pp. 1-2).[5] Notably, the teachers reported that the student "'ha[d] not been in school often enough to make an accurate assessment of the student's ability,'" "'d[id] not make any attempt to make up work from absences,'" "'really ha[d]n't done anything in class,'" "'d[id] no work and ma[de] no effort to make up missing work,'" asked to go to the nurse when she was present for class and her attendance was "'hindering her from doing well'" (id. at p. 1). According to the counselor evaluation, which was completed on December 4, 2015 by the district social

[3] The recommended "504 Plan" was an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 ("section 504") (29 U.S.C. § 794[a]).

[4] The CST had the October 6, 2015 report from the private psychologist when it convened (Tr. p. 323).

[5] The CST summary was dated March 22, 2016; however, the school psychologist testified that this document was available to the CSE (Tr. pp. 360-61).

worker, during counseling sessions the student "appear[ed] resistant and talk[ed] very little;" and she "appear[ed] irritated and disengaged as indicated by her body language and verbal responses" (id. at p. 4). The district social worker indicated that in-school counseling had not been effective (id.).

In a letter to the parents dated November 3, 2015, the private psychologist reported her conversations with the parents regarding the student's "extreme difficulties" "in her academic performance, her incompliance, and her avoidance with regard to taking responsibilities" (Joint Ex. 28 at p. 1). According to the private psychologist, many of the student's behaviors were secondary to the acute stress which she experienced in response to being berated in front of her peers in seventh grade (id.). The psychologist opined that "it was from this time onward that [the student's] willingness to go to school, willingness to do homework, and motivation to be successful waned to the point that she actually became oppositional" (id.). The psychologist noted, however, that the student was not a behavior problem in the classroom and "d[id] make the appearance that she [wa]s paying attention and she [wa]s trying" (id.). The private psychologist diagnosed the student with acute stress disorder and recommended that she be placed in an inclusion class at a minimum and, if not, on home instruction for a period of time (id. at pp. 1-2).

On November 17, 2015 the district referred the student to Child Protective Services (CPS) due to concerns regarding her attendance (Tr. pp. 310, 376, 379, 441; Joint Ex. 21 at p. 2). On November 24, 2015, the parents sent a letter to the district indicating that they suspected their daughter had an educational disability and requesting that the district begin the assessment process as soon as possible (Joint. Ex. 4). Around this same time the parents advised the district that the student was anemic (Joint Exs. 20 at p. 1; 21 at p. 2; 29). On December 2, 2015, the district referred the student to the CSE for an initial evaluation (Joint Ex. 20).

Shortly thereafter, the student's parents requested that the district provide the student with home instruction due to her acute stress disorder diagnosis and intense anxiety (Dist. Ex. 42). The student was granted home instruction for a period of 10 weeks by the district for medical reasons and was scheduled to return to school on February 22, 2016 (Tr. p. 464; Dist. Exs. 40; 41). The student did not consistently attend home instruction (Tr. pp. 286, 612; Dist. Exs. 31-39). The student's report card for the first quarter of ninth grade indicated that she was absent on 25 days and tardy on 8 days; she had a 42.00 grade average (Dist. Ex. 21).[6]

In a third letter to the parents dated January 11, 2016, the private psychologist detailed her recommendations for the student's upcoming CSE meeting (Joint Ex. 30). The private psychologist recommended that the student be classified as having an other health impairment and that she be placed in an integrated classroom with accommodations of preferential seating, availability of one-on-one instruction, an extra set of books, additional time for tests/exams, a scribe, and permission to leave the classroom and go to a designated staff person when her anxiety level became too high (id.).

The CSE convened on January 14, 2016 and determined that the student was ineligible for special education and related services because she did not "meet the criteria to be classified as a

[6] The attendance record for the first quarter indicated that the student was absent 25 times (Joint Ex. 25 at pp. 3-4). Overall, for the 2015-16 school year, the student was absent 106 times, not including the time she was on home instruction (see id. pp. 2-4).

student with a disability" (Joint Ex. 8 at p. 1). As part of its eligibility determination the CSE noted that the student "ha[d] exhibited appropriate progress within the general education program as evidenced by current grades and classroom performance" (id. at p. 5).

In a letter dated September 1, 2016, the parents provided notice of their decision to unilaterally place the student in a NPS, as well as their intent to seek public funding for the cost of the student's tuition (Joint Ex. 10). The district responded to the parents' letter on September 2, 2016 indicating that the parents were not entitled to public funding (Joint Ex. 11).[7]

Following the notice of unilateral placement, the district sought to reevaluate the student based on the parents' concerns regarding the student's progress and educational learning environment (Joint Ex. 12 at p. 1). The district requested consent for evaluations from the parents on September 16, 2016, which the parents did not provide (id. at p. 3). A second request for consent was sent on September 28, 2016 (Dist. Ex. 7; Joint Ex. 13).

A. Due Process Complaint Notice

By due process complaint notice dated September 30, 2017, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2014-15, 2015-16, and 2016-17 school years because the district did not refer the student for an initial evaluation or provide the student with any special education services (Joint Ex. 1 at p. 3).

The parents asserted that the student developed "anxiety related emotional issues during, or around, her seventh grade" (2013-14) school year and that these issues continued into the eighth grade (2014-15) which resulted in "a lack of organization and developing school avoidance" (Joint Ex. 1 at p. 3). By the end of the eighth grade school year, the parents contended that the student was missing academic instruction and they had difficulty getting the student to attend school (id.). Moreover, the parents asserted that the school was aware of these issues; however, the district failed to refer the student for additional support through an IEP or a 504 plan (id.). The parents asserted that the student began to see a private psychologist during the summer of 2015 and that the private psychologist recommended the student for special education (id.).

The parents asserted that during the fall of the student's ninth grade (2015-16) year, they spoke with school staff, including the "school psychologist, social worker, guidance counselor, and assistant principal, on multiple occasions" (Joint Ex. 1 at p. 3). The parents asserted that during these interactions, they shared the private psychologist's analysis of the student and the "requests and recommendations [for] special education programming" (id.). Further, the parents asserted that they requested the student be identified as a student with a disability (id.). Despite this information, the parents asserted that the district failed to refer the student to either the CSE or the 504 team until December 2015 (id.). Instead, the parents' claimed that the district improperly "referred the [p]arents to [CPS] based on an allegation of educational neglect due to the [s]tudent's failure to attend school regularly" (id.).

[7] Beginning in the fall of 2016, while the student was attending the NPS, the family began to receive services through the county to help with the student's attendance issues; the student participated in the PINS diversion program and the parents participated in a Multisystem Therapy Approach (MST) program (Tr. pp. 636, 707-08, 725-26).

The parents asserted that around the time the student was referred to the CSE, she was "placed on homebound instruction due to her medical and emotional issues, as well as her difficulty attending school regularly" (Joint Ex. 1 at p. 3). The parents asserted that "despite [the student's] documented disabilities, as well as those disabilities' adverse impact on the [s]tudent's education," the CSE found the student ineligible for special education and related services (id.). Further, the parents alleged that the district "failed to convene a 504 [t]eam meeting to evaluate the [s]tudent's eligibility under that alternative statute" (id.).

The parents asserted that in June 2016, they again requested "Section 504 accommodations"; however, the school psychologist "responded by saying no determination would be made until the fall, after the current school year had already begun" (Joint Ex. 1 at p. 3). Subsequently, the parents asserted that they began to look for non-public schools for the student and were able to identify a program in the last week of August 2016 (id.).

The parents asserted that placement of the student at the NPS for the 2016-17 school year was appropriate (Joint Ex. 1 at pp. 3-4). The parents asserted that the NPS was equipped to handle the student's medical and emotional needs "by tailoring the instruction to her specific academic level, and also providing [the student] more than one avenue to access her instruction" (id. at p. 4).

The parents asserted that after they provided the district with written notice of the unilateral placement on September 2, 2016, the district responded on the same day informing the parents that they were not entitled to reimbursement (Joint Ex. 1 at p. 4). The parents asserted that they received a letter from the district on September 19, 2016, more than ten business days following the parents' written notice, in which the district initiated a referral to the CSE and requested consent to evaluate the student (id.). The parents asserted that the district did not provide an "explanation as to why additional, duplicative, evaluations were necessary" (id.). Further, the parents asserted that the CSE process would not have been completed until well into the school year, which would have continued "the denial of any form of service plan and/or accommodations to address the [s]tudent's disability related needs " (id.).

As relief, the parents requested that the district: "identify the [s]tudent as a student with a disability, and provide the [s]tudent with a [FAPE]"; "reimburse the [p]arents for tuition for the 2016-17 school year at" the NPS; "shall develop a transition plan, in consultations with the [p]arents, the [s]tudent's private service providers, and representatives from [the NPS], to facilitate the [s]tudent's return to her public school; "provide the [s]tudent with additional services to compensate for the district's failure to provide the [s]tudent with a [FAPE]", including, "appropriate credit recovery programming, pending the student's progress at [the NPS], to address the [s]tudent's failure to receive credits during her ninth grade year"; and pay for the parents' reasonable attorney fees and costs associated with this matter (Joint Ex. 1 at p. 4).

B. Impartial Hearing Officer Decision

On April 27, 2017 the parties convened for an impartial hearing which concluded on June 16, 2017 after four days of proceedings (see Tr. p. 1-767). In a decision dated November 24, 2017,

the IHO found the student was denied a FAPE for the 2015-16 school year, continuing into the 2016-17 school year (IHO Decision at pp. 15-21).[8]

The IHO found that the district did not present any evidence describing its child find procedures (IHO Decision at p. 15). In particular, the IHO found that the failure to present evidence of procedures to identify students exhibiting school avoidance problems was a procedural violation under the IDEA, which contributed to the denial of FAPE (id. at p. 16).

