The University of the State of New York

The State Education Department
State Review Officer
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No. 18-032

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

Appearances:
Peter D. Hoffman, attorney for petitioner, by Peter D. Hoffman, Esq.

Thomas, Drohan, Waxman, Petigrow & Mayle, LLP, attorneys for respondent, by Daniel Petigrow, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which partially denied her request to be reimbursed for her daughter's tuition costs at the Robert Louis Stevenson School (RLS) for the 2015-16 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student for the 2015-16 and 2016-17 school years. The appeal must be dismissed. The cross-appeal must be sustained.

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, who is currently 17 years old, has received diagnoses of generalized anxiety disorder, depression, bipolar disorder, borderline personality disorder, adjustment disorder with depressed mood, social phobia, and panic disorder (Tr. pp. 1513-14, 1965, 2190; Parent Ex. Y at p. 72; Dist. Exs. 6 at p. 8; 15 at p. 3). She presents with average cognitive abilities and academic skills and exhibits primarily social/emotional difficulties (Tr. p. 1965; Dist. Ex. 6 at pp. 3-8).

During the 2012-13 school year (seventh grade), the student exhibited behaviors related to depression and suicidal ideation, and the student's private psychologist at that time (private psychologist B.) confirmed that the student had one incident of self-injury in 2013 (Tr. pp. 1017, 1482-83; Parent Ex. V at pp. 67-71, 173-74, 176).[1] The student moved to the district in 2014 and began attending the district high school for the 2014-15 school year (ninth grade) (Tr. p. 1116; see Parent Ex. B). In February 2015, the student experienced "mini panic attacks" on an airplane during a trip out of the country, and in March 2015 the parent was contacted by school staff concerning self-injury (Tr. pp. 1019-20, 1646-47). The student continued to engage in self-injurious behavior during April and May 2015, and also expressed suicidal ideation (Tr. pp. 884-85, 1516-17, 1553; Parent Ex. V at pp. 210-11, 227; Dist. Ex. 122). As a result of her suicidal ideation and self-injurious behavior the student was hospitalized at a psychiatric hospital (hospital S) in late May 2015; she was then transferred to another psychiatric hospital (hospital M) in late June 2015 (Tr. pp. 348, 1024, 1253; Dist. Ex. 15 at pp. 2-3; 129-33; 135-36). The student did not return to the district high school for the remainder of the 2014-15 school year (Tr. pp. 480-81, 957-58; Parent Exs. K; N). By letter dated August 28, 2015, the parent referred the student to the CSE (Dist. Ex. 1).

The student remained in hospital M until on or about October 2, 2015, and then received home-based tutoring at a relative's house for the subject of health, and online tutoring for core academic subjects before beginning at RLS on November 30, 2015 (Tr. pp. 65-67, 1259, 1722-23; see Dist. Exs. 15; 26; 46 at p. 1). On October 5, 2015, the CSE convened to determine the student's eligibility for special education services (Dist. Ex. 17). Finding the student eligible for special education services as a student with an emotional disturbance, the CSE recommended a 12:1+1 special class placement in a State-approved "therapeutic day program" (id. at pp. 2, 7, 10).[2] Additionally, the CSE recommended the following related services: two 30-minute individual counseling sessions per week, one 30-minute group counseling session per week, and one bi-monthly 60-minute counseling consultation with the student's current private psychologist (private psychologist M.), "to support [dialectical behavior therapy (DBT)] skills/techniques" (id. at p. 7). The October 2015 IEP also included goals to identify the need for and solicit assistance, and to identify and implement coping strategies in "situations that cause anxiety, anger or distress" and when dealing with negative emotions at school (id. at p. 6). During the October 2015 CSE meeting the district agreed to research therapeutic day schools and sent referrals to multiple out-of-district public and nonpublic school programs following the meeting (Tr. pp. 68-70; Dist. Ex. 17 at pp. 1-2; 25; 27; 30; 33-40; 42; 44; 45; 49; 50). On October 26, 2015, the student was accepted to the

[1] Concerning the incident of self-injury in 2013, the parent stated that she believed it was an "attention getting incident," and that "nobody was really concerned about it at the time" (Tr. pp. 1017-18). The parent further testified that the student did not have any medical issues or issues related to self-injurious behaviors during the 2013-14 school year (eighth grade) (Tr. p. 1017).

[2] The student's eligibility for special education as a student with an emotional disturbance is not in dispute in this proceeding (see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

Karafin School (Karafin), a State-approved nonpublic program (Tr. p. 397; see Dist. Exs. 27; 32).[3] The CSE reconvened on November 12, 2015, to review the referral responses and recommended that the student attend Karafin (Tr. pp. 487-88; Dist. Ex. 46 at pp. 1-2).[4] The November 2015 IEP reflected additional changes made to the October 2015 IEP to conform with the Karafin recommendation; specifically, the CSE recommended a 6:1+1 special class, one 30-minute session per week of individual counseling, and one 30-minute session per week of group counseling (compare Dist. Ex. 17 at p. 7, with Dist. Ex. 46 at p. 8).[5] By letter dated November 12, 2015, the parent rejected the CSE's recommendations in the IEP, informed the district that the student would be placed at RLS on November 30, 2015, and sought tuition reimbursement and transportation to RLS (Dist. Ex. 48). On February 16, 2016, the district received a letter from the director of RLS recommending that the student receive 12-month services (Dist. Ex. 54). The CSE reconvened on February 22, 2016, to discuss the student's need for 12-month services for summer 2016, and determined that the student did not require 12-month services (Dist. Ex. 56 at pp. 1-2).

A CSE convened on May 9, 2016, to conduct the student's annual review for the 2016-17 school year, and recommended an 8:1+1 special class placement for English language arts (ELA) and social studies in a therapeutic support program utilizing dialectical behavior therapy (TSP) at the district high school (Dist. Ex. 62 at pp. 1-2, 8). The CSE recommended that the student receive one 40-minute session per week of individual counseling and one 60-minute session per week of counseling in a small group (id. at p. 8). Additionally, the student would participate in a daily support period with a special education teacher, one session per week of a skills training counseling group that used the DBT model, and she would have access to a teaching assistant (4:1) and "therapeutic/clinical supports" throughout the school day (id. at pp. 2, 6, 9). To address concerns about the student reentering the district's school building, the CSE indicated that it would develop a transition plan in collaboration with RLS and the parent that included an individualized pick-up/drop-off schedule, teaching assistant support, and flexible classroom schedules to "avoid large groups in the hallways" (id. at p. 2). As in the previous year, the CSE recommended one bi-monthly 60-minute counseling consultation with private psychologist M. to support DBT skills and techniques (id. at p. 9). By letter dated May 25, 2016, the parent rejected the CSE's recommendations and informed the district of her intent to unilaterally place the student at RLS for summer 2016 and the 2016-17 school year at district expense (see Dist. Ex. 65).

[3] By email dated November 6, 2015, the parent identified her objections to the programs to which the district had sent referrals (Dist. Ex. 40). With respect to Karafin, the parent identified it as "inappropriate because of the student profile being so different from [the student's] and that the education possibilities related to college placement were not suitable for [the student]. Karafin is also not appropriate because it lacks any element of DBT practice and it appears none of the staff is trained in DBT" (id. at p. 1).

[4] The district's recommendation that the student attend Karafin is only identified in the meeting notes and is not otherwise identified elsewhere on the IEP (see Dist. Ex. 46).

[5] The former director of special education services for the district (former director) testified that individual counseling was reduced to one session per week because Karafin provided on demand counseling throughout the day, whenever the student needed support (Tr. pp. 81-82, 312).

A. Due Process Complaint Notice

By due process complaint notice dated July 19, 2016, the parent alleged that the district failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (see IHO Ex. I).[6] With respect to both school years, the parent claimed the district "failed to identify, locate and evaluate [the student] as a child with a disability . . . in accordance with IDEA Child Find provisions" and generally "failed to appreciate the impact of [the student's] disability on her academic success" (id. at pp. 9, 11, 14). The parent asserted that the district failed to properly evaluate the student, and that the district "ignored" recommendations made by the providers who treated and evaluated the student, as well as the parent's input (id. at pp. 10-11). The parent contended that the district failed to develop IEPs that "would offer [the student] a FAPE" for the 2015-16 and 2016-17 school years (id. at p. 10). In particular, the parent argued that the district "failed to provide [the student] with appropriate academic instruction and counseling services," and "failed to provide competent and qualified providers for services" required by the IEPs developed for both school years (id. at pp. 10-11). The parent also claimed that the district failed to "institute known appropriate educational modalities" related to emotional and psychological disturbances during both school years (id. at pp. 10). The parent argued that the district "failed to acknowledge" her "requests for appropriate referrals to out-of-district placements" and "failed to engage in a diligent search for an appropriate out-of-district placement" during both school years (id. at pp. 10-11).

Specifically, with respect to the 2015-16 school year, the parent asserted that the October 2015 IEP did not reflect the parent's request for a program employing DBT (IHO Ex. I at p. 16). In addition, the parent claimed that Karafin did not "employ DBT training" (id.). The parent further argued that the district "failed to find a placement that could appropriately address [the student's] unique educational and therapeutic needs," specifically, "a placement with a DBT program" (id. at p. 17). As a result, the parent asserted that the recommended program had "the inherent and unavoidable potential for academic and behavioral issues to be overlooked, unreported, and unaddressed" (id. at pp. 17-18). The parent next challenged the district's failure to recommend 12-month services for the student to address the student's "significant anxiety, depression, and suicidal tendencies" (IHO Ex. I at p. 19). The parent maintained that the student required 12-month services during summer 2016 to provide continuity of support, without which there was "a significant likelihood that [the student] would regress and not graduate on time at best, and be hospitalized, at worst" (id. at p. 20). With respect to the 2016-17 school year, the parent asserted that the district recommended that the student attend a district program, which would not be appropriate (id. at pp. 20-21).