In addition, the IHO found that the district had sufficient information to refer the student to the CSE for an initial evaluation by the end of her 8th grade year (2014-15) (IHO Decision at p. 17). The IHO noted that the student's grades plummeted by the end of 8th grade as she "barely passed her classes for the first time in the [d]istrict" and that this "decline was coupled with substantially increased absences and lateness" (id.). The IHO found that the information regarding the student's school avoidance was available to the high school when the 2015-16 school year began, as the middle school provided the parents assistance with the student's attendance (id.). Further, the IHO found that the information was "supplemented by additional information from the family therapist" (id.). The IHO noted that the parents were credible when they testified regarding "the difficulties they faced with [the student's] school avoidance issues from the end of the [2014-15] school year and their willingness to share this information with the [d]istrict," which included allowing the district to come into their home "to evaluate and assist" (id.). The IHO found that the district failed to comply with the child find responsibilities under the IDEA by failing to refer the student for an initial evaluation at the end of the 2014-15 school year and this failure continued through the start of the 2015-16 school year (id.).

After the student was referred for an evaluation, the IHO found that the district failed to ensure the student was evaluated in all areas of suspected disability (IHO Decision at p. 18). The IHO found that the January 2016 CSE had information indicating that the student had "substantial social/emotional needs that were preventing [the student] from participating in the educational setting" (id.). The IHO found that the CSE was required to perform a psychiatric evaluation and a functional behavior assessment (FBA) in order to obtain additional information regarding the student's school avoidance (id.). The IHO found that the district needed to identify the root cause of the student's school avoidance behavior in order to develop appropriate strategies to address it (id. at pp. 18-19).

The IHO found that the student was eligible for special education and related services as a student with an emotional disturbance in the 2015-16 school year (IHO Decision at p. 19). The IHO found that the record reflected that the student demonstrated a number of characteristics of an emotional disturbance during the 2015-16 school year and at the end of the 2014-15 school year (id. at pp. 19-20). The IHO pointed to the student's grades before and after her eighth grade year as well as her absences as evidence of "an inability to learn that cannot be explained by intellectual, sensory, or health factors," "inappropriate types of behavior or feelings under normal circumstances," "a generally pervasive mood of unhappiness or depression," and "a tendency to develop physical symptoms or fears associated with personal or school problems" (id. at p. 20).

[8] The IHO declined to make any findings regarding the parent's claims related to Section 504, dismissing them without prejudice (id. at p. 29).

Based on this, the IHO determined that the student was eligible for special education as a student with an emotional disturbance (id.).

Further, the IHO disagreed with district personnel who opined that the student was a "disobedient, maladjusted child who the parents enabled" (IHO Decision at p. 21). The IHO found that there was no evidence to support the district's argument that "the student's emotional difficulties centered on social maladjustment and poor parenting" (id. at p. 26). The IHO noted that this argument was "speculation by [d]istrict staff, who neither evaluated the student nor ensured that appropriate evaluations were conducted" (id.). The IHO indicated he was "appalled" by some of the district behavior during the school years in question, specifically noting the district's referral of the student to CPS and visiting the student's home unannounced and without parental consent (id. at p. 21).

The IHO found that unilateral placement of the student at the NPS as of January 2016 was appropriate for tuition reimbursement (IHO Decision at p. 22). The IHO determined that as of January 2016, when the NPS adjusted the student's schedule, enabling her to begin to attend school and receive credit, the NPS was an appropriate placement (id. at p. 24). The IHO noted that prior to January 2016, the school's determination to follow the student's desire to rapidly make up the year of education lost due to her school avoidance resulted in months of continued school avoidance (id. at p. 25). However, once the student's schedule was "altered to a program which allowed the student to gradually make up subjects, the cycle of school avoidance was broken and [the student] began to attend and succeed" (id.). Moreover, the IHO found that the parents researched appropriate educational options before placing the student at the NPS and that the NPS provided the student with the type of accommodation recommended by the private psychologist (id. at p. 24). Additionally, the IHO found that the student made progress at the NPS after her schedule was adjusted in January 2016 (id. at pp. 25-26). Further, the IHO found that there was no basis to find the NPS was inappropriate on LRE grounds as "the therapeutic nature of the program at [the NPS] far outweighs any need for [the student] to interact with regular education students" (id. at pp. 26-27).

In regard to equitable considerations, the IHO noted that it was undisputed that the parents failed to timely notify the district of their intent to unilaterally place the student at the NPS and seek tuition reimbursement (IHO Decision at p. 27). However, the IHO also noted that the district provided no evidence that it informed the parents of their responsibility to provide notice (id.). The IHO found that the parents' failure to timely inform the district of unilateral placement was one factor to consider when determining equities (id. at pp. 27-28). The IHO also noted that the district did not argue the cost of the NPS was unreasonable and he declined to do so (id. at p. 28).

The IHO found that a compensatory remedy was appropriate for one and a half school years (IHO Decision at p. 28). The IHO awarded reimbursement for the cost of the student's tuition at the NPS for half of the 2016-17 school year because the IHO had determined the NPS was only appropriate beginning midway through the 2016-17 school year (id.). The IHO also noted that the hearing record did not indicate where the student was attending school for the 2017-18 school year; and determined that in the event the student attended the NPS for the 2017-18 school year, the district shall fund the cost of the student's tuition provided that the student maintains 80% attendance and obtains passing grades for each quarter she attends (id. at pp. 28-29). The IHO stated that he considered all other requests and claims by the parties and determined they were without merit or insufficiently addressed (id. at p. 29).

IV. Appeal for State-Level Review

The district appeals from the entire IHO decision, except for the IHO's findings that the NPS was not appropriate for the student during the first half of the 2016-17 school year, for which the IHO denied reimbursement, and that the parents' Section 504 claims were dismissed.

Initially, the district asserts that the IHO unilaterally entered four extensions without either the parents or district requesting or consenting to these extensions. The district asserts that the IHO should have at a minimum sought the parties' consent to enter an extension if he thought he was unable to render a timely decision within the compliance date.

The district argues that the IHO erred in finding there was a child find violation. The district asserts that the parents did not raise the issue of child find in their due process complaint notice. Further, the district argues that child find is irrelevant because the student was referred to the CSE and was found ineligible for special education and related services.

The district asserts that the IHO erred in finding the district had sufficient information to refer the student to the CSE at the end of her eighth grade (2014-15) school year. The district notes that the basis for the IHO's finding was that the student's grades dropped, her absences and tardiness increased, and she stopped participating in extracurricular activities. The district argues that if this finding were accepted, it "would represent a significant and inappropriate expansion of a school district's responsibilities under the IDEA." The district asserts that there are a variety of factors which are unrelated to disabilities that could explain these types of changes in a student and that "[s]chool districts are not, and cannot be expected to, submit every student who displays such changes to the CSE for evaluation." The district asserts it is "only required to submit students to the CSE for evaluation when it has notice of a potential disability within the meaning of the IDEA—and that was not the case here until at least November 2016." The district argues that it fully complied with its obligations.

The district argues that there is uncontroverted proof that they were "unaware of the existence and extent of the [s]tudent's ritualistic and avoidance behavior at home." The district asserts that they were not aware of this behavior until the parents' testimony at the impartial hearing. The district argues that it was "patently improper" for the IHO to use the parents' testimony to reach a finding that the district had sufficient information to refer the student to the CSE.

The district asserts that the IHO erred in finding that the CSE "failed to ensure the [s]tudent was evaluated in all areas necessary to determine her eligibility for special education."

The district argues that the IHO's finding that the student was eligible for special education and related services as a student with an emotional disturbance for the 2014-15 and 2015-16 school years is not supported by the record. The district points out that the IHO relied on the student's increased absences to support his finding; however, the district argues that the IHO's analysis "would significantly and inappropriately expand district responsibilities" under the IDEA. Further, the district contends that the IHO overlooked evidence that the district was not aware of "the [s]tudent's ritualistic and avoidance behaviors at home." The district argues that the IHO erred in finding that it "knew or should have known that the [s]tudent was engaging in anxiety ridden avoidance behaviors at home" because the record shows that the parents did not share this

information with the CSE. Moreover, the district argues that the IHO failed to consider testimony from district staff demonstrating that the student was "never withdrawn, socially isolated, argumentative, or aggressive at school and did not present with anxiety or other hallmarks of an emotional disturbance." The district argues that the IHO should not have relied on the opinion of the private psychologist and that her diagnosis of the student was inconsistent with the criteria for an acute stress disorder. Additionally, the district argues that the IHO erred as he "overlook[ed] and fail[ed] to consider the clear proof that the [s]tudent was 'socially maladjusted' rather than a student with an emotional disturbance." The district argues that this contention is supported by the fact that the student's behaviors only improved after the parents received therapy on how to address the student's behaviors through services provided by the county.

The district asserts that the IHO improperly found that there was no basis for the district to contact CPS during the 2015-16 school year. The district asserts that its staff members are mandatory reporters and the failure to refer the student could have led to staff members losing their licenses. The district argues that staff did not have knowledge that public services would not be available to the parents while the CPS call was pending, and it was improper for the IHO to "impute this knowledge to the [d]istrict" in finding that the district "lacked a basis for the CPS call." Further, the district argues that "even if school staff knew that the CPS call would restrict services, [it] does not change the necessity of the call" because "the law does not excuse a mandated reporter from making a CPS call simply because the call might have negative impact on the family or restrict certain services." The district asserts that the IHO decision "effectively penalized the [d]istrict for complying with the law" and the hearing record shows the call was made to help the parents. Moreover, the district argues that the IHO "had no jurisdiction whatsoever to determine where a CPS referral was appropriate or warranted." The district argues that this "ultra vires finding in this regard must be reversed." Further, the district argues that the IHO allowed his view of the CPS call to "color his view of the [d]istrict's action and to impact his decision-making process on the IDEA claims."