The parent asserted that the student's placement at RLS was appropriate for the 2015-16 and 2016-17 school years as it was a small therapeutic school for students with social/emotional and learning challenges; it also provided small classes and a comprehensive evidence-based DBT

[6] The parent's due process complaint notice consists of a cover page (IHO Ex. I at p. 1), a 3-page affirmation of service (id. at pp. 2-4), a 4-page New York State due process complaint notice form (id. at pp. 5-8), and an "addendum" consisting of 15 consecutively numbered pages (id. at pp. 9-23), followed by 13 exhibits (id. at pp. 24-120). Citations to the due process complaint notice in this decision conforms to the total number of pages in the exhibit, rather than the document's various internal paginations.

program (IHO Ex. I at pp. 18-22). Moreover, the parent claimed that equitable considerations favored the parent as she fully cooperated with the district (id at p. 22). For relief, the parent requested "compensatory education" as a remedy for the district's failure to offer the student a FAPE for the 2015-16 and 2016-17 school years, and reimbursement for the costs of the student's tuition at RLS and transportation to RLS for the 2015-16 and 2016-17 school years, including summer 2016 (id. at pp. 7, 23).[7]

B. Impartial Hearing Officer Decision

The parties convened for an impartial hearing on November 2, 2016, which concluded on September 28, 2017, after fourteen hearing days (see Tr. pp. 1-2309). By decision dated February 13, 2018, the IHO found that the district had denied the student a FAPE for the 2015-16 and 2016-17 school years and awarded partial reimbursement for the costs of the student's tuition at RLS (see IHO Decision at pp. 39, 44, 49-50, 56).

Initially, with respect to the parent's child find claims, the IHO found no basis to conclude that the district had violated its child find obligations (IHO Decision at p. 39). Specifically, the IHO found that the student "maintained very good grades at substantially the same levels and that her attendance record remained unchanged and appropriate until she was withdrawn" from the district high school (id. at p. 38). The IHO further determined that the district had no "reason to believe that anything required further attention" until the student made a district social worker and counselor aware of an instance of self-injurious behavior and suicidal ideation in April 2015 (id.). However, the IHO found that because the parent did not provide consent to district staff to communicate with the student's treating clinicians, it had the effect of "foreclose[ing] [the social worker's] access" (id.). Because the student continued to make academic progress despite her social/emotional issues beginning in spring 2015, "the very limited period of time after that before the student was withdrawn," and the fact that the parent failed to provide the district with further information concerning the student while she was at hospital S until she referred the student to the CSE in August 2015, the IHO determined that the district did not violate its child find obligations (id. at p. 39). Moreover, the IHO found that after the parent referred the student to the CSE in August 2015, the CSE acted expeditiously and did not delay evaluating the student (id. at pp. 39-40).

Regarding the 2015-16 school year, the IHO determined that the district's position regarding the cause of the student's self-harm and suicidal ideation was inconsistent with the opinions of the student's clinicians and not supported by a psychological evaluation report or the treatment summary from hospital M (IHO Decision at p. 42). The IHO also found that there was no merit to the parent's claims that the evaluation reports utilized by the district indicated the

[7] Among the exhibits attached to the parent's due process complaint notice was a letter from private psychologist M., dated June 30, 2016, expressing concern that the district high school was not appropriate to meet the student's academic or social/emotional needs as a result of class size, school size, and school culture at the district high school (IHO Ex. I at pp. 119-20). The CSE reconvened on September 9, 2016 to discuss the letter (Dist. Ex. 75 at p. 1; see Tr. pp. 105-06; Dist. Exs. 72; 74 at p. 1). Meeting notes from the CSE meeting identified that district staff believed the district could provide programming similar to what the student received at RLS (Dist. Ex. 75 at p. 1). By letter dated September 13, 2016, the parent reiterated her objections to the recommended program and location in the district high school and restated her intention to seek reimbursement for the cost of the student's tuition at RLS (Dist. Ex. 76).

student required DBT, nor did private psychologist M. testify that the student required DBT (id. at p. 43). Furthermore, the IHO noted that the CSE "recommended a small class and counseling in a therapeutic day school and provided accommodations and modifications consistent with certain specific recommendation[s]" made in the psychological evaluation report and treatment summary (id.). Nevertheless, the IHO found that Karafin would not have been able to implement consultation with private psychologist M. "to 'support DBT skills/techniques' as required by the IEP" (id. at pp. 43-44). In particular, the IHO noted that no one at Karafin had "even taken a course in DBT" and that, as DBT is a "very comprehensive skill based system," the IHO found "no basis for concluding that experience with general counseling skills/tasks . . . would substitute for knowledge of DBT" (id.). As a result, the IHO found that "any meaningful collaboration" required by the IEP between Karafin and private psychologist M. "was not likely to be possible" and concluded "that where there would likely be no meaningful support for the therapy she was receiving from [private psychologist M.] notwithstanding the CSE's belief that it was important this student would be put at high risk" (id. at p. 44). As a result, the IHO found the district had failed to offer the student a FAPE "by failing to provide a placement that could appropriately implement the IEP with regard to element[s] critical to enable the student to make meaningful gains" (id.).

Regarding 12-month services for summer 2016, initially, the IHO found that the parent provided no support for the proposition that 12-month services are required where a student is at risk of substantial emotional regression (IHO Decision at pp. 45-46). In any event, the IHO found that the student was not at risk for substantial regression as, while she experienced some emotional difficulties during the period between her discharge from the intensive residential program at hospital M and RLS, the student did well almost immediately at RLS despite the two-month gap and quickly recovered any lost or diminished skills (id. at pp. 46-47). Furthermore, the IHO found that there was no evidence to conclude that the student "would have been at risk of life-threatening actions" (id.). Accordingly, the IHO found that the district did not deny the student a FAPE by not providing 12-month services.

Regarding the 2016-17 school year, the IHO determined that RLS and the district's TSP shared the "same basic elements," and that the hearing record did not contain any evidence that the student could not make meaningful gains in a program similar to RLS (IHO Decision at p. 47). Accordingly, the IHO found that the parent's objections to the program other than its location within the district high school did not constitute a basis for a determination that the recommendation was not appropriate (id.). Moreover, the IHO found that district staff had received appropriate training in DBT, and there was no indication the district could not appropriately implement the program (id. at pp. 47-48). The IHO further found the parent's claim that the district could not implement the program because the district had not yet identified a site location was without merit because the site of a program does not need to be specified at the time of the CSE's review, the district identified a site within the district high school and implemented the program before the beginning of the school year, and, in any case, the program location was "adequately equipped and furnished for its purpose when the program commenced" (id. at p. 48). However, the IHO found persuasive private psychologist M's testimony that the student would be at substantial risk of regression in the district high school as a result of her perception of her prior experiences there, "notwithstanding the provision of DBT therapy" (id. at pp. 48-49). The IHO also found that the student's "extreme vulnerability to other people's opinions of her," and the "constant possibility" of the student's attendance in a special education program becoming known

to other students "would likely result in substantial daily anxiety" for her (id. at p. 49). The IHO also determined that the size of the district high school was not appropriate for the student as the student exhibited difficulty in large groups which could trigger panic attacks (id. at pp. 49-50). For these reasons, the IHO found that the district failed to offer the student a FAPE for the 2016-17 10-month school year (id. at p. 50).

Regarding the appropriateness of RLS, the IHO found that RLS provided an academic program for the student that "was reasonably calculated to enable [the] student to make meaningful educational gains" (IHO Decision at p. 52). Specifically, the IHO noted that the student received 55 minutes of 1:1 advisor support each day "targeting [her] unique needs," counseling was available whenever the student or staff believed it was needed, and the school utilized DBT methodology and worked cooperatively with private psychologist M. and the parent (id. at pp. 50-51). Furthermore, the IHO determined that the content, methodology, and delivery of services at RLS addressed the student's unique needs despite the "same general program design" being used for other students, and that the student had made academic and social/emotional progress while at RLS (id. at pp. 51-52). Finally, the IHO determined that even if the length of the student's bus trip to RLS was a factor in making a determination whether RLS was the student's least restrictive environment (LRE), it was not dispositive and was not a basis for concluding that RLS was not an appropriate unilateral placement (id at p. 52).

Regarding equitable considerations, for the 2015-16 school year the IHO determined that the parent did not misrepresent or withhold information from the CSE and did not predetermine the student's placement at RLS (IHO Decision at p. 53). The IHO also found that the evidence did not support that the parent's primary motivation for rejecting the district's program was her objection to the student's relationship with another student at the district high school (id. at pp. 53-54). However, the IHO determined that although the parent "fully cooperated with the district throughout the CSE evaluation process" and visited seven potential placements, she failed to fully cooperate with the district's attempts to locate an appropriate placement when she refused to visit a placement in another public school district due to her preference that the student attend RLS, and that the parents' failure to do so was not justified (id. at pp. 54-55). Accordingly, the IHO reduced the award of tuition reimbursement by 20 percent for the 2015-16 school year (id. at p. 55). For the 2016-17 school year, the IHO found that the parent's "strong preference" for RLS over the district's TSP was not a basis for limiting an award of tuition reimbursement, and there was no indication that the district had been prevented from evaluating the student or that the parent obstructed the CSE process (id. at p. 56).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that the district did not violate its child find obligations, as it "was obvious by the [s]pring of 2015 that [the student] had an emotional disturbance and that this required an examination by the CSE." The parent also claims that the IHO erred in reducing the tuition award for the 2015-16 school year by 20 percent on equitable consideration grounds as the parent fully cooperated and was "fully forthcoming" with the CSE. Finally, the parent contends that the IHO erred not awarding tuition reimbursement for summer 2016 as the IHO failed to credit testimony that the student could regress if she did not receive services.

In an answer, the district responds by generally denying the parent's allegations and asserts that the IHO properly determined the district did not violate its child find obligation and the CSE appropriately did not recommend 12-month school year services for the student in summer 2016. The district also interposes a cross-appeal asserting the IHO erred in finding that the district denied the student a FAPE for the 2015-16 and 2016-17 school years, that RLS was an appropriate unilateral placement, and that equitable considerations warranted reimbursement. Regarding the 2015-16 school year, the district claims that the IHO erred in finding that Karafin could not implement the IEP recommendations for consultation with private psychologist M. to support DBT skills/techniques. The district also contends that the IHO erred in finding that the inability of Karafin to meaningfully collaborate with private psychologist M. would have denied the student a FAPE.

With respect to the 2016-17 school year, the district maintains that the IHO erred in relying on private psychologist M.'s testimony that there was a "substantial risk of regression" if the student returned to the district high school. The district also claims that the IHO erred by relying on evidence of the student's prior experiences at the district high school in 2015, before the student had been classified, and an experience occurring at a nonacademic activity held at the high school, to support a conclusion that the student could not return to the school. The district also contends that the IHO erred in finding that the district high school was too large for the student.

The district also asserts that the IHO erred in finding that RLS provided the student with specially designed instruction and that the student made academic or social/emotional progress at RLS. The district also claims that the IHO erred in finding that the student received an appropriate form of counseling at RLS. Additionally, the district alleges that the IHO erred in finding that the length of the student's bus trip to RLS "was not a factor in considering [LRE]," and that the length of the bus trip did not render RLS inappropriate.

As to equitable considerations, for the 2015-16 school year, the district argues that the IHO erred in finding that the parent did not predetermine the student's placement at RLS and that the parent did not completely refuse to cooperate with the intake and CSE placement process. For the 2016-17 school year, the district claims the IHO ignored evidence that the parent's primary motivation for rejecting a placement at the district high school was related to the student's relationship with another student and that the parent predetermined her rejection of the district program.

In an answer to the cross-appeal, the parent denies the allegations set forth in the district's cross-appeal.[8] The parent contends that the IHO "concluded that DBT was a critical component of any program for [the student]" and asserts that the IHO erred to the extent she found that a psychological evaluation report and hospital M treatment summary did not recommend the student continue to receive DBT.

[8] To the extent that the parent attempted to respond to the general denials set forth in the district's answer, the parent exceeded the permissible scope of a reply under State regulation, and her allegations will not be considered (see 8 NYCRR 279.6). A petitioner may only "reply to any claims raised for review . . . that were not addressed in the request for review, to any procedural defenses . . ., or to any additional documentary evidence" (id.).

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).

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).

[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).

VI. Discussion

A. Child Find

The IHO found that the district did not violate its child find obligations since the student maintained good grades until she was hospitalized, the district was not aware of the student's social/emotional difficulties until March 2015, and the parent had not provided the district with updated information concerning the student's hospitalization until the parent referred the student to the CSE in August 2015. On appeal, the parent argues that the IHO's analysis of child find was flawed as it was "obvious" that the student had an emotional disturbance by "spring 2015," and the CSE should have acted at that time. Further, the parent claims that the district failed to apprise the parent of her rights to an IEP.

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. 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. 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).[10] A district's child find duty is triggered when the district has "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660, 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

[10] A student may be referred by his or her parent (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]).

Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. 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).

Regarding the parent's claim that it was "obvious" the student had an emotional disturbance by spring 2015, the standard for evaluating child find is not whether a specific classification was "obvious," but whether the district had reason to suspect a disability and suspect that special education services may be needed to address the disability. Nevertheless, as discussed below, it was neither obvious that the student had an emotional disturbance by spring 2015 nor was it clear that the district had a reason to suspect a disability that may have required special education services before the time the parent requested a referral to the CSE in August 2015.

According to the hearing record, the student did well academically throughout the 2014-15 school year (Tr. pp. 1510, 1536).[11] Prior to February 2015, there is no indication in the record that the student was exhibiting social/emotional difficulties or that the district had reason to be aware of such difficulties if they existed. The student first exhibited social/emotional difficulties in the form of panic attacks during a February 2015 plane trip out of the country (Tr. pp. 1273-74, 1646-47, 2136).[12] Approximately one month later, the school nurse at the district high school became aware that the student had engaged in self-injurious behavior (Parent Ex. S at p. 1). The school nurse recorded that the student had "very superficial cut marks" on her wrist that appeared to be healing (id.). That same day, the school nurse informed the district social worker about the incident and contacted the parent; the social worker testified that this was the first time she was aware of the student exhibiting this type of behavior (Tr. pp. 682-83, 711-13, 885, 1019-20; Parent Ex. S at p. 1).[13] On April 27, 2015 the school social worker became aware of another incident of the student engaging in self-injurious behavior (Tr. p. 885). According to an April 27, 2015 email sent from the parent to the student's private psychiatrist, the student told her counselor for the end of the 2014-15 school year (counselor S.), and the social worker that she "wants to kill herself" (see Tr. pp. 812, 815-16, 885; Dist. Ex. 122 at p. 1). Notes from the school nurse further indicated that the social worker reported the student had engaged in self-injurious behavior and was having "'disturbing thoughts'" (Parent Ex. S at p. 7). The school nurse report indicated that there were "[n]umerous small scratches on [the student's] inner left wrist," and the student was endorsing suicidal ideation and "hearing voices" (Parent Ex. S at p. 7; see Dist. Ex. 15 at p. 2). The social

[11] The student has historically done well academically and was reported to "always receive A's and B's" (Dist. Ex. 6 at p. 2).

[12] It is unclear when or to what extent the district was aware of this event (see Tr. pp. 1273-74). Moreover, the parent testified that the student did not tell her about the events that transpired in February 2015 until "quite some time afterwards" (Tr. pp. 1646-47).

[13] In an email, the parent described the student's behaviors in March as more "attention getting than anything anxiety related" (Dist. Ex. 119). Nevertheless, private psychologist B. testified that she did not agree with the parent's assessment and believed that the student's self-injurious behaviors had to do with an "escalation of the tensions that had been building all through the fall semester" (Tr. p. 1541).

worker testified that she did not believe the student required a referral to the CSE at that time because she continued doing well academically, there had not been any excessive attendance or grade issues, and she had not been skipping classes (Tr. p. 887). Furthermore, the social worker testified that she often worked with students who engaged in superficial self-injurious behavior but did not necessarily require a referral to the CSE (Tr. p. 887).[14] In order to ensure that the district was "doing everything . . . we need to do to provide support for the student," the social worker requested consent to speak with private psychologist B. and sent a consent for release of information form to the parent the day following the April 2015 incident (Tr. pp. 684-86; Dist. Exs. 95; 96). The social worker further testified that she sent the release to inform private psychologist B. about what was occurring at school (Tr. pp. 685-86). The district received consent from the parent to speak with private psychologist B. on May 14, 2015 (Tr. p. 686; Dist. Ex. 97).

The hearing record indicates that the district may have known of the extent and severity of the student's social/emotional difficulties following the social worker's communication with private psychologist B. in late May 2015. The social worker testified that during a telephone conversation in late May 2015, private psychologist B. opined that she was becoming "increasingly concerned" regarding the student's behavior and her inability to "follow through on [her] treatment protocol" (Tr. pp. 690-92; see also Parent Ex. C).[15] Moreover, following a third incident on May 14, 2015, during which the student engaged in self-injurious behavior, the social worker testified that private psychologist B. informed her that she believed that the student's situation had gotten to a point where hospitalization was necessary and that the student would be hospitalized at hospital S (see Tr. pp. 690-92; see also Parent Ex. C).[16] While this information, coupled with what the district already knew of the student the previous two months, could have provided the district a basis to suspect that the student had a disability (see Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N., 2017 WL 4641219 at *7 [S.D.N.Y. Oct. 10, 2017] [identifying that a district had reason to suspect that an evaluation would be needed where the parent informed the school district that the student was hurting herself, expressing suicidal thoughts, was asked to leave her boarding school as a result of the extremity of her behaviors, and was recommended hospitalization by a school counselor]), the social worker did not believe that hospitalization alone necessitated a referral (Tr. pp. 698-700). The social worker further testified that hospitalization does not automatically require referral to the CSE as there are many reasons that a student might go to the hospital which may not be related to a disability, especially in instances where the student maintains good grades (see Tr. pp. 698-99). Similarly, a district school psychologist testified that referrals are only made to the CSE when the student is suspected of having a disability that

[14] The social worker further opined that if a "student is [injuring] themselves, it doesn't automatically mean we do anything differently than contact the parent, contact the outside therapist," and if the therapist "has recommendations, we follow those recommendations" (Tr. p. 759).

[15] Call notes from the social worker suggest that she had contacted private psychologist B. on various occasions between May 19, 2015, and September 8, 2015 (see Parent Ex. C at pp. 2-4).

[16] On May 14, 2015, the student's mother emailed private psychologist B. and the private psychiatrist regarding an incident where the student had texted a friend "saying that she had cut herself after a fight with a friend" (Tr. p. 1664; Dist. Ex. 125).

"adversely impact[s] their educational performance" (Tr. pp. 478, 481-82).[17] In addition, while the report of a July 2015 psychological evaluation noted that the parent believed the student's grades had decreased "significantly" during the end of the 2014-15 school year, during the hearing the parent testified that the student maintained good grades throughout the 2014-15 school year (Tr. pp. 1018-19, 1563; Dist. Ex. 6 at p. 2).[18] Furthermore, the student's year-end report card for the 2014-15 school year suggested that the student had made continuous steady improvement in all classes over the course of the year, despite the aforementioned increase in social/emotional concerns (Parent Ex. Q; Dist. Ex. 104).

On May 20, 2015, the social worker sent a consent for release of information form to the parent to allow the district to contact hospital S (Dist. Ex. 98). The parent provided consent for the district to contact hospital S for "educational purposes only" (Parent Ex. I). The social worker claimed that the parent's qualification ensured that hospital S could not share information related to the student's emotional needs and supports, and that the district would only be allowed to speak with the student's tutors at hospital S (Tr. pp. 693-94; Parent Ex. I). Despite the social worker's interpretation, it is not clear that the parent's reference to "educational purposes" limited the district to only academic information (see Tr. pp. 693-94; Parent Ex. I). Moreover, the social worker could not remember if she followed up with the parent to explain her reasons for needing broader authority to speak with hospital S, and she did not attempt to contact anyone at hospital S after she received consent because of her belief she "had no one to contact" (see Tr. pp. 694-95, 734, 770). Finally, the social worker testified that the parent did not provide her with the student's treatment information from hospital S or the student's discharge summary (Tr. pp. 697-98).

Between the time that the social worker requested consent to speak with hospital S and received consent from the parent, the student had been referred to the district's student response team (SRT), and a meeting was scheduled for June 16, 2015 (Tr. pp. 477, 480, 680; Parent Exs. L; O; P).[19] The former director of special education for the district (former director) explained that the SRT was a group of "professionals from the building, [including] school psychologists, guidance staff, school counselors, [and the] assistant principal" who "met to discuss students for a variety of reasons" (Tr. p. 218). The student's guidance counselor for the 2014-15 school year (guidance counselor B.) testified that the SRT generally discussed "individual students in the area of academics, social-emotional, [and] attendance, to see how we can support them" (Tr. p. 963). The school psychologist testified that the purpose of the SRT was to develop interventions for

[17] Counselor S. also testified that at the time the student was hospitalized she did not "stand out in any way" academically and described her as an "at least a B student if not higher," and private psychologist B. testified that the emotional events impacting the student did not "in any way" affect her academics (Tr. pp. 818, 1525, 1568).

[18] The evaluator also noted that the student's "academics struggled over the final months of the 2014-15 school year which in light of the current profile is attributable to anxiety" (Dist. Ex. 6 at p. 7).