The district argues that the IHO erred in finding that it denied the student a FAPE because the student did not qualify as a student with a disability and is not eligible for special education and related services. Moreover, the district argues that "even if the [s]tudent were eligible for special education and related services, the [d]istrict implemented nearly all of the accommodations and services recommended by the private psychologist."

As to the unilateral placement, the district argues that the NPS was not appropriate and the student did not make progress while attending the school. The district again notes that it was not until the parents attended therapy through the county that the student's behavior improved, demonstrating that the NPS did not contribute to the student's progress. Additionally, the district argues that the private psychologist and the NPS representative, whose testimony the IHO apparently accepted, were not qualified to make a determination about whether the student made progress. In addition, the district argues that the NPS was not a 'therapeutic' setting.

The district argues that the IHO "erred in not appropriately considering the balance of equities as required." The district asserts that the parents failed to provide timely notice before they removed the student from the district and the district was not required to inform a parent of their responsibility to give notice. The district asserts that "ignorance of the law is no excuse." Further, the district argues that the IHO ignored the parents' "failure to provide relevant information to the CSE and make the student available for a writing evaluation as part of the CSE

process." The district argues the IHO failed to consider the impact of these facts, that equitable considerations do not favor the parents, and that the IHO erred in granting partial reimbursement for the 2016-17 school year.

The parents, in their answer, assert that the request for review should be dismissed and the IHO decision upheld in all respects. The parents assert that the district should be directed to comply with the IHO's decision and order.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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).

VI. Discussion

Preliminarily, the district argues that the IHO erred in finding that there was no evidence in the hearing record to support the district's decision to report the parents to CPS during the 2015-16 school year. The district argues that the IHO decision penalized the district for complying with the law and the IHO allowed his view of the CPS report "to color" his view and "impact his decision-making process" (Req. for Rev. ¶¶ 22-25).

The IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation, or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR § 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). Therefore, the IHO's finding regarding the propriety of district staff's referral of the student to CPS is outside the jurisdiction of an impartial hearing, except to the extent that it may have related to the identification, evaluation, or educational placement of the student. In this case, the IHO factored the referral to CPS into his determination regarding child find (IHO Decision at pp. 16-17). However, the IHO's focus was on the district's lack of child find procedures rather than the CPS referral (IHO Decision at pp. 15-18). Nevertheless, as set forth above it is an SRO's duty to conduct an impartial review of the IHO's findings, conclusions, and decision and 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 solely upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).[10] Accordingly, I conduct an independent review of the hearing record and the district's child find obligations.

A. Child Find and CSE Referral

The parents asserted in their due process complaint notice that the district denied the student a FAPE for 2014-15, 2015-16 and 2016-17 school years by failing to provide the student

[10] The district in its request for review complained that the IHO did not issue a decision until three months after the parties submitted their post-hearing briefs and that the IHO entered extensions without obtaining the consent of the parties (Req. for Rev. ¶¶ 6, 12). There were twelve extensions granted by the IHO; all extensions indicated that both parties were requesting the extensions (see IHO Ex. I). However, the last three extensions were granted after the parties submitted their post-hearing briefs and indicated the reason for the extensions as "review submissions/record for decision" (IHO Exs. I at pp. 10-12; see IHO Ex. II-III). The parties' post hearing briefs were dated August 14, 2017; yet, the IHO did not close the hearing record until November 24, 2017 (IHO Decision at p. 1; IHO Exs. II-III). The IHO is reminded that although the IHO is required by regulation to determine when the record is closed and issue a decision no later than 14 days from the date the record is closed (8 NYCRR 200.5[j][5], [j][5][v]), the State Education Department has indicated that "a record is closed when all post-hearing submissions are received by the IHO" ("Changes in the Impartial Hearing Reporting System," Office of Special Educ. [Aug. 2011], available at http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf). Additionally, once the record is closed, State regulation does not permit any further extensions of the timeline to render a decision (8 NYCRR 200.5[j][5][iii]). Accordingly, even if the extensions were at the request of the parties as documented by the IHO, the hearing record supports the district's position that the IHO did not comply with State regulations in issuing his decision.

with any special education services during these school years and for failing to refer the student to the CSE for an initial evaluation until December 2015 (Joint Ex. 1 at p. 3).

The IHO found that the district failed to present evidence of their child find procedures regarding students with school avoidance issues, and that this failure was a procedural violation that contributed to a denial of FAPE (IHO Decision at pp. 15-16). The IHO also found that the district had sufficient information to refer the student to the CSE at the end of her eighth-grade school year and that the district failed to comply with its child find obligations by not referring the student to the CSE at that time (id. at p. 17).

On appeal, the district argues that the IHO improperly found that there was a child find violation, as the issue of child find was not raised in the parents' due process complaint notice. The district further argues that the hearing record does not support the IHO finding that there was sufficient information to refer the student to the CSE at the end of the 2014-15 school year. Moreover, the district argues that it did not deny the student a FAPE for the 2015-16 school year.

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 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 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][1], [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][1], [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][1], [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] [noting that "[s]chool 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).[11] A district's child find duty is triggered when the district has "reason to

[11] However, a student may be referred by a student's parent or person in parental relationship (see 34 CFR 300.301[b]; 8 NYCRR 200.4[a][1][i]; see also 8 NYCRR 200.1[ii][1]-[4]). State regulations do not prescribe the form that a referral by a parent must take, but do require that it be in writing (8 NYCRR 200.4[a]; Application of a Child Suspected of Having a Disability, Appeal No. 05-069; Application of a Child Suspected of Having a Disability, Appeal No. 99-69).

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, quoting New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the Child Find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. Aug. 7, 2009]). To support a finding that a child find violation has occurred, "the [d]istrict must have 'overlooked clear signs of disability' or been 'negligent by failing to order testing,' or there must have been 'no rational justification for deciding not to evaluate'" (J.S., 826 F. Supp. 2d at 661, quoting Bd. of Educ. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

Here, the district is correct that the parents did not specifically raise the issue of child find in the due process complaint notice (see Joint Ex. 1). Rather, the parents cited the student's anxiety, school avoidance, and missed instruction, and claimed that "[n]otwithstanding these issues, of which the District was aware, the District failed to refer the Student for additional support and/or accommodation through an Individualized Education Program" (Joint Ex 1 at p. 3). Accordingly, the parents' assertion requires a determination as to whether the district overlooked clear signs of disability when it failed to refer the student for an initial evaluation. Certainly one way the district could have defended this allegation would have been to present evidence of its child find procedures and its compliance with them; however, in the context of the hearing, the district chose to defend its decision by asserting that the student appeared to be a capable student while in school, she did not have a qualifying disability, and she was not in need of special education (see IHO Ex. II at pp. 4, 7-10). Therefore, the IHO erred in finding that the district's failure to present evidence regarding its child find procedures for students with school avoidance was a procedural violation contributing to a finding of a denial of FAPE. Regardless of whether the district had child find policies and procedures in place, the determinative issue is whether the district had sufficient reason to suspect that the student had a disability requiring special education to warrant a referral of the student to the CSE for an initial evaluation, and if so, when the district had such information.

Initially, the IHO erred in finding that the district had sufficient information to refer the student to the CSE at the end of the eighth grade. While the student's grades dropped throughout the 2014-15 school year, her final average for the year was 71.66 and she received a final grade of 65 or higher in all of her academic classes (Joint Ex. 17). Although the student's absenteeism and tardiness for school began to increase in May 2015, no clear pattern of absenteeism had been established by the end of the 2014-15 school year (Joint Ex. 17; 25 at p. 5). At the end of the 2014-15 school year, the student's attendance issues did not warrant referral of the student for an initial evaluation absent some other identifying information and the parents did not obtain or provide the district with the private psychologist's report until the following school year (Tr. pp. 599-600). As described below, the student's social/emotional issues were documented in that report and until the district was in possession of that report, the hearing record does not demonstrate that the district knew or should have known the extent of the student's social/emotional difficulties.

However, the hearing record demonstrates that the district had enough information about the student, to suspect that she had a disability, as early as the October 27, 2015 CST meeting, and therefore, should have referred the student to the CSE for an initial evaluation as of that date.

As noted above, the parents briefly enrolled the student in a private school at the beginning of ninth grade (Joint Ex. 19 at pp. 1, 3). The student's mother testified that shortly after the student

began attending the private school,[12] she called the district social worker, informed her that the student was returning to the district, and indicated that the student had been assessed by a private psychologist over the summer, who recommended the student receive 504 accommodations (Tr. pp. 594-95; see Joint Ex. 21 at p. 2). Additionally, the parent shared her concern about the student's attendance (Tr. p. 595).