[19] Testimony from district staff reflects that the SRT has at various times been referred to as the school resource team, the response to intervention (RtI) team, and the child study team (CST), and in some instances these terms are used interchangeably (see, e.g., Tr. pp. 160, 165, 218-19, 221, 247, 477-78, 509-12, 674-75, 750, 810-11, 918). Review of the hearing record in further detail suggests that the SRT was in existence during the 2014-15 school year but was subsequently renamed as/understood to be the RtI team going forward (Tr. pp. 477-78, 674-75, 810-11). For purposes of ease and consistency, the remainder of the decision will refer to it as the SRT.

students who were struggling (Tr. pp. 509-10). The special education supervisor at the district high school (special education supervisor) also testified that the SRT meets to discuss and determine appropriate steps, such as interventions and monitoring, for students who require "study skills," "organizational support," and grade adjustments, and for students who have "a medical condition going on" (Tr. pp. 219-20). The social worker further testified that the SRT "gets together to see what kind of services/interventions we can provide for the student to help them to be successful" (Tr. pp. 674-75). The social worker also testified that there are many reasons a student may be referred to the SRT that are not necessarily related to special education needs (see Tr. p. 677).[20]

Many of the questions from both the district and parent raised during the hearing assumed that an SRT meeting was necessary to determine whether and for what reason a student should be referred to the CSE, even though no witnesses provided testimony precisely to this effect. The social worker testified that the SRT would not refer a student to the CSE without collecting sufficient data on the student and exhausting interventions beforehand (Tr. p. 678). Counselor S. testified that a student is not necessarily referred to the CSE after the SRT has met to discuss the student, rather, it is the "first step to see what happens, [and] many students are not referred" (Tr. p. 811). Furthermore, the school psychologist testified that for the SRT to make a referral to the CSE it would need information detailing the student's functioning and diagnosis, what precipitated the hospitalization, and recommendations from the treating clinician, none of which was available to the district during the SRT meeting (Tr. pp. 542-43). Nonetheless, the former director testified that district staff could refer students to the CSE without referral to the SRT, and the school psychologist testified that referrals to the CSE should be made when the student is suspected of having a disability that "adversely impact[s] their educational performance" (Tr. pp. 169, 478-79).

The hearing record does not reflect that the district attempted to obtain additional information relevant to the student's hospitalization and treatment prior to the end of the 2014-15 school year; however, it also appears that the parent did not provide this information to the district, nor did she provide evaluative information to the district detailing the student's social/emotional issues until after she referred the student to the CSE in August 2015. The social worker testified that she first received the student's private evaluation reports and treatment information from the parent during the October 2015 CSE meeting (Tr. pp. 699-700, 703). Although the parent testified that she left "multiple" messages per week for both counselor S. and the high school principal

[20] The hearing record suggests that the SRT met to discuss the student's grades in relation to her hospitalization at hospital S. The meeting referral form identified that the goal of the June 2015 SRT meeting was to determine the "appropriate grading for the 4th quarter and final grades" and to discuss "finals and whether or not it is appropriate to approve exemption" (Parent Ex. P). In addition, guidance counselor B. testified that the purpose of the June 2015 meeting was to discuss "options for grading [the student] for the fourth quarter" (Tr. pp. 964-65). The school psychologist also testified that the student was referred to the SRT in June 2015 to inform the team that the student was hospitalized and would not return for the remainder of the school year, that the student had changed guidance counselors, and to get some input on how to grade the student for the fourth quarter (Tr. pp. 480-81). The social worker testified that the student was originally referred to the SRT because the district was trying to "come up with a plan to give her grades for the fourth quarter" since the student was not expected to return to school for the rest of the 2014-15 school year, and due to the stress it might cause, would not be completing any more schoolwork (Tr. pp. 681-82, 868). The school psychologist also noted that no members of the SRT inquired as to the student's hospitalization during the meeting, nor did she recall discussing that the student had needs related to anxiety (Tr. p. 520).

beginning in August 2015 (Tr. p. 1027), the parent indicated that the purpose of those messages was to inform the district that the student would not be home for the start of the school year, rather than to request special education programming, and that when she spoke to the principal, the principal recommended that the parent refer the student to the CSE (Tr. pp. 1351-53). The parent also testified that she did not attempt to contact the school district regarding the student's need for special education services before August 2015 (Tr. p. 1028).

As a final note, once the district received the referral from the parent, the district responded in a relatively timely fashion. The CSE requested consent to evaluate the student on September 9, 2015 and received consent from the parent on September 16, 2015 (Tr. p. 53; Dist. Ex. 5). Following receipt of consent, the CSE conducted a brief classroom observation while the student received tutoring at hospital M, and the CSE convened on October 5, 2015, identified the student as a student with a disability, and developed an IEP, less than three weeks after the parent provided consent to evaluate (Dist. Exs. 16; 17 at p. 1). Over the next month, the CSE made multiple referrals in an effort to locate an appropriate school in which the student's IEP could be implemented, and determined by November 12, 2015 to recommend that the student attend Karafin (Dist. Ex. 46; see Dist. Exs. 19-25). Accordingly, the hearing record does not support a finding that the district violated its child find obligations by first identifying the student less than five weeks after the parent referred her to the CSE (Mr. P. v. West Hartford Bd. of Educ., 885 F.3d 735, 750-52 [2d Cir. 2018] [finding that the district acted with "sufficient expedition" where the student was found eligible for special education three months after the initial referral]).[21]

Therefore, based upon the information in the hearing record, the district did not violate its child find obligations, as district staff were first informed of the student's difficulties in early March.[22] The district was aware by late May that the student had been hospitalized as a result of social/emotional issues and that the student would not return to the school for the remainder of the

[21] The parent also asserts that the district failed to apprise the parent of her rights to an IEP. In support of this claim, the parent references the IHO decision which stated that the district "made no effort to conduct any evaluation of this student nor did it inform the parent as to rights with regard to evaluations, services or accommodations under the IDEA" (IHO Decision at p. 37). In her memorandum of law, the parent seems to identify that by spring 2015 the district failed to provide her with "any information concerning [the student's] right to a CSE evaluation for a disability, classification and an IEP or procedural safeguards" (Parent Mem. of Law at p. 3). Districts are required to provide procedural safeguards notice to parents of a student with a disability once a year and upon initial referral or parental request for evaluation, upon the first filing of a due process complaint notice, or upon the request of a parent (8 NYCRR 200.5[f][3]). As there is no indication in the record that the parent requested such information in spring 2015 or that the district failed to provide such information after the parent had referred the student to the CSE, the hearing record does not support a finding that the district failed to provide the parent with required notice of her rights under the IDEA.

[22] A student with an emotional disturbance must meet one or more of five characteristics outlined in federal and State regulations, including, but not limited to, "[a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers" and "[a] general pervasive mood of unhappiness or depression" (34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]). In addition, 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.). As the student had not exhibited difficulty in school prior to her removal to hospital S in May 2015, the hearing record does not establish that the district overlooked clear signs of a disability, or that it was negligent in or had no justification for failing to evaluate the student prior to her referral by the parent (J.S., 826 F. Supp. 2d at 661).

school year (see M.M. v. New York City Dep't of Educ., 26 F. Supp. 3d 249, 256 [S.D.N.Y. 2014] [holding 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"]). However, as the student's hospitalization at hospital M was unknown to the district from late June 2015 until after the parent referred the student to the CSE in August 2015, it is unclear whether and to what extent the district would have been capable of initiating its procedures to identify, locate, and evaluate the student (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]). In any case, the parent does not request any relief on appeal related to the district's potential violation of its child find obligations.

B. 2015-16 School Year

The IHO found that Karafin staff did not have the requisite knowledge of DBT in order to implement an element of the 2015-16 IEP "critical" to enable the student to make "meaningful gains," specifically, the 60-minute bi-monthly counseling consultation between Karafin and private psychologist M. (IHO Decision at pp. 44-45; see Dist. Exs. 17 at p. 7; 46 at p. 8). In a cross-appeal, the district claims that the IHO erred in finding that Karafin could not support the student's transition from hospital M or implement the CSE's recommendation for consultation with private psychologist M. to support DBT skills and techniques. Moreover, the district claims that the IHO mischaracterized the evidence of Karafin's experience with DBT and improperly relied on testimony at the hearing that was not available to the CSE. The parent responds that in addition to the IHO determining that Karafin staff had an insufficient knowledge of DBT to implement the consultation with private psychologist M. required by the IEP, the IHO also "concluded that DBT was a critical component of any program for [the student]." The parent further asserts that the IHO erred in finding that the parent's claim that the evaluative information available to the fall 2015 CSEs "specifically recommended a school providing a DBT-based program" lacked merit (IHO Decision at p. 43).

As an initial matter, the IHO's reliance on Karafin's familiarity with DBT was central to her determination that the student was not provided with a FAPE. However, the parent did not raise this claim in her due process complaint notice, and the parent's claim in the due process complaint notice that the district failed to "find a placement with a DBT program," in context, appears to have been a claim related to the failure of the CSE to recommend DBT in the November 2015 IEP rather than a claim that Karafin was incapable of implementing the IEP. As it relates to DBT, the November 2015 CSE recommended that Karafin consult with private psychologist M., who would continue to provide the student with DBT; however, it did not recommend a "DBT program" (see Dist. Ex. 46). As the IHO's finding of a denial of a FAPE was based upon a determination about Karafin's ability to implement that facet of the student's program, the district now argues that Karafin could implement the IEPs, and does not directly address whether the recommendations made in the October and November 2015 IEPs were appropriate for the student. However, while the parent argues that the IHO erred in determining that the information available to the CSEs did not recommend DBT, she does not assert that the IHO erred by not addressing the claims raised in her due process complaint notice regarding the district's failure to recommend DBT for the 2015-16 school year. Accordingly, this decision focuses on the issues as presented by the parties: whether the evaluative information available to the CSE recommended the provision of DBT to the student; and whether Karafin was capable of implementing the recommendation in the IEP that Karafin staff consult with private psychologist M.

According to the director of RLS, DBT is "an offshoot" of cognitive behavioral therapy (CBT), which validates "where a client stands with also the need for change," and is a very structured and effective treatment for adolescents who have multiple and complex diagnoses (Tr. pp. 1844-46; see Tr. pp. 602, 1845). Private psychologist M. testified DBT was originally a treatment used for suicidal adults, that had been adapted for use with adolescents, teens, and their families (Tr. pp. 1953-54).[23] He further testified that DBT is an "advanced form" of CBT that has a "whole skills curriculum to help [patients] better regulate their emotions and behavior" (Tr. pp. 1957-58). Private psychologist M. explained that DBT uses the change-oriented strategies of CBT and adds meditation and acceptance-based strategies to "synthesize them into a coherent treatment, balancing and acceptance and change" (Tr. pp. 1957-58).[24]

A review of the hearing record indicates that the October 2015 CSE considered the following evaluative information: a March 2015 physical examination, the report of a July 2015 private psychological evaluation,[25] a September 2015 social history update, an October 2015 classroom observation, and an October 2015 hospital M treatment team summary (Tr. p. 59; Dist. Exs. 6; 8; 15; 16; 17 at p. 3). The July 2015 psychological evaluation report reflected that the student exhibited cognitive and academic skills in the average range, with a weakness in math fluency skills which the evaluator attributed–along with the student's other academic struggles during spring 2015—to the student's anxiety (Dist. Ex. 6 at p. 7). The evaluation report further indicated that the student exhibited "severe anxiety struggles that are seen in the context of the evolution of sensory issues," and that she "lacks the ability to identify the ways in which her anxiety affects her, both internally and regarding the consequences it has on her environment" (id. at p. 8). The July 2015 psychological evaluation report and the October 2015 hospital M treatment summary indicated that the student had been hospitalized in June 2015 due to emotional dysregulation, suicidal ideation, self-harm, and severe anxiety (Dist. Exs. 6 at p. 1; 15 at p. 2). The treatment summary further reported that the student was in a residential DBT program that focused on "decreasing ineffective behaviors and increasing adaptive behaviors" (Dist. Ex. 15 at p. 2). The treatment summary also reported that the student had received diagnoses of adjustment disorder with anxiety and depressed mood, panic disorder, and social phobia (id. at p. 3).

While the hearing record shows that the student was provided with DBT during the summer 2015 hospitalizations, a review of the documents available to the October 2015 CSE supports the IHO's finding that the reports do not specifically recommend a "school providing a DBT-based program" (IHO Decision at p. 43; Tr. p. 1025; Dist. Ex. 15 at pp. 2-3; see Dist. Exs. 6; 8; 16). The July 2015 psychological evaluation report recommended: "continued psychoeducation around [the

[23] The hearing record reflects that private psychologist M. was instrumental in adapting DBT for use with adolescents and teens (Tr. pp. 1846-47, 1953-54; see Parent Ex. X).

[24] A district school psychologist from the TSP testified that DBT defines five "problem areas," and provides skills to address difficulties in each area (Tr. p. 571). The psychologist described the problem areas and the corollary skills as: lack of self-awareness (mindfulness); impulsivity (distress tolerance); personal conflict (walking the middle path); emotional dysregulation (emotional regulation); and difficulty in relationships (interpersonal skills) (Tr. pp. 571-74).

[25] While the evaluation took place on July 28, 2015, the report of the evaluation is dated September 16, 2015; for ease of reference future references will be to the July 2015 psychological evaluation report (Dist. Ex. 6).

student's] physiological symptoms of anxiety, the function of anxiety, and effects it has on her behavior" and "around the role of depressive thoughts in her presentation;" the report also noted that therapy should include a strong component of "mindfulness of emotions to increase her emotional awareness" (Dist. Ex. 6 at p. 8). The psychological report also noted that the student should "receive an IEP to help her succeed in light of" her struggles with a significant anxiety disorder that had "impacted her ability to learn" (id.). However, the evaluator recommended that the student and the parent continue with "individual, group, parent and phone consultation modalities" of DBT in light of her suicidal ideation; it also recommended that a "point person," a school counselor, should assist with de-escalation and regular check-ins, and this person "should be in contact with [the student's] DBT therapist to assist in the identification of appropriate skills" for the student to use (id. at pp. 8-9). The October 2015 hospital M treatment summary identified that the student's needs would be "appropriately met through placement in an academic setting with an emotional support component that can provide necessary support for her emotional disability" and that it was "critical" for the student to "access her academic potential in an environment that is sensitive to her ongoing clinical needs" (Dist. Ex. 15 at p. 3). The evaluators further recommended "a school with small class sizes, rich academic curricula, and access to emotional and social supports" (id.). The treatment summary also indicated that the student required an "academic setting that will offer therapeutic support, and that will challenge her academically while providing the clinical oversight that she requires" (id.).

Consistent with the above recommendations, the fall 2015 CSEs included recommendations in the IEP to address the student's needs including: specific management needs, a special class, counseling, and access to emotional and social supports (Dist. Exs. 15 at pp 2-3; 17 at pp. 4-5, 7; 46 at pp. 6, 8). The October and November 2015 IEPs identified recommendations set forth in the management needs that indicated the student's ability to learn was impaired by her emotional difficulties and that she needed ongoing and specific accommodations for anxiety and her tendency toward depressive symptoms to integrate socially with peers (Dist. Exs. 17 at p. 5; 46 at p. 6). The management needs also indicated that the student needed therapeutic and clinical support to continue to make progress in these areas (Dist. Exs. 17 at p. 5; 46 at p. 6). Finally, the "effect of student needs on involvement and progress in the general education curriculum" section of the IEP indicated that her social/emotional needs impacted her ability to make academic progress and that she required "continued psychoeducation around her physiological symptoms of anxiety, the function of anxiety and effects it has on her behavior," and that she needed "to develop coping skills to manage symptoms of behavior" (Dist. Exs. 17 at p. 5; 46 at p. 6). The CSEs also recommended both individual and group counseling, and bi-monthly 60-minute telephone consultations with private psychologist M. "to support DBT skills/techniques" (Dist. Exs. 17 at p. 7; 46 at p. 8).[26]

[26] Additionally, the present levels of academic performance in the October 2015 IEP described that the student needed an "academic climate that can support social/emotional mental health needs to access relatively strong academic abilities" (Dist. Ex. 17 at p. 4). The IEP further indicated that she needed a counselor to help her deescalate when necessary, and to develop skills to identify the effects of anxiety and coping strategies to deal with the effects of anxiety (id.). The October 2015 IEP present levels of physical performance indicated that while there were no concerns with the student's physical development, her "emotional health contributes to her ability to participate in all aspects of life, including academics" (id.).

Therefore, contrary to the parent's assertion, the July 2015 psychological evaluation report and the October 2015 hospital M treatment summary—while referencing DBT—do not reveal that either evaluator recommended that the student be placed in a "DBT program" (Dist. Exs. 6; 15 at pp. 2-3). While the parent may have requested that the fall 2015 CSEs recommend a placement that provided DBT, as stated above, the October and November 2015 IEPs provided the psychological evaluation report's recommendation for a DBT phone consultation, and the meeting information attached to the IEPs reflect that the purpose of the consultation was to coordinate treatment with the DBT provided by private psychologist M. (Dist. Exs. 17 at pp. 2, 7; 46 at pp. 2, 8).

Next, review of the hearing record does not support the IHO's finding that during the student's transition from the "intensive residential DBT program" at hospital M to "an entirely different environment" (i.e., Karafin), "there would likely be no meaningful support for the therapy [the student] was receiving from [private psychologist M.]" (IHO Decision at p. 44). The parent testified that the student was discharged to home from hospital M on or about October 2, 2015 (Tr. p. 1259). The hearing record indicates that the student stayed with a relative during the day and received home-based tutoring in the subject of health and online tutoring for core academic subjects (Tr. pp. 65-67, 1722-23; Dist. Ex. 46 at p. 1). During this time, the student had individual therapy sessions with private psychologist M. two times per week, as well as weekly "multi-family skills training group" and "periodic family therapy sessions" (Tr. pp. 1701, 2271-75; see Dist. Ex. 17 at p. 2). On November 12, 2015, approximately six weeks after the student was discharged from hospital M, the CSE reconvened and recommended Karafin (Dist. Ex. 46 at pp. 1-2, 8). Consequently, at the time of the CSE meeting the student had already transitioned to an environment (i.e., home) "entirely different" from the "intensive residential DBT program" at hospital M (IHO Decision at p. 44). Had the parent accepted placement at Karafin, the student would have received full-time instruction in a 6:1+1 special class placement, individual and group counseling, and as discussed in detail below, consultation between Karafin staff and private psychologist M. (Dist. Ex. 46 at pp. 1-2, 8). Additionally, the director of Karafin testified that the smaller class size with a lower student to teacher ratio (6:1+1) would be a good transition for the student after having been in the "much more restrictive environment" at the hospital (Tr. p. 410). The former director testified that the October 2015 CSE added a counseling consultation with private psychologist M. because it would support the student's transition from the hospital setting, and it was "important for the clinicians at school to be collaborating with a clinician providing treatment on the homefront, and [private psychologist M.] was going to be the clinician providing treatment to [the student] and her parent" (Tr. pp. 62-63). She further testified that the November 2015 CSE recommended the 6:1+1 special class at Karafin because it felt it would be supportive to the student while transitioning from a "very intensive" DBT program at hospital M and after having been at home for a period of time (Tr. p. 310).

Turning now to the district's assertion that the IHO improperly found that Karafin could not implement an "element critical" to the student's ability to receive educational benefit from the IEP, generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). However, the Second Circuit held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O., 793 F.3d at 245; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5 [2d Cir. 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir.

Aug. 24, 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Mar. 30, 2015]; see also Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]), based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]). The hearing record supports the district's contention that the IHO erred in finding Karafin could not implement the recommendation on the IEP to support DBT skills/techniques. All evidence available to the CSE at the time of the November 2015 CSE meeting indicated that Karafin could implement the bi-monthly consultations with private psychologist M.

On November 6, 2015, the parent emailed the former director and provided reasons why she found the schools to which the district had referred the student were not appropriate (Dist. Ex. 40 at p. 1). In the email she stated that Karafin was not appropriate because the student's profile was "so different" from the other students that had attended the school, that educational possibilities related to college placement were not suitable, that the school lacked any element of DBT practice, that none of the staff were trained in DBT, and that it was too restrictive of an environment (id.). In a response to the parent dated November 9, 2015, the former director explained that the July 2015 psychological evaluation report recommended a counselor to assist in de-escalation when necessary and that the counselor periodically contact private psychologist M. to help identify appropriate skills for the student to use (Dist. Ex. 41 at p. 1). The former director also noted that the October 2015 IEP contained recommendations for a therapeutic day school, extended time, chunking assignments, breaking up long term assignments, counseling supports, small class sizes, and access to social and emotional supports to prevent regression (id.). Additionally, the former director indicated that clinicians in all the programs they visited were familiar with the tenets of DBT (id.). The former director also noted that "none of the recommendations received from [hospital M] advised that the school program must have DBT" (id.). Rather, they recommended that "the school program therapist be allowed to consult with [the student's] therapist in order to support [her] IEP goals" (id.).