According to the district social worker, the district's middle school staff " were worried about how [the student] was doing academically based on her attendance," which had become an issue in middle school (Tr. p. 428). As a result of their concern, the student was "already sort of on [her] radar" at the time the parents requested that she meet with the student in September 2015 (Tr. pp. 426-27). The district social worker testified that at her initial meeting with the student she introduced herself and "wanted to make sure that she was adjusting okay and that she knew there was support available to her, a safe place where she could go if she was feeling overwhelmed" (Tr. pp. 426-27). The social worker recalled that she met with the student at least once a week when she was in school, through November 2015 (Tr. pp. 425-26; see Joint Ex. 21 at p. 2).[13] According to the social worker, she talked with the student about school, how she was doing academically, and her attendance, but the student "did not want to engage in conversations about that so much" (Tr. p. 425). Moreover, the hearing record demonstrates that during the counseling sessions with the district social worker, the student appeared resistant and spoke "very little" most of the time (Joint Ex. 21 at p. 4). Additionally, the social worker indicated that when the topic of the student's academic performance came up, she appeared "to be irritated and disengaged as indicated by her body language and verbal responses" (id.).[14]

The school guidance counselor and district social worker testified that on September 25, 2015 they met with the student's father, at which time he raised concerns about the student's organization and academic progress (Tr. pp. 269, 429-30). According to the guidance counselor, the student's father also reported that the student had previously struggled with organization and was not performing to her ability in the middle school (id.). The guidance counselor testified that as a result of the September 2015 meeting, the district scheduled the student for an academic study hall every other day to address her organizational needs and study skills (Tr. pp. 269-70). The guidance counselor testified that the student only attended academic study hall once and that two weeks later it was removed from the student's schedule at her father's request (Tr. pp. 270-71).

[12] Testimony by the student's mother indicated that the student refused to go to the private school and only went for two days (Tr. p. 594). The hearing record demonstrates that the student first attended the district school on September 17, 2015 (Dist. Ex. 26 at p. 2).

[13] District documentation indicates that the social worker met with the student on September 21st and 30th; October 8th, 9th and 19th; and November 2nd (Joint Ex. 21 at p. 20).

[14] As noted previously, Joint Ex. 21 is dated March 22, 2016 (Joint Ex. 21 at p. 1). Specifically, the information regarding the district's counseling session was dated December 4, 2015 (id. at p. 4). However, the report documented the dates in which the social worker provided the student with counseling and each date listed occurred on or before October 19, 2015 (id. at p. 2). Based on these dates, the evidence demonstrates that the social worker at the time of the CST meeting had this information and could have presented it at the CST meeting.

According to the CST summary form, the CST referral for the student was received on October 9, 2015 and the CST met on October 27, 2015 (Joint Ex. 21 at p. 2). The CST meeting was attended by the school psychologist, the district social worker, the reading specialist who supervised the student's academic study hall, and the student's guidance counselor (Tr. p. 272).[15] As noted above, the CST request form indicated that at the time of the referral the student had 10 unexcused absences which had "already begun to affect her grades," she refused to meet with the academic study hall teacher, she had left school without permission (Dist. Ex. 19 at p. 1). In addition, the parents reported concerns related to the student's lack of motivation, maturity, and possible anxiety related to school (Joint Ex. 19 at p. 1; see Joint Ex. 25 at p. 4).

In addition to the above information, the October 2015 CST had access to the private psychologist's first report dated October 6, 2015 (Tr. p. 323; see Joint Ex. 27). The private psychologist's report indicated the student was having behavioral issues which were interfering at home and school, specifically noting that the student was disorganized, refused to take responsibility for her behavior, and was missing a "great deal" of school (Joint Ex. 27 at p. 1). Further, this report indicated that the student was locking herself in the bathroom at home when she became overwhelmed (id.). In addition to the private psychologist's report, the district's own disciplinary records showed that from the time the student entered the high school in mid-September to the date of the CST meeting, the student had four disciplinary referrals, two for cutting class and two for leaving the building without permission (Joint Ex. 24 at p. 2-3).[16]

According to the guidance counselor's testimony, the district attendees shared their concerns regarding the student and concluded that the student's lack of attendance made it difficult to evaluate her (Tr. pp. 272-73).[17]

The outcome of the CST meeting was to reinstate the student's academic study hall, to provide the student with access to the guidance counselor and district social worker, and to provide preferential seating (Tr. p. 273). The school psychologist testified that the CST did not discuss referring the student to the CSE because "all the information that we had available to us for review … and [the private psychologist's] report indicated that [the student] had a good capacity to learn and she was … in all accounts a capable learner" (Tr. p. 323). The hearing record reflects that

[15] The guidance counselor testified that the CST meeting was also attended by one other person who the school psychologist identified as the assistant principal (Tr. pp. 272, 438; Joint Ex. 22 at p. 1). The parents were not part of the CST (Tr. pp. 375-76).

[16] The discipline log reflects that the student was in the tenth grade when the incidents occurred; however, the student did not attend a district school for tenth grade and the dates listed indicate the incidents occurred during the 2015-16 school year when the student was in ninth grade (Joint Ex. 24 at pp. 1-2; see Tr. p. 63).

[17] During questioning at the hearing about the CST meeting, the guidance counselor indicated that he had conversations with the parents about an incident that occurred when the student was in seventh grade where the student had been confronted and embarrassed by a teacher, in front of her classmates, which "caused some school issues" (Tr. pp. 274-75). However, it is unclear from the guidance counselor's testimony whether this information had been disclosed to high school staff by the parents by the time of the October 27, 2015 CST meeting (see Tr. pp. 274-78). The hearing record reflects that this information was available to the CSE at the time of the student's eligibility meeting on January 14, 2016, as it is referenced in the November 3, 2015 report by the student's private psychologist (Joint Ex. 28 at p. 1).

although the CST was aware of the student's attendance problems, the CST did not have an answer as to why the student was not coming to school.

The hearing record supports a conclusion that the October 2015 CST had reason to suspect the student had a disability and reason to suspect that special education services may have been needed to address that disability. As summarized above, the CST knew that the student had problems with attendance the previous school year, was possibly anxious about attending school and had some health issues, had current attendance issues that were affecting her grades, as well as secondary social/emotional difficulties, and refused to attend the academic study hall that was put into place to help her with academics. Moreover, because the CST lacked information that would have explained why the student was not attending school, it should have referred the student to the CSE for an initial evaluation.

Child find is a distinct question from eligibility, and "[t]he IDEA does not call for instantaneous classification of a student upon suspicion of a disability". . . rather, "[o]nce a school has 'reason to suspect a disability,' the school must conduct an evaluation of the child within a reasonable time" (W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *24 [S.D.N.Y. Nov. 23, 2016], quoting Murphy v. Town of Wallingford, 2011 WL 1106234, at *3 [D. Conn. Mar. 23, 2011]).

Although, the district should have referred the student to the CSE for an initial evaluation as of October 27, 2015, this in and of itself did not deny the student a FAPE as the district still had to evaluate the student and conduct a CSE meeting to determine the student's eligibility. Additionally, while the district had sufficient reason to suspect the student might be eligible for special education as a student with a disability as of the October 2015 CST meeting, the district began the CSE process in December 2015 based on the parents' referral on November 24, 2015 (Joint Exs. 4; 5; 6).

B. Evaluative Information and Eligibility

1. Evaluative Information

The IHO found that the district failed to evaluate the student in all areas necessary to determine whether the student was eligible for special education; specifically, finding that the district was required to perform an FBA and psychiatric evaluation of the student (IHO Decision at p. 18). The district asserts that it evaluated the student in all areas necessary to determine her eligibility for special education.

An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). Pursuant to 8 NYCRR 200.4(b)(4), a reevaluation of a student with a disability must be conducted by a multidisciplinary team or group that includes at least one teacher or specialist with knowledge in the area of the student's disability and, in accordance with 8 NYCRR 200.4(b)(5), the reevaluation must be "sufficient to determine the student's ability to participate in instructional programs in regular education and the student's continuing eligibility for special education." A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8

NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

The hearing record shows that as part of its initial evaluation of the student the district collected updated health/physical data on the student, provided the parents with a social history to complete; attempted to conduct a classroom observation, but could not because the student was not in school; and conducted a counseling evaluation (Joint Ex. 21 at pp. 2-4).[18] The district also recorded the results of intelligence and academic testing obtained by the student's private psychologist in August 2015 and feedback from the student's teachers (Joint Ex. 21 at pp. 1-4). The district compiled this information in a child support team summary (Tr. pp. 87-88; Joint Ex. 21). In addition to the information collected by the district, the parents provided the district with three letters from their private psychologist (see Tr. pp. 366-70).

The evaluative information gathered by the district showed that the student performed in the average range overall on tests of cognitive and academic abilities, that she may have difficulties with short-term memory and attention, that she was anemic, and that during counseling she generally had poor eye-contact and engaged minimally in conversation (Joint Exs. 20 at p. 1; 21 at pp. 2-4). The gathered information also showed that the student had chronic attendance difficulties, did not attend classes while in school, did not make up missed work, and was receiving failing grades (Joint Exs. 20 at pp. 1-2; 21 at p. 1). Finally, the documentation showed that the student had been diagnosed with an acute stress disorder by her private psychologist (Dist. Ex. 28 at p. 1). The documentation did not reference the student's school disciplinary history (see Joint Exs. 20, 21, 27, 28, 30).

A review of CSE meeting comments shows that the committee discussed the student's testing results, anxiety, absenteeism, refusal to do school work, home instruction, and a 504 plan (Joint Ex. 22 at pp. 1-4). The district members of the CSE opined that placement in a special education class would not help the student (Dist. Ex. 22 at. pp. 2-3). Based on the recorded comments, it appears that much of the CSE meeting focused on how to get the student to return to school and included suggestions to involve "the county," that the parents work with the CSE

[18] The parties disagree as to whether or not the parents returned a completed social history to the district (Tr. pp. 326, 743).

chairperson and coordinator of student services, and that the student's private psychologist develop a contingency behavior plan (Tr. p. 310; Joint Ex. 22 at pp. 2-3).

The CSE chairperson confirmed that the January 2016 CSE had the private psychological evaluation available for consideration (Tr. p. 70; see Joint Ex. 22 at p. 4). The CSE chairperson indicated that based on the evaluation, the CSE felt the student had average foundational skills in reading, math, and written language and a solid capacity to learn, remember, and pay attention and therefore, the student had all of the "rudimentary abilities to be a successful student" (Tr. p. 70).

The CSE chairperson testified that the people who interacted with the student and who were at the CSE meeting, felt the student was cooperative, pleasant, demonstrated normal peer interactions, and did not demonstrate any sort of emotional issues while in attendance at the high school (Tr. pp. 71-72). Similarly, the guidance counselor testified that when the student was in school "she performed solidly" (Tr. p. 313). The school psychologist testified that information available to the CSE indicated the student had a "good capacity to learn" and the student was "acquiring information at a rate that was consistent with her peers" (Tr. p. 327). She also testified that teachers reported when the student was in school she was "attentive" and "participat[ed] appropriately" (id.). Further, the school psychologist testified that "teachers remarked at how impressed they were with [the student's] ability to come back to school after extended periods of absence and kind of pick up where they were … without any hesitation" (id.). Additionally, the special education co-teacher in the student's global history class testified that when in her class, the student demonstrated that she was a capable student, had friends, was appropriate in class, polite, and was "like a typical student" (Tr. pp. 160-163). The school psychologist testified that although the January 2016 CSE did not have a classroom observation of the student or a completed social history, she believed that the CSE had enough information about the student to make an eligibility determination without them (Tr. pp. 326-27).

However, the hearing record reveals that the testimony of these CSE members is inconsistent with documentation reviewed at the CSE meeting. Specifically a review of the CST summary reveals that although some of the teachers described the student as respectful and pleasant, all of the teachers indicated that the student rarely came to class, some indicated that when she did come she did not read or do her classwork, and another teacher reported that when the student came to class, she asked to go to the nurse (Joint Ex. 21 at p. 1).

Consistent with this, the initial referral to the CSE which was presented by the school psychologist to the CSE, indicated that when in school, the student refused to attend the academic study hall where she was scheduled to go to catch up on her missed work, and did not attend any of her classes with consistency (Tr. p. 84, Joint Ex. 20 at p. 1). Also, the report provided that the student did not secure missing work from her teachers when she did return to school (id.). Additionally, the student's grades for the first quarter of ninth grade indicated that she was failing all of her classes except for gym and had a 42.00 average (Dist. Ex. 21; Joint Ex. 20 at p. 1).[19]

Similar information was also documented at the January 2016 CSE meeting. Comments included in the January 14, 2016 Committee Meeting Information report reflected that the special

[19] The exhibit list for the district documents reflects that second quarter marking period went from November 16, 2015 through January 25, 2016 and as such was not available to the CSE at the time of the January 14, 2016 CSE meeting.

education co-teacher reported at the meeting that when in class, the student often refused to do work and that the home instructor also reported this (Joint Ex. 22 at p. 2). The special education co-teacher also reported at the CSE meeting that she did not see an academic issue, but rather saw an emotional issue (id.).

In light of the above, the testimony given by the CSE chairperson indicating that the people at the CSE meeting who knew and had interacted with the student viewed her as a "typical [ninth] grade girl who … was not demonstrating any sort of emotional issues when she was in attendance" at the high school, and testimony by the school psychologist that indicated the student was "acquiring information at a rate consistent with her peers" is not supported by the hearing record and is therefore, unconvincing (Tr. pp. 71-72, 327).

In addition, the hearing record shows that the district had records documenting the student's disciplinary referrals which indicated that by the time of the parents' referral to the CSE on November 24, 2015, the student had cut class six times, had left the school building without permission three times and had requested a pass to the nurse on one occasion but did not go there (Joint Ex. 24 at pp. 1-3). In addition, the CST summary indicated that the student actually cut more classes than were documented (Joint Ex. 21 at pp. 1-2). The CST summary reflects that the student's academic study hall teacher only saw the student once from early October until December 4, 2015 and that because the student had many other issues to deal with, she did not write referrals for absences because she believed that the referrals and consequences would only "'compound and complicate the issues [the student] [wa]s struggling with"' (id.). The hearing record also shows the district had documentation of the student's attendance record which reflects that she had 22 unexcused absences and one excused absence from the beginning of the 2015-16 school year, September 17 until November 24, when she was approved for home instruction (Joint Ex. 25 at pp. 3-4). The attendance record also reflects that the student had ten unexcused and four excused late arrivals during this time period (Joint Ex. 25 at pp. 3-4). Additionally, the student's first quarter report card indicated that the student had missed significantly more class time than reflected by her attendance record (Dist. Ex. 21).

The testimony by the CSE chairperson, the special education teacher, and the school guidance counselor all indicated that they had no idea why the student was unable to attend school (Tr. pp. 82, 186, 310-11, 314). Moreover, the CSE chairperson correctly indicated that the testing included in the private psychologist's evaluation did not assess the student's social/emotional functioning (Tr. pp. 136-38). Despite this, the CSE chairperson testified that the multidisciplinary team that gathered information for the CSE did not conduct a social/emotional assessment of the student "simply because none of the teachers or practitioners had noted any unusual behaviors" (Tr. p. 138). Notably, the CSE chairperson acknowledged in her testimony that refusing to come to school could be an indication of anxiety (Tr. p. 142).

Based on the above, the IHO correctly determined that the district failed to fully evaluate the student. Given the student's well-documented school avoidance and her failure to attend, or participate in, classes or academic study hall on those rare days she did attend school, the CSE should have done further evaluations of the student to determine why the student was not able to come to school, the extent of her social/emotional needs, and whether they impeded the student's learning before determining the student was not eligible for special education services. However, notwithstanding that the CSE did not fully evaluate the student in all areas of her suspected

disability, as discussed below, the January 2016 CSE had sufficient information available to find the student eligible for special education.

2. Eligibility Determination

The IHO determined that based on the information in the record, the CSE should have classified the student as a student with an emotional disturbance in the 2015-16 school year (IHO Decision at pp. 19-20). The district argues that IHO erred in this determination and the record does not support classification.

A student with an emotional disturbance must meet one or more of the following five characteristics:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(34 CFR 300.8[c][4][i]; see 8 NYCRR 200.1[zz][4]). Additionally, the student must exhibit one or more of the five characteristics over a long period of time and to a marked degree that adversely affects the student's educational performance (id.). While emotional disturbance includes schizophrenia, the term does not apply to students who are socially maladjusted, unless it is determined that they otherwise meet the criteria above (34 CFR 200.8[c][4][ii]; 8 NYCRR 200.1[zz][4]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 398 [N.D.N.Y. 2004]).

The CSE chairperson explained that the CSE did not recommend that the student be classified because the criteria for emotional disability included the phrase "inability to learn" and up until that point the student was learning (Tr. p. 71). In addition, the criteria stated "over a long period of time" and the student had been successful throughout her career (id.). However, as described in the evaluative information recited in detail above, the student demonstrated multiple aspects of the characteristics included in the definition of the emotional disturbance disability category and they adversely affected her educational performance over a long period of time and to a marked degree.[20] The student's school refusal, work avoidance, and poor academic performance indicated an inability to learn that cannot be explained by intellectual, sensory, or health factors (Joint Exs. 19 at p. 1; 21 at pp. 1-2; 22; 24 at pp. 1-3; 25 at pp. 3-4; Dist. Ex. 21).

[20] The generally accepted definition for a "long period of time" is from two to nine months and typically it is required that preliminary interventions are deemed to be ineffective during that period (213 IDELR 247 [OSEP 1989]).

Her inability to develop positive relationships and accept assistance from most of her teachers, including the academic study hall teacher, the student's ultimate withdrawal from friends, sports and band, and her refusal to leave the house, demonstrated an inability to maintain satisfactory interpersonal relationships with peers and teachers (Tr. pp. 584-85, 613, 614; Joint Exs. 19 at p. 1; 21 at p. 1; see Joint Ex. 28 at p. 1; 30 at p. 2). The student's negative perception of how teachers and students perceived her, and her behavior at home such as locking herself in the bathroom after school for hours, demonstrated inappropriate behavior and feelings under normal circumstances, as well as a generally pervasive mood of unhappiness or depression (Tr. at pp. 579-80, 583, 613, 663; Joint Ex. 27 at p. 1). Lastly, the student's ongoing anxiety stemming from the student's perception of an incident that occurred in the seventh grade and subsequent school refusal demonstrated that the student developed fears associated with school problems (Tr. pp. 580, 583, 604-05, 606-07; Joint Exs. 22 at p. 2; 28 at p. 1).

The district contends that the IHO failed to consider evidence that the student was socially maladjusted rather than a student with an emotional disturbance. Specifically, the district argues that the IHO ignored evidence that "what made all the difference – what caused the [s]tudent to start somewhat attending and become somewhat engaged in school – was not special education, but the fact that [the parents] participated in therapy addressing parenting skills through the county" (Req. for Rev. ¶ 20).[21] Neither federal nor State regulations define social maladjustment.[22] The parents testified that they participated in an MST program; while the student and parents participated in a PINS diversion program; both county programs were deemed successful according to the parents' testimony (Tr. pp. 636, 707-08, 725--28, 749, 751-52, 754-55). The success of these programs does not necessarily mean the student was socially maladjusted, as the district contends. However, even if, the student was deemed to be socially maladjusted, this does not require a finding that the student is ineligible for special education and related services as a student with an emotional disturbance. The student would still be eligible for services because she meets the criteria set forth in the statute (see 34 CFR 200.8[c][4][ii]; 8 NYCRR 200.1[zz][4]).