The meeting information attached to the November 2015 IEP reflected that at the November 2015 CSE meeting, the director of Karafin reported that Karafin could meet the student's academic needs and goals listed in the IEP and would be able to support her transition to a post-secondary program such as a four-year college (Dist. Ex. 46 at p. 2). The Karafin director also confirmed that the student would be placed with students who have similar needs and abilities (id.). The school psychologist who attended the October and November 2015 CSE meetings testified that she believed Karafin was appropriate because the school could provide the student with all the supports recommended by the CSEs, including that Karafin would be in communication with the student's outside treatment provider to coordinate efforts and services (Tr. pp. 488-89; see Dist. Exs. 17 at p. 1; 46 at p. 1).

The meeting information summary attached to the October 2015 IEP indicated the parent expressed that the student should be enrolled in a program "familiar with the tenets of DBT counseling" (Dist. Ex. 17 at p. 2). The parent testified that during her visit to Karafin she was informed by the Karafin director that staff were not trained in DBT, although there was one staff member who "knew of DBT" (Tr. p. 1049). She further testified that "just knowing of DBT does not make you able to help a child that's in a crisis situation know what skill to use" (id.). During the November 2015 CSE meeting, the director of Karafin confirmed that "Karafin staff routinely work[ed] with students who [were] in private therapy and working on replacing ineffective behaviors with adaptive and effective behaviors, including students who have or are receiving [DBT]" (Dist. Ex. 46 at p. 2).

The director of Karafin testified that all students at Karafin receive school-based counseling per their IEP and the mental health clinicians at the school coordinate with private mental health professionals (Tr. pp. 401-02). He also indicated that while clinicians at the school are not certified in DBT, they are familiar with it and continue their professional development in a variety of ways (Tr. pp. 403, 422). He further testified that the counselors at Karafin have previously worked with students in DBT and would refresh their knowledge before working with a student to ensure they "knew what to do and how to communicate properly with those students" (see Tr. pp. 403, 422). The former director testified that during the intake at Karafin, the director of Karafin shared that school staff had worked with students engaged in "outside" DBT and, although not certified, had participated in workshops about DBT (Tr. pp. 77-78). According to the former director, during the intake the director of Karafin stated that Karafin staff would "certainly" be able to work with the student's therapist to support whichever skills the student was currently working on, within the Karafin program (id.). She further testified that Karafin would have been able to offer the academic classes as well as the therapeutic component the student required and was willing to work with the student's private psychologist (Tr. p. 295). Additionally, the former director testified that even though Karafin did not have a DBT program, it was "absolutely willing" to work with the student's private psychologist, the clinicians at Karafin had a working knowledge of DBT, and they would be able to support the student and her parent (Tr. pp. 300-01).

Although private psychologist M. was not present for the October and November 2015 CSE meetings (see Dist. Exs. 17 at pp. 1, 11; 46 at pp. 1, 12), the IHO relied on his testimony to find that Karafin would not be able to implement the counseling consultation provided for in the 2015-16 IEP (IHO Decision at pp. 43-44). However, a review of the cited testimony establishes that it does not support the conclusion drawn by the IHO (see Tr. pp. 2276-78). Initially, private psychologist M. testified that some schools with DBT programs "choose not to necessarily do all of the comprehensive elements of it and do pieces of it . . . and use me as an adjunctive out-patient therapist" (Tr. p. 2270). Without first determining private psychologist M.'s knowledge of Karafin's program, staff training, ability to consult with outside providers, or level of DBT knowledge, the IHO asked private psychologist M. to what extent it would be necessary for staff "to have some sort of DBT training in order to function as an adjunct" to the DBT he provided to the student (Tr. p. 2277).[27] In response, private psychologist M. testified that it was "very critical"

[27] Private psychologist M. testified that although he had "heard about" Karafin "years earlier" from patients, he did not have sufficient recent knowledge to "make any recommendations myself on it" (Tr. p. 1994).

for staff to receive training to be able to "effectively deliver the skills in various contexts [and] to provide coaching to the students during the day" (id.). The IHO then asked private psychologist M.'s opinion as to "the appropriateness of a program with staff who may be familiar theoretically with DBT, but have not necessarily received specific training in it as an adjunct to your program," to which private psychologist M. responded that familiarity without training "doesn't mean anything to me," and that "having read a textbook or an article [on DBT] without being trained in how to adequately supervise in general I don't think really would suffice" (Tr. pp. 2278). Notwithstanding that, as described above, the November 2015 IEP did not require DBT services be provided directly to the student. Accordingly, the fact that private psychologist M. testified that simple awareness of DBT would be inadequate for a school program that "wants to be complementary to the work [he was] doing in an out-patient setting" does nothing to undermine the ability of Karafin to implement the November 2015 IEP. Private psychologist M. did not testify that he would be unable to collaborate with Karafin staff, as required by the IEP, "to support DBT skills/techniques."

In any event, even if private psychologist M.'s responses to the questions posed by the IHO were relevant to Karafin's ability to implement the IEP, they are outweighed by the evidence in the hearing record consisting of testimony provided by the director of Karafin and the former director who participated in both the October and November 2015 CSE meetings that Karafin staff had experience consulting with outside providers who use DBT and attended workshops about DBT (Tr. pp. 77-78, 401-03, 422; Dist. Exs. 17 at p. 1; 46 at pp. 1-2). As a result, private psychologist M.'s answers failed to establish that Karafin staff could not implement the CSE's recommendation for bi-monthly consultations. Additionally, as discussed above, none of the evaluative information available to the October and November 2015 CSEs indicated that the student required a DBT program in order to receive a FAPE, and given the evidence about Karafin staff knowledge and the ability of Karafin staff to implement the counseling consultation, the IHO's conclusion that "any meaningful collaboration between [Karafin] and [private psychologist M.] was not likely to be possible" is not supported by the hearing record (IHO Decision at p. 44; see Dist. Exs. 6; 8; 15; 16; 17 at p. 3; 46 at p. 4-5). Furthermore, while the former director testified that it was "important for the clinicians from the school to be collaborating with" the student's private clinician (Tr. pp. 62-63), the hearing record does not support the IHO's determination that the bi-monthly one hour phone consultation was "critical to enable the student to make meaningful gains" (IHO Decision at p. 44) in light of the other supports provided to address the student's social/emotional needs as described above. Accordingly, the IHO's determination that the district failed to offer the student a FAPE for the 2015-16 school year must be reversed.

C. 2016-17 School Year

1. Summer 2016 12-Month Services

The IHO found that the parent failed to assert the student was "at risk of academic regression." The IHO also determined that the student maintained her "very good" grades even while under "extreme emotional stress," and did not lose credits as a consequence of her hospitalization (IHO Decision at pp. 45-46). The IHO further determined that the student quickly found academic and social success while at RLS, such that "if some skills were lost or diminished it appears that she very quickly recovered them" (id. at pp. 45-47). On appeal, the parent argues that the IHO failed to credit testimony indicating that the student could regress and become suicidal

as a result of being away from RLS. State regulations require that students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]; see 8 NYCRR 200.1[eee]). "Substantial regression" is defined as "a student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).[28] State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more ("Questions and Answers Extended School Year 2017," Office of Special Educ. [Feb. 2017], available at http://www.p12.nysed.gov/specialed/applications/ESY/esy-2017/documents/questions-and-answers-extended-school-year-2017.pdf).[29]

Both private psychologist M. and the director of RLS testified that the student would "potentially regress" or have a significant risk of regression in summer 2016 without the support and structure that RLS had been providing to her during the 2015-16 school year (see Tr. pp. 1868-69, 1977-78; Dist. Ex. 54). Meeting information attached to the February 2016 IEP reflected that the student struggled with anxiety and depression, and the student did not always initiate disclosure of her feeling and concerns (Dist. Ex. 56 at p. 2). Moreover, district staff from RLS noted that the student exhibited "some symptoms of depression as she transitioned from one quarter to the next" during the 2015-16 school year, but that she was developing more trust with adults (id.). However, the CSE also discussed that the student had exhibited academic and social/emotional progress, would be on track to attain a Regents diploma if she took Regents examinations and, as there was no evidence of substantial regression, did not meet the criteria for 12-month services (id.). To this point the former director testified that the CSE did not recommend 12-month services for summer 2016 because the student "was not exhibiting any substantial regression," and that the student's RLS reports indicated she was "progressing and doing very well with the academic program," and was making progress in social/emotional areas (Tr. p. 83; Dist. Ex. 56 at p. 2). She also testified that the 2015-16 school year progress reports from RLS indicated that the student did not exhibit any concerning behaviors, including those behaviors that originally led to the student's hospitalization (see Tr. pp. 356-57).

Additional evidence in the hearing record also reflected that it was unlikely the student would regress emotionally during summer 2016. The student received limited services for approximately two months between the time she was discharged from hospital M in early October

[28] While the IHO questioned whether social/emotional regression would qualify a student for 12-month services (IHO Decision at pp. 45-46), the areas of need required to be considered by the CSE when determining appropriate educational programs and services for a student include academic achievement, functional performance and learning characteristics, social development, physical development, and management needs (8 NYCRR 200.1[ww][3][i]). As the district does not raise any argument to the contrary, for the decision it is presumed that a student's social/emotional regression otherwise meeting the regulatory requirements would entitle a student to receive 12-month services.

[29] District Courts in New York have followed the eight-week standard set forth in guidance when determining whether substantial regression has occurred (D.D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at *15-*16 [E.D.N.Y. Sept. 2, 2011]; see F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 274 F. Supp. 2d 94, 125 [E.D.N.Y. 2017]).

2015 and when she began attending RLS on November 30, 2015 (Tr. pp. 314, 351-52, 1055, 1259).[30] While at home before attending RLS, the student received some tutoring services from the district and continued to receive treatment two to three times per week from private psychologist M., but she did not receive any additional services (Tr. pp. 67, 1701, 1722-23). The parent further testified that the student had begun decompensating emotionally as a result of being home during that time and had become anxious about not being in school (Tr. pp. 1722-23). Nevertheless, upon entering RLS the student did well academically, "immediately made friends," and was "nominated as student of the week the second week she was there" (Tr. pp. 1055-57). The director of RLS testified that the student had done "exceptionally" well upon entering RLS and "her transition was really very smooth;" she further elaborated that the student was very social and made friends quickly, was getting "nothing but positive feedback" from teachers related to her transition into school, and she felt accepted and comfortable both socially and academically at RLS, even though it was known that the student would "sometimes conceal" when she was "struggling" (Tr. pp. 1864-67). The director of RLS also opined that during her transition the student did not utilize the counseling office "all that often," though she frequently utilized her advisor (Tr. pp. 1866-67). The January 2016 educational evaluation report drafted by the student's advisor noted that the student exceeded expectations in social skills with respect to interacting with other students and communicating with her advisor by the end of her first quarter at RLS (Parent Ex. W at p. 81). The advisor also noted that the student "quickly made friends, got used to her classes and felt as if she were at RLS 'forever'" (id.). The student was receiving straight As by the end of her first quarter, and teacher comments in the student's education evaluation reports noted that her behavior in class was cooperative, that she related and worked well with other students, and that she was either motivated or highly motivated in class (see id. at pp. 81-87). Finally, while there was limited information as to whether the student exhibited regression during other breaks in the school year, the February 2016 IEP meeting minutes noted that the student was able to successfully transition back to school after winter break (Dist. Ex. 56 at p. 2).

The parent also claims that the RLS director's support of 12-month services was not related to credit recovery but the "consequences of suicide and suicidal ideations and regression" when the student was away from RLS. However, evidence in the record shows that the information available to the February 2016 CSE related to the director's belief that the student's social/emotional difficulties were linked to perceived difficulties with credit recovery and timely graduation. In her February 2016 letter in support of 12-month services, the director "strongly recommend[ed] a 12-month IEP for [the student] so that she can have the opportunity to recover credits that were lost during her hospitalization and graduate on time" (Dist. Exs. 54; 56 at p. 2). Moreover, according to the director, "delaying [the student's] graduation date would negatively impact her self esteem and increase the risk of her becoming increasingly anxious and depressed" (Dist. Ex. 54). The director testified that if the student "didn't recover some of the credits that she lost at [the district high school] when she was hospitalized . . . that would . . . exacerbate" the student's social/emotional difficulties (Tr. p. 1869). However, information from the February 2016 CSE meeting indicated that the district guidance counselor at the CSE meeting clarified that the student was not behind in credits, but rather was "ahead of schedule" (Dist. Ex. 56 at p. 2). Further,

[30] The former director testified that the student was discharged on either October 3, 2015 or October 4, 2015 (Tr. p. 352). The parent testified that she believed the student was at hospital M until approximately October 2, 2015 (see Tr. p. 1259).

counselor S. testified that the CSE looked at the student's transcript and there was no indication the student would not have graduated on time as a result of her hospitalization, since by the end of the 2014-15 school year the student had already accumulated 10 out of a total 22 credits required to graduate (Tr. pp. 824-26; see Dist. Ex. 104). Additionally, at the hearing the director of RLS clarified that her concerns surrounding credit accumulation in the February 2016 letter had to do with the particular way RLS provides credits per quarter and that credits at RLS do not "always add up the same way" as credits earned in the district (Tr. p. 1903).[31]

The parent maintains that the student would regress without 12-month services, but the evidence presented does not indicate that the student had previously exhibited substantial regression in the form of any loss of skills, either academically or socially/emotionally. For those reasons, while I sympathize with the parent's fear that her child could regress emotionally without the support provided by a 12-month program, the IHO appropriately determined that the hearing record does not support a finding that 12-month services were required for the student to receive a FAPE.

2. May 2016 IEP

At the outset of the discussion for the 10-month 2016-17 school year, the IHO stated that the "principal issue to be determined with regard to the district's TSP recommendation is the consequence for this student of the program being housed within [the district's high school]" (IHO Decision at p. 47). The IHO next found that the TSP and RLS programs "provide the same basic elements," TSP staff had received appropriate training, and that there was no basis to conclude they could not appropriately implement the TSP (id. at p. 47-48). Additionally, the IHO determined that "a specific site within the school was identified and the program was implemented by the start of the school year," and that "the program location was acceptable and . . . was adequately equipped and furnished for its purpose when the program commenced" (id. at p. 48). The IHO turned next to "the claim that any location within [the district's high school] put the student at substantial risk of regression" with regard to her social/emotional status and concluded that due to certain facets of the district high school, her familiarity with students who attended the school, and the large size of the school, the district "failed to establish that it provided a program reasonably calculated to enable this student to make meaningful educational gains" for the 2016-17 10-month school year (IHO Decision at pp. 48-50).

On appeal, the district asserts that the IHO erred in finding that the student would have a "substantial risk of regression" if she returned to the district high school. The district alleges the IHO erred when she relied on impermissibly speculative information that the student's perceptions and "culture" of the school, and the possibility that the student would encounter familiar peers at the school would cause the student anxiety. The district also claims that the IHO improperly relied on evidence about the student's experiences at the school prior to the time the student was eligible

[31] The director noted that it was important to maintain the "structure" of the student's day throughout the summer so that the student would have "unlimited access to the counseling office," as well as access to an advisor, as a result of her past "intense" emotional struggles (Dist. Ex. 54; see Tr. p. 1920; Dist. Ex. 54). A therapist from RLS present at the February 2016 CSE meeting noted that the student would be able to "contact people at the school" over summer break, but she would not be assigned an individual advisor if she were not receiving 12-month services during the summer (Tr. p. 1060; Dist. Ex. 56 at p. 2).

for special education services and her experience in a nonacademic activity at which she received no special education support. Finally, the district contends that the IHO erred in finding that the district high school was too large for the student based upon subjective and unquantified descriptions.

Although the evaluative information available to the May 2016 CSE and the present levels of performance in the May 2016 IEP are not directly in dispute, a brief discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, the appropriateness of the May 2016 CSE recommendation. In addition to the evaluative information reviewed by the October 2015 CSE, the hearing record indicates that the May 2016 CSE considered information provided in January 2016 and March 2016 RLS educational evaluation reports (Parent Ex. W at pp. 80-93; Dist. Exs. 60; 62 at pp. 1-2, 4-5).

The March 2016 RLS educational evaluation report indicated that the student made "good progress," "excellent progress" or had exhibited "superior achievement" in all classes, demonstrated good to outstanding participation, was highly motivated in all classes, completed assignments, and demonstrated good study habits (see Dist. Ex. 60). The educational evaluation report further indicated that the student related to and worked well with others, exhibited cooperative behavior in class and with her teachers, had satisfactory to excellent attendance, and was usually on time (id.). Additionally, during sessions with her advisor the student exceeded expectations in participation and social skills, met expectations in communication with her advisor, was usually on time during morning check-in, mid-morning advising sessions, and afternoon check-out, and demonstrated responsible use of both her Chromebook and planbook (id. at p. 7). The educational evaluation report also indicated that the student either met or exceeded expectations in her individual student goals for the quarter (id.). Regarding the student's goal that she would "[p]rocrastinate less on assignments," the advisor noted that the student consistently completed her assignments in a timely fashion; the advisor also noted that the student's grades were strong in every class, and she never missed or handed in late work (id.). Considering the student's goal that she would "[e]xpand social group," the advisor noted that the student made good social connections with some of her peers and was very close with a few students, and that the student would continue getting to know others at the school (id.). Regarding the student's goal that she would "[p]articipate more in class," the advisor noted that the student had "some discomfort speaking up during class, though she always participates" when asked directly, and she would continue to work on participating voluntarily (id.).

According to the meeting information attached to the May 2016 IEP, the school psychologist from RLS who participated in the meeting by telephone, reported that the student made progress in all academic areas as well as in her individual goals of procrastinating less on assignments, "social group," and participating in class (Dist. Ex. 62 at p. 1). Additionally, he reported that the student was very well liked and had adopted her own group of friends (id.). He further indicated that the difficulties she experienced in the classroom were associated with her generalized anxiety disorder, and that she had a "significant history of emotional supports" (id.). When asked how the student's anxiety manifested itself, the RLS school psychologist commented that her weaknesses included identifying, understanding and managing symptoms, and asserting or advocating for herself; and further indicated that the DBT she received outside of school had helped "a lot" as well as receiving counseling as needed (id.). The RLS school psychologist suggested that the student benefitted from an advocate, to whom she could talk when needed

throughout the day (id. at pp. 1-2). The RLS school psychologist also opined that the student needed a program with a "low student to teacher ratio" and commented that the student exhibited "a large degree of anxiety in larger settings" (id. at p. 1).[32]

The May 2016 IEP reflected that the student received grades ranging from A- to A+ in March 2016 (Dist. Ex. 62 at p. 5; see also Dist. Ex. 60).[33] Academically, the IEP noted that the student needed to develop more active learner skills such as increased participation in group discussions and organization skills (Dist. Ex. 62 at p. 5). Related to social development, the CSE identified and the IEP reflected that the student needed to work on voluntarily participating more and asserting herself in class (id.). The IEP also included information about the student's goals from the March 2016 RLS educational evaluation report, as previously discussed above (id.). In the management needs, the IEP noted that the student's ability to learn was impaired by her emotional difficulties, anxiety, and her tendency towards depressive symptoms, that she required ongoing support, opportunities to practice and generalize coping skills and specific strategies to address anxiety, and she needed to integrate socially with peers (id. at p. 6). The IEP further indicated that the student needed therapeutic and clinical support throughout the day to continue making progress in these areas (id.). The May 2016 IEP indicated that the student required strategies, including positive behavioral interventions, to address behaviors that impede the student's learning or that of others; however, she did not require a behavioral intervention plan as the "[t]herapeutic program will support behavioral needs" (id.). The May 2016 CSE recommended the student attend an 8:1+1 special class in ELA and social studies in the district's TSP; the student would also receive one 40-minute session per week of individual counseling and one 60-minute session per week of counseling in a small group (id. at p. 8). The CSE also recommended a teaching assistant (4:1) throughout the school day in all environments and one 60-minute bi-monthly phone consultation with private psychologist M. "to support DBT skills/techniques" (id. at pp. 8-9). The CSE further recommended the following accommodations and modifications: breaking large assignments into smaller components with separate due dates, extended time for all tests including State tests, and administration of tests in a separate location (id. at pp. 9-10).

[32] The RLS director testified that classes at RLS averaged "five to ten students, with one teacher" (Tr. p. 1843).

[33] Information related to the student's needs contained in the May 2016 IEP was identical to the information included in the October 2015 IEP, except that any new information obtained from the March 2016 educational evaluation report was added, where applicable (compare Dist. Ex. 17 at pp. 4-5 with Dist. Ex. 62 at pp. 5-6).