Moreover, the hearing record also reflects that there was sufficient information in front of the January 2016 CSE to determine the student was, as the parents contended, eligible for special education as a student with an other health-impairment. An other health-impairment means

[21] To the extent the district is requesting a review of the January 2016 CSE's determination that the student was not eligible for special education based on information that was not available to the January 2016 CSE (the parent and student's participation in county programs during the 2016-17 school year), such a review requires a retrospective analysis of the January 2016 CSE's determination. While, the facts of this case do not involve an IEP for an eligible student, but rather revolve around the district's decision not to create an IEP because it believed the student was ineligible, R.E. does not explicitly limit its holding regarding prospective analysis to only those students who have previously been determined to be eligible (see R.E., 694 F.3d at 188). The Second Circuit's reasoning is equally applicable in this context, in which there is an evaluation and eligibility dispute; in other words, the general rule is that the CSE's decisions on how to initially evaluate the student and its decision regarding whether the student is eligible for special education must be evaluated prospectively at the time of the CSE's decision (see Application of a Student Suspected of Having a Disability, Appeal No. 16-011). Accordingly, although the district's assertion is directly addressed above, based on R.E., even if the subsequently acquired information did support finding that the student was not eligible for special education, it cannot be considered in assessing the January 2016 CSEs eligibility determination.

[22] The Department of Education declined requests to define social maladjustment or remove the term from the definition of emotional disturbance (Emotional Disturbance, 71 Fed. Reg. 46,549-50 [Aug. 14, 2006]).

"having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems … which adversely affects a student's educational performance" (8 NYCRR 200.1[zz][10]; see also 34 CFR 300.8 [c][9]). As discussed above, the CSE chairperson, the special education teacher, and guidance counselor all testified that they did not know why the student was unable to attend school (Tr. pp. 82, 186, 310-311, 314). However, there is evidence in the record that demonstrates the student was unable to attend school due to her anxiety and acute stress disorder (Tr. pp. 221-22, 607). A problem that should have been apparent to the January 2016 CSE as these conditions were listed as the reasons she could not attend school on the home instruction request form completed by the parents in December 2015 (Dist. Ex. 42). The fact that the student's anxiety was preventing her from attending school demonstrated that her education was being adversely affected (M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d. 249, 256 [S.D.N.Y. 2014] [finding that "[f]ew things could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school."].

The CSE also should have known from the student's home instruction request form that the student had received a diagnosis of an Acute Stress Disorder (Dist. Ex. 42). Testimony by the school psychologist confirmed that the CSE knew at the time of the January 14, 2016 eligibility meeting that the student had received this diagnosis (Tr. p. 342). The CST summary also documented that the school psychologist called and left a message with the student's father to discuss the November 3, 2015 report from the student's private psychologist, in which the psychologist made the diagnosis (Joint Exs. 21 at p. 2; 28 at p. 1). In addition, the January 14, 2016 eligibility meeting document reflects that the student's mother stated at that meeting that the student's "other health impairment is her anxiety" and further reflects that the parents reviewed the student's history of anxiety starting in seventh grade (Joint Ex. 22 at p. 2). The CSE chairperson's testimony also reflects that the incident that occurred at school during seventh grade that distressed the student was discussed at the January 14, 2016 CSE meeting (Tr. pp. 136-37, 142). The school guidance counselor testified that the parents had shared with him, the seventh-grade incident wherein the student was confronted by a teacher in class' which embarrassed the student and "caused some school issues" (Tr. pp. 274-75). The school psychologist indicated that at a meeting with herself, the assistant principal, the school guidance counselor, and the school social worker in late October 2015, the parents discussed the seventh-grade incident which, according to the school psychologist's testimony "really kind of served as a -- as a starting point for the difficulty that [the student] was having" (Tr. pp. 319-20).

In addition, although the initial referral to the CSE stated that there was no medical documentation related to the student on file with the school nurse, other than a noted history of asthma, the document does reflect that the student had anemia (Joint Ex. 20 at p. 1). The hearing record reflects that the student's doctor provided a letter dated November 27, 2015, indicating the student was suffering from a medical condition that resulted in anemia and the need for access to a bathroom (Joint Exs. 21 at p. 2; 29). The letter also indicated that the student was taking high doses of iron which caused abdominal pain and that she may need to go to the nurse frequently (Joint Ex. 29). The hearing record reflects that the district had this information, as it was documented in the CST summary that was used to develop the student's initial referral to the CSE (Tr. pp. 87-88; Joint Ex. 21 at p. 2). In addition, testimony by the private psychologist also

indicated that the student had anemia and that she believed the student was "traumatized" by embarrassing events related to her medical condition (Tr. at pp. 209-10; see also Tr. pp. 598).

As described above, the hearing record supports finding that the student's anxiety, and subsequent school refusal coupled with anemia, limited the student's ability to interact with her educational environment, which adversely affected her educational performance. In addition, the CSE also had the private psychologist's recommendation that the student be classified as having an other health-impairment (Joint Ex. 30 at p. 1). Accordingly, there was sufficient information available to the January 2016 CSE for the CSE to find the student eligible for special education and related services as a student with an other health impairment.

Moreover, the record reflects that the district did not conduct its own educational, neuropsychological, or psychiatric evaluations of the student to support the January 2016 CSE's assumption that the student's attendance issues were not related to a disability. The IHO determined that the district should have performed an FBA and psychiatric evaluation of the student (IHO Decision at p. 18). However, rather than conduct its own evaluations, the district chose to rely on the reports of the private psychologist and did not present any evaluative evidence to contradict the private psychologist's opinion that the student should be classified and deemed eligible for special education services or to rebut the evidence in the educational record, such as the teacher/counseling reports, attendance issues, medical issues, discipline reports, and parental concerns, that supported a classification of either emotional disturbance or other health-impairment. In addition, the district accepted the parents' request to place the student on home instruction due to her anxiety and acute stress disorder,[23] thereby tacitly acknowledging that the student needed modified instruction and educational interventions in order for her to access the curriculum and attend to learning (see Dist. Ex. 42).[24] Although the district contends that the student was "socially maladjusted," and therefore did not require special education or related services, it did not base this conclusion on evaluative information available to the CSE, but rather noted that the student made some progress after she and her parents received county services.

Once the student was referred to the CSE, by her parents, in November 2015, the hearing record supports the IHO's determination that the district failed to fully evaluate the student in all areas of suspected disability as the district failed to evaluate the student's social/emotional and behavioral difficulties related to her school avoidance. Moreover, notwithstanding the lack of evaluative information identifying the cause of the student's school avoidance, the January 2016 CSE had sufficient evaluative information to find the student eligible as either a student with an

[23] To the extent the district asserts that the private psychologist's diagnosis of the student with an acute stress disorder does not comport with the definition of an acute stress disorder as defined by the Diagnostic and Statistical Manual of Mental Disorders-Fifth Edition (DSM -5) (see Tr. pp. 403-04; Dist. Ex. 48), the district's argument misses the mark, as the district does not offer any evaluative information indicating an alternative explanation as to why the student was exhibiting anxiety or school avoidance at the time of the January 2016 CSE meeting.

[24] The district coordinator of student services explained that she approved the student for home instruction because anxiety can inhibit students from coming to school, the home instruction request form indicated the student was working with a psychologist who could address an acute stress disorder, and the form also indicated a plan for the student returning to school (Tr. pp. 463-65).

emotional disturbance or as a student with an other health impairment. Based on these failures, the district failed to offer the student a FAPE as of January 2016.

C. Unilateral Placement

Based on the finding that the student was denied a FAPE, the case turns to whether the placement at the NPS was appropriate for the purpose of tuition reimbursement. The IHO found that the placement was appropriate for such purpose as of January 2017 (IHO Decision at pp. 27).[25] The district asserts that the IHO erred by finding that the NPS was an appropriate placement for the student as of January 2017.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is

[25] I note that the parents did not cross appeal the IHO's finding that the NPS was only appropriate for the purposes of tuition reimbursement as of January 2017, therefore, the issue of the NPS's appropriateness prior to January 2017 is not at issue.

> receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The executive director of the NPS indicated that the school is a "high school for grades eight to twelve that specializes in unconventional situations using a customized approach for every student and their family" (Tr. p. 502; see Tr. p. 531). He testified that "[a]ny student or family that has a need that isn't being met by another school is a candidate for [the] school," noting that this could range from an academic, behavioral, social, or simply a scheduling need (Tr. p. 503). Notably, testimony by the student's mother indicated that the NPS was the only school they found that would work with them to help get the student to school (Tr. p. 634).

The executive director testified that the school is housed in an old mansion that was converted to office space where each room is typically set up for 1:1 instruction, although the rooms could comfortably accommodate three or four students and a teacher (Tr. pp. 530-31). The school has one larger room, where all of the students in the school can meet for a group class at the same time with either one or two teachers (Tr. p. 531). His testimony indicated that to allow students to move at their own pace, the faculty to student ratio was typically 1:1, although he believed the student may have one additional student in her science class (Tr. pp. 505, 568).

According to the executive director, in addition to himself, there were six teachers and seven students at the school, in what he described as a "very small, intimate environment" (Tr. p. 531). He opined that as such, there is "nowhere to hide," noting that students are always within sight of one or more of the teachers, and further indicated that one of the school policies at the NPS is that students are not allowed to wander on their own (id.).

The executive director also indicated that the teachers at the NPS were certified and had master's degrees in education, one was certified in special education and gifted education and another "unofficially perform[ed] a lot of duties that a social worker might" (Tr. pp. 531, 545). The executive director indicated that the teachers collaborate between classes about the students, for example, with regard to a student's mood or how a lesson went (Tr. pp. 531-32). They also meet at greater length to design curricula together, to collaborate on specific approaches for each student, or to talk about methods that work (Tr. pp. 532-33). For example, one teacher might pass on information that a student likes to be assessed verbally or share academic or social/emotional techniques (Tr. p. 532). The executive director testified that at the time of the hearing (June 2017) they were meeting to discuss fourth quarter report cards, summer school, the next school year, and in general, "everything" (id.). He further testified that he had frequent communication with the student's parents; that he interacted with one of them at least once a week and sometimes as much

as multiple times a day for five days in a row (Tr. p. 537). Infrequently he talked to the parents on nights and weekends (id.).

1. How the NPS Addressed the Student's Needs

With regard to the development of the student's program at the NPS, the executive director described a trial and error approach where the NPS staff came up with a starting point, tried it for a period of time (days, weeks, or months), and changed anything that did not work while keeping the things that did work (Tr. p. 504).[26, 27] According to the executive director, the student's schedule had been revised several times "to build a course load [that was] appropriate for her, as well as a schedule throughout the day [that was] appropriate for her" (Tr. p. 507). The executive director testified that the student initially took an ambitious schedule including a full ninth-grade curriculum and two additional courses that would be considered tenth-grade courses (Tr. p. 506). This was done at the student's request in an effort to make up her ninth-grade year and get a "jump" on tenth grade (Tr. pp. 506, 524, 753). However, it proved to be too much for the student to handle so the NPS stopped the extra tenth grade classes (Tr. pp. 506-07). In addition, the student's third quarter 2016-17 report card indicated that the student was also allowed to withdraw from Spanish class because it was in her best interest to focus on her core classes (Tr. p. 507; Parent Ex. C at p. 2).[28] The third quarter report card indicated that at that time, the student received instruction in ELA, mathematics, social studies, and science (Parent Ex. C at pp. 1-2).

The executive director testified that to address the student's sleep schedule they modified the student's school schedule by assigning her a study hall for the first period of the day that was followed by a school-wide break time so that the student could come in as late as 10:20 in the morning and not miss any class time (Tr. p. 507).[29] However, he indicated that if the student missed a day, upon returning to school, she started where she left off during her last day of attendance (Tr. p. 505).

The executive director testified that the school "absolutely prioritize[d] [the student's] emotional health" and emotional needs over her academic needs (Tr. p. 524). He explained that he was a "big believer that learning can't take place unless Maslow's hierarchy…is met" noting

[26] Testimony by the student's father indicated that there was a tremendous amount of flexibility at the NPS (Tr. pp. 753-54).

[27] The executive director indicated that he began his employment at the NPS on September 1, 2016 and at that time he inherited all the staff, students, and their course schedules (Tr. p. 504). He explained that it was his approach to begin the year with everything his predecessor had put in place unless there was a very good reason to change it (Tr. pp. 504-05).

[28] The student's third quarter 2016-17 report card reflects that at that time the student stopped taking the class Writing Across the Genres for credit but sat in on the class to meet ELA standards that were not being met in her ELA class (Parent Ex. C at p. 2). The report card indicated that any work the student completed in that class was being included in her English grade, that the class was non-credit bearing because the student was unable to make up the work missed for credit at that time and that the class period was also being used at times to make up lab hours that she missed (id.).

[29] The executive director indicated that on the days that the student was in school by 10:20 she would still be marked tardy (Tr. p. 509).

that a student could only focus on academics when they felt safe, were well fed, and their emotional needs were addressed (id.). With regard to the student's emotional needs, the executive director described how at the beginning of the year, the NPS staff met with the parents and the student to demonstrate to the student that they were all on the student's team (Tr. p. 526). The executive director testified that he believed the student understood that NPS staff were not trying to stand in her way or be obstacles to her happiness or her freedom but were there to do what was best for her (id.). He described how they "treat[ed] [the student] as a person and recognized that she had needs, but also explained to her the reasons why the NPS had certain policies as well as the reasons for what they did at the school (id.). Further, he noted that the school gave second chances where appropriate and did not give second chances when that was appropriate (id.). The executive director opined that the student had "shown tremendous emotional development" at the school and that they were "on the verge of making that transition to real academic progress"(Tr. p. 525). He explained that "that emotional piece, that foundation is pretty much entirely there" (id.).

With respect to the student's report card grades, the executive director stated that he made an executive decision to post the student's grades as "incomplete" because he and the NPS staff believed that the grade was there for feedback and not as a label (Tr. p. 510). He suggested that it might be damaging to the student to assign an "embarrassingly low grade, shamefully low grade that did [not] tell the full story" (Tr. pp. 510-11). The executive director recalled that "rather than discourage [the student] with some…tiny number," NPS staff explained to the student in person, that the term incomplete simply meant that she was not finished yet and that there was more to do (Tr. pp. 510-11).[30]

2. Progress

A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).[31] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

The executive director described the progress the student made related to her attendance over the course of the school year (Tr. p. 527). Notably, he reported that the student attended

[30] Testimony by the executive director indicated that the student's actual grades were disclosed to the parents in a letter although they were not included on an official transcript (Tr. pp. 546-47).

[31] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs"]).

school only one or two days per week in the fall, whereas at the time of his testimony in June 2017 the student was coming to school four or five days per week (id.).

The executive director indicated that at the time of his testimony, the student was confiding in a couple of teachers at the NPS (Tr. p. 526). He indicated that the student's level of engagement with her courses had improved in that she had recently shown up to take an exam and work with a teacher even though she knew she could not earn credit for it (Tr. pp. 527-28; see Tr. p. 638). The executive director characterized the student's behavior as "phenomenal" as it showed a "commitment to actually learning" the information " and opined that the student had a "strong bond with the teacher," an "invested interest in her academics and her future," and that she was "reciprocating some of the effort that [the NPS] put forth to help her" (Tr. p. 528). Notably, his testimony indicated that the student had recently taken the algebra Regents exam, the Earth science lab practical and was scheduled to take the "meat and bones" of the Earth Science exam very soon (Tr. p. 529).[32] He indicated that he believed the student had completed the 1200 minutes of lab requirements to be eligible to sit for the lab practical (id.).

The hearing record reflects that at the start of the 2016-17 school year the student was still missing a lot of days of school and the parents were still met with a struggle when trying to get the student up in the morning and to sleep at night (Tr. pp. 723-24). According to the student's father, although the student made some improvement in November and December, she was still not where her parents wanted her to be and therefore at that time they filed for PINS services (Tr. pp. 636, 724-75). The parents testified that the family participated in a PINS diversion program for at-risk kids which worked with the NPS, meeting with the director and some of the NPS teachers (Tr. pp. 636, 707-08, 711, 725, 726). The student's mother testified that following the CPS call they put a behavior plan in place (Tr. p. 636). She reported that there were times that the probation officer assigned as part of the PINS diversion program would meet the parents at the school when the student was absent (id.). She reported that the student's attendance was better based on this and the implementation of therapeutic techniques they (the parents) had learned (id.). The student's father reported that through the PINS diversion program, the parents were directed to participate in the MST program which met two to three times a week for at least one hour per session; they were taught skills such as how to improve your child and your family life and how to reward good behaviors and modify bad behaviors (Tr. pp. 725, 734, 754-55).

The student's third quarter 2016-17 report card from the NPS reflected third quarter grades ranging from 70.2 percent in math, to 74 in science, 75.26 in social studies and 79.81 in ELA (Parent Ex. C at pp. 1-2). Teacher comments reflected the student's attendance varied in each class and ranged from present 50 percent of the time in social studies, to 65 percent in ELA, and 73 percent in math (id.). The student's science teacher indicated that the student had been absent only three times during the last three weeks of the quarter (id. at p. 2).[33] Other teacher comments

[32] In a joint stipulation, dated August 14, 2017 the parties agreed that the student took the New York State Algebra I Regents Examination on June 13, 2017 and earned a score of 74; that the student took the New York State Earth Science Regents Examination Laboratory Practical component on June 1, 2017 and the New York State Earth Science Regents Examination on June 15, 2017 and earned a total score of 46; and that the student was registered to take the New York State Global History and Geography Regents Examination on June 15, 2017 but did not appear for the examination (IHO Ex. IV).

[33] The report card indicated that the student's science teacher was away on maternity leave and that the comments

included that the student had made some improvement in her homework completion in ELA, that the quality of her work had improved and she had completed more assigned work on time in math, and that she had redone the labs that she had not received a passing grade for, although she still needed to make up additional labs that she had been absent for (id. at pp. 1-2). However, her social studies teacher indicated that her grade declined in the third quarter due to her poor attendance (50 percent) and opined that the student was "not willing to take the time to be present at school to a point where she can fully engage with the content and skills" (id. at p. 1). Despite this, the social studies teacher indicated that the student had made progress in being personally accountable in that she had begun to come to the teacher to see what she had missed and how she could work to make up her absences (id.). The social studies teacher indicated that the student's credit driven approach to school was preventing her from realizing her potential and thriving (id. at p. 2).

Comments by the executive director indicated that the student had generally been more present, positive, and engaged during recent months compared with the beginning of the school year (Parent Ex. C at p. 2). He indicated that the student interacted with other students positively, formed collaborative relationships rather than conflicting ones and had taken an active interest in completing her course work satisfactorily (id.). He further indicated that the student had made progress in her attitude, attendance, and engagement although he would like to see the student learning more for intrinsic factors such as pleasure, knowledge, and curiosity rather than extrinsic ones such as earing credit, a diploma, and for a resume (id.).The student's father reported that around March 2017 the student's attendance had significantly improved and the reports that the MST was getting from the NPS were positive and moving in the right direction (Tr. pp. 727-28). As such the PINS diversion officer determined that the program had been a success and he "faded out of the picture" (Tr. p. 728).

The hearing record reflects that the student's absences from school continued to decrease over the course of the 2016-17 school year while she was at the NPS (see Parent Ex. A at pp. 1-4). Testimony by the student's father and the executive director indicated that by the time of the hearing, she had formed great relationships with students and teachers (Tr. pp. 533, 730). The student's father also indicated that they were receiving good reports more frequently regarding the student's engagement with school work (Tr. pp. 731-32). He indicated that the student's behavior at home had improved in that she was falling asleep at a reasonable hour more often, she seemed happier in general, enjoyed her friends more, seemed less irritable, and talked back and lashed out less often (Tr. pp. 732-33). The student's mother indicated that although they continued to work on getting the student to sleep at night, her attendance was better, she was no longer locking herself in the bathroom, no longer followed the "makeup ritual" she had needed in order to leave the house and despite still having difficulty getting up early, she was following through on commitments to meet with teachers early, before school, so she could "catch up" (Tr. pp. 636-38).

As described above, the hearing record supports finding that the NPS provided the student with an appropriate program.

While the hearing record supports finding that the NPS was appropriate for the student at the time of the parents' decision to place her there, and the NPS worked in conjunction with the PINS diversion program and further addressed the student's social/emotional needs informally,

were written by a substitute teacher (Parent Ex. C at p. 2).

with staff who work in a therapeutic way throughout the day, the school did not provide mental health services necessary to explore the cause of the student's school-related anxiety and help the student develop coping strategies (Tr. p. 568). A unilateral placement is not appropriate simply because it removes a student from an anxiety-provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (see John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). In this case, considering that the district did not offer the student an IEP, and considering the other supports in place to address the student's school avoidance and organizational need, the hearing record supports finding that the parents' decision to place the student at the NPS for the 2016-17 school year was appropriate (see W.A. v. Hendrick Hudson C. Sch. Dist., 219 F. Supp. 3d 421, 472, 474 [S.D.N.Y. 2016] [unilateral placement found appropriate based on "totality of the circumstances" including improved attendance, despite lack of "meaningful counseling"]). However, the student's anxiety and school avoidance remain an issue for the student, and without evidence of the NPS working on returning the student to a general education environment or counseling designed to teach the student organization and coping strategies to work on her anxiety and school avoidance, serious doubts remain as to whether the NPS will continue to be an appropriate placement for the student beyond the 2016-17 school year. As such, these issues should be taken into account and considered going forward.

D. Equitable Considerations

Having found the unilateral placement appropriate for the 2016-17 school year, the next issue is whether equitable considerations support the parents' request for tuition reimbursement. The district asserts that the IHO incorrectly found that equities favor the parent as the parent failed to provide timely notice of their intent to unilaterally place the student at the NPS for the 2016-17 school year, failed to provide relevant information to the CSE, and failed to make the student available for a writing evaluation.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger, 348 F.3d at 523-24; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, there is no question that the parents failed to provide timely notice of the unilateral placement to the district (see 20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]; see also Joint Ex. 11). However, this in and of itself does not bar the parents from tuition reimbursement. The record demonstrates that the parents were neither obstructive nor uncooperative during the CSE process in January 2016 (see C.L., 744 F.3d at 840). Further, the parents communicated and met with the district on multiple occasions throughout the 2015-16 school year, even after the January 2016 CSE meeting (Tr. pp. 39-40, 269 271, 273, 288, 319, 429, 431, 458, 473, 476, 599, 618, 622, 650, 655).

To the extent the district asserts that equitable considerations should reduce the relief awarded to the parents because the parents failed to make the student available for a writing evaluation, the hearing record reflects that the January 2016 CSE had a writing assessment completed by the student. The school psychologist indicated that she had suggested to the student's father that a writing evaluation be completed since there was no writing component included in the private evaluation; however, the parent wanted to consult with the private psychologist about it and did not get back to her about it (Tr. p. 325). The school psychologist further indicated that one of the student's teachers did provide her with a sample of the student's writing (id.). The student's teacher testified that the student completed a writing assignment prior to the January 2016 CSE meeting and that the student scored in the average range (Tr. pp. 160-61). Accordingly, the district's assertion is not supported by the hearing record.

Additionally, the IHO essentially reduced the award of tuition reimbursement for the 2016-17 school year by 50 percent in finding that the NPS was only appropriate for half of the school year. As noted above, I disagree with the IHO in this regard and determined that the NPS was appropriate at the time the parents' made the decision to place the student there in the beginning of the 2016-17 school year. As the IHO's determination regarding reimbursement for the 2016-2017 school year has not been appealed by the parents, even if I believed some equitable factors should limit reimbursement for the 2016-17 school year, they would not reduce it any further than the 50 percent reduction already imposed by the IHO's award. Accordingly, equitable factors do not weigh in favor of altering the IHO's award for reimbursement for half of the cost of the student's tuition at the NPS for the 2016-17 school year.

E. Compensatory Education

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]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). In New York State, a student who is otherwise eligible as a student with a disability, may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (34 CFR 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]), or until the conclusion of the ten-month school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5][b];[34] 8 NYCRR 100.9[e], 200.1[zz]; see 34 CFR 300.102[a][1], [a][3][ii]). The Second Circuit has held that compensatory education may be awarded to students who are ineligible for services under the IDEA by reason of age or graduation only if the district committed a gross violation of the IDEA which resulted in the denial of, or exclusion from, educational services for a substantial period of time (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; French v. New York State Dep't of Educ., 476 Fed. App'x 468, 471 [2d Cir. 2011]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75-76 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071, 1078-79 [2d Cir. 1988], aff'd on reconsideration sub nom. Burr v. Sobol, 888 F.2d 258 [2d Cir. 1989]; Cosgrove v. Bd. of Educ. of Niskayuna Cent. Sch. Dist., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; 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]"]; see also E. Lyme, 790 F.3d at 456; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [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"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Likewise, SROs have awarded compensatory 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. of City Sch. Dist. of Buffalo 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]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the

[34] If a student with a disability who reaches age 21 during the period commencing July 1st and ending on August 31st and if he or she is otherwise eligible, the student is entitled to continue in a July and August program until August 31st or until the termination of the summer program, whichever first occurs (Educ. Law § 4402[5][a]).

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. of Fayette County 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 [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"]).

In their due process complaint notice, the parents' requested compensatory services "to address the [s]tudent's failure to receive credits during her ninth grade" (Joint Ex. 1 at p. 4). In their post-hearing brief, the parents specifically requested placement at the NPS for the 2017-18 school year as a form of compensatory education (IHO Ex. III at pp. 23-24). Although in certain limited circumstances, an award directing a district to prospectively place a student in an appropriate, but non-approved school may be proper (see Connors v. Mills, 34 F.Supp.2d 795, 802, 805-06 [N.D.N.Y. Sept. 24, 1998]), as noted above, due to continuing concerns regarding whether the NPS is actively addressing the student's school avoidance and anxiety (rather than avoiding the need by removing the student from an anxiety-provoking environment), continued placement of the student at the NPS for the 2017-18 school year, without further examination would not be appropriate.

Additionally, to the extent that the IHO awarded prospective placement of the student at the NPS for the 2017-18 school year resulting from a denial of FAPE that occurred during the 2015-16 and 2016-17 school years, doing so circumvented the statutory process, under which the CSE is the entity tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs. In this instance, the hearing record indicates that the district was seeking further evaluation of the student's needs during the 2016-17 school year (Dist. Ex. 7; Joint Exs. 12-13). Accordingly, prior to awarding prospective relief for the 2017-18 school year, the district should have the opportunity to conduct a review of the student's current needs subsequent to the matters under review in the instant proceeding. The IHO circumvented the statutory process under which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing a student's needs (see Student X, 2008 WL 4890440, at *16). Accordingly, the appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parents remain displeased with the CSE's recommendation for the student's program for the 2017-18 school year, they may obtain appropriate relief by challenging the district's determinations regarding that school year in a separate proceeding (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year).

In this instance, it is unclear from the evidence in the hearing record what compensatory education services could reasonably and efficiently place the student in the position that he would have been but for the denial of a FAPE (E. Lyme Bd. of Educ., 790 F.3d at 457). Accordingly, this matter is remanded for further administrative proceedings regarding the issue of compensatory

education (see Educ. Law § 4404[2]; 8 NYCRR 279.10[c]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). An award of compensatory education should focus on a remedy for the district's failure to refer the student to the CSE for an initial evaluation in October 2015 and the January 2016 CSE's failure to find the student eligible for special education. Additionally, while the district's assertion that it provided the student with the recommendations made by the private psychologist does not weigh on the district's failure to find the student eligible and offer the student an IEP, services provided to the student during the 2015-16 school year may be considered in crafting an appropriate compensatory education remedy (see Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]). Both parties should have the opportunity to present a reasoned explanation as to what an appropriate remedy would be to place the student in the position she would be in had she not been denied a FAPE, taking into account her current programming and this matter is remanded to the IHO for that purpose.

VII. Conclusion

A review of the evidence in the hearing record reveals that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years, the unilateral placement was appropriate, and that equitable considerations favor the parents. The matter is remanded the IHO to determine an appropriate compensatory education award for the period the student was denied a FAPE during the 2015-16 school year and the IHO's findings that the NPS was an appropriate placement for half of the 2016-17 school year and that equitable factors do not warrant a reduction in reimbursement for the cost of the student's tuition at the NPS are affirmed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO decision dated November 24, 2017 is modified, by reversing that portion which awarded tuition reimbursement at the NPS for the 2017-18 school year as a form of compensatory education; and

IT IS FURTHER ORDERED that this matter is remanded to the same IHO who issued the November 24, 2017 decision to determine the merits of the unaddressed requests for compensatory education contained within the parents' due process complaint notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that if the IHO who issued the November 24, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
February 5, 2018

STEVEN KROLAK
STATE REVIEW OFFICER