To address the recommendations set out in the May 2016 IEP, the CSE determined that the student's needs could be met in the district's newly created TSP at the district high school.[34] While the TSP is not directly referenced in the recommended special education programs and services or goals sections of the IEP, the program is described in the portion of the IEP related to the student's management needs (see Dist. Ex. 62 at pp. 2-3, 6-9).[35] The IEP described the TSP as offering a "home base," with a special class and mainstream academic schedule "as needed to support student's academic schedule preferences," such as electives and "AP" classes, which was "developed in collaboration with guidance and supportive of transition goals," and included a daily "[s]upport period" that focused on executive functioning skills (id. at p. 6). According to the IEP the program also offered individual and group counseling with a DBT focus, "access to therapeutic/clinical supports throughout the day," and teaching assistants "trained in TSP/DBT protocols for support in mainstream classes as necessary" (id.). According to the meeting information attached to the May 2016 IEP, in the TSP the student would specifically receive one session per week of individual counseling, instruction in a daily support period with a special education teacher, and a "once weekly skills training counseling group using a DBT model" (id. at p. 2). The TSP also provided "access" to a teaching assistant to provide support in elective and special classes, and access to a clinician during the day to "check-in with [the student] to address any concerns that might come up" (id.). Further, a transition plan would be developed with RLS and the parent to support the student's "return to [the] district [and] to address concerns about re-entering the building including individualizing the daily schedule, including a pick-up, drop-off schedule, [t]eaching [a]ssistant support, [and a] flexible classroom schedule to avoid large groups in the hallways" (id.).

Testimony from district staff highlighted the importance of the TSP's small size and location in relation to the district high school as a key supportive element for students who required the program. District staff testified that the TSP was housed at the district high school in a separate,

[34] In November 2015, the district school psychologist provided the former director with a "TSP proposal" she had developed in conjunction with a high school special education teacher (Tr. pp. 628-30; Dist. Ex. 90 at pp. 1-2). The November 2015 TSP proposal noted that the TSP would "provide emotionally fragile students with academic and therapeutic support throughout their day" and would provide services to students in grades nine through twelve who were emotionally fragile and/or engaged in maladaptive behavior patterns (Dist. Ex. 90 at p. 3). According to the TSP proposal, students had the opportunity to take all academic coursework in the mainstream environment with the support from the TSP teacher/teaching assistant as necessary, students who required a smaller environment could receive instruction in a special class for ELA and global studies (id.). Additionally, all TSP students would participate in a "study skills class" and a "daily support period," counseling, and had access to a DBT-trained clinician throughout the school day (id.). The TSP proposal also noted that the TSP would be staffed with a full time special education teacher, two full time teaching assistants, a full time clinician, a consulting psychiatrist available on a monthly basis, and a guidance counselor (see Tr. p. 618; Dist. Ex. 90 at p. 4).

[35] The portion of the IEP explaining "the extent . . . to which the student will not participate in regular class . . . activities" specified that the student "needs a therapeutic support program to make academic progress" (Dist. Ex. 62 at p. 11).

adjacent building with private entrances and egresses (Tr. pp. 108-12, 641).[36] The former director explained that the separate building has a clinician's office that is located in the same area (Tr. p. 112). She further explained that students could go directly to the separate location and would not have to enter the front entrances of the main high school building (id.). The special education teacher who drafted the TSP proposal and was assigned to the TSP (TSP teacher), testified that the physical location was beneficial to students because it was a quiet, comfortable, safe environment away from the distractions and busyness of the crowded hallways of the main building (Tr. pp. 628-30; 642; see Dist. Ex. 90 at p. 2). She further described that for students the TSP was "a bit of a reprieve from being in the main building" in that it is small, safe and structured, and provides them with a break when needed (Tr. p. 642). Specific to the student, the social worker believed that the TSP would have been appropriate for her because it was a small setting that offered emotional support as part of the program and "high expectations" for academic achievement (Tr. pp. 901-02). She also testified that, generally, students will learn DBT skills in the separate classroom and then "go out into the [general education environment] . . . to practice those skills to work through issues" (Tr. p. 901). The school psychologist who worked in the TSP (TSP psychologist) also believed that the TSP was appropriate for the student because the "smaller ratio that we offer, the smaller location where we are is helpful for students in terms of allowing them to feel more comfortable" (Tr. pp. 569, 580).

As stated above, the May 2016 CSE recommended that the student receive instruction in an 8:1+1 special class as part of the TSP for ELA and social studies (Dist. Ex. 62 at p. 8; see Dist. Ex. 90 at pp. 3-4).[37] The TSP teacher testified that students in the TSP have an academic support period "in the morning," and ELA and social studies special classes, but otherwise some students attend general education classes in the main building for math, science, lunch and other electives (Tr. pp. 638, 643-46, 659).[38] This was confirmed in the November 2015 TSP proposal which noted that students "would be afforded the opportunity to take all academic coursework in the general education environment with support from the TSP teacher/teaching assistant as needed" (Dist. Ex. 90 at p. 3). The TSP teacher also acknowledged that the student in this case would have

[36] According to the 2015 TSP proposal, the TSP classroom needed to be "in a location that allows for privacy," and "TSP students should be able to access the TSP room and the clinician's office in a private, discrete manner on occasions in which they are unable to navigate crowded hallways, feel uncomfortable or anxious and cannot be in the mainstream . . ., or when in crisis and need a safe, comfortable, private environment to appropriately work through private emotions" (Dist. Ex. 90 at p. 5). The proposal identified two classrooms that offered "private entry and discretion" (id.).

[37] The 2015 TSP proposal identified that the following courses would be available in a special class: 9 and 10th grade ELA and global studies, 9 through 12th grade study skills, 9 through 12th grade support class, and a TSP team meeting period (Dist. Ex. 90 at p. 4). While the student was in 11th grade during the 2016-17 school year, the TSP school psychologist testified that the district later determined that students in 11th and 12th grade could be placed in special classes for ELA and social studies, if needed (Tr. pp. 532-33; Dist. Ex. 62 at p. 1).

[38] The TSP psychologist testified that students in the TSP are placed in classes based upon student need, and that the district has a range of students who are in classes ranging from special education classes to general education classes and other "high-end" courses such as honors and AP (Tr. p. 582).

been in the main high school on a regular basis if she attended the TSP (Tr. p. 658).[39] To accommodate the student's needs in "all environments," the May 2016 CSE provided the student with access to a teaching assistant throughout the school day, and access to a clinician throughout the school day to check-in as needed and to address any concerns as they came up (Dist. Ex. 62 at pp. 2, 9). The TSP psychologist also testified that students with avoidance and anxiety issues in general education classes, like the student in this case, were supported through individual counseling and the TSP teacher and psychologist working with the regular education teachers to build an understanding of the student and to conduct "constant check-ins" (Tr. pp. 582-83). The TSP teacher testified that students received support from teaching assistants that went with them into their general education classes (Tr. pp. 648-49).[40] Teaching assistants and the TSP teacher also worked closely with classroom teachers to develop strategies to meet the students' needs related to anxiety and therefore, if any students exhibited anxiety or other issues, the classroom teacher would be aware of it (Tr. p. 649). The TSP teacher further testified that TSP staff meet with the regular education teachers before a student enters the TSP, and that all the regular education teachers know which students are in the TSP (Tr. pp. 655-56, 663-64). According to the TSP teacher, "typically" regular education teachers identified when a student was struggling, and may then approach the student, ask questions, and offer the opportunity for the student to speak with staff from the TSP (Tr. pp. 663-64). The TSP teacher also testified that students can go to the TSP room "whenever they need to," their work from mainstream classes goes with them, and they have the opportunity to finish class work or projects in the TSP classroom if needed (see Tr. pp. 649-50). Furthermore, the TSP teacher opined that if a student was in crisis and not able to "utilize the skills they are learning," they could go to the TSP building for coaching provided by the TSP teacher, TSP psychologist, or TSP teaching assistants (Tr. pp. 639-40).[41] TSP staff would ensure that this was done in a "timely manner so [the students] don't miss out on curriculum and classes" (Tr. pp. 639-40). The TSP also provided "check-in and checkouts" throughout the school day (Tr. pp. 640-41).

As it relates to the specific grounds on which the IHO found the recommendation for the student to attend the TSP inappropriate, including that the student's perceptions of the school and the possibility of student encounters would cause anxiety, the IHO largely based these findings on documents and testimony that were not available to the district at the time the CSE convened to develop the May 2016 IEP.

[39] The TSP teacher also testified that students who attended the TSP classes, namely ELA and social studies, did not have special education academic needs; rather, she acknowledged that they were emotionally unable to access the regular school program and that the curriculum was the same as in general education classes (Tr. pp. 666-67).

[40] The TSP teacher also noted that teaching assistants are not always helpful for all students and that while teaching assistants may accompany students in general education classes, not all students would have a teaching assistant with them as there are not enough teaching assistants to ensure all students have access to one at any given time (Tr. pp. 648-49; 655-56).

[41] The TSP teacher also testified that there would always be someone in the program that students can access if they were in crisis (Tr. pp. 639-40).

According to the district school psychologist, during the May 2016 CSE meeting the parent's attorney stated that private psychologist M. believed the program recommendation was not appropriate because of the district high school setting and environment (Tr. pp. 502-03; Dist. Ex. 62 at p. 2). The district social worker also testified that the parent indicated at the May 2016 CSE meeting that she was "concerned with [the student] being in a large school" (Tr. p. 878). The meeting information attached to the May 2016 IEP also identifies that the parent's attorney "insist[ed] that it [was] the high school setting that [was] the issue," and that he "anticipated that the district would suggest this program for [the student] and so had extensive discussion with the treating therapist prior to the CSE about the appropriateness of a district program" (Dist. Ex. 62 at p. 2). The former director testified that the RLS school psychologist, who was present at the May 2016 CSE meeting, expressed concern that if the student moved back to the district too soon, she would risk "decompensating in the old school culture where she felt insufficiently supported emotional[ly] socially and academically" (Tr. pp. 333-34; Dist. Ex. 62 at p. 1).[42] However, during the May 2016 CSE meeting, the former director noted that the district had the ability to offer the student "small classes, advising throughout the school day, a daily support class, and counseling" (Dist. Ex. 62 at p. 2). Moreover, the director stated that a transition plan would be developed in conjunction with RLS to support the student's return to the district and to address the parent's concerns related to the student's ability to be in the high school environment with peers that were "not appropriate" (Dist. Ex. 62 at pp. 2-3).

The IHO relied on conclusions raised by private psychologist M. in a June 2016 letter attached to the parent's due process complaint notice that the size of the school, its culture, and the student's perceptions of the school would put the student at substantial risk of regression; moreover, the IHO identified that private psychologist M. believed that the benefits of the district DBT program were outweighed by the student's risk of regression (IHO Decision at pp. 29-30, 48). The June 2016 letter stated private psychologist M.'s concerns that the district high school was not an appropriate placement "due to class size, school size and culture," and that there was a risk the student would decompensate "in the old school culture where she felt insufficiently supported emotionally, socially, and academically" if she were moved back to the district too soon (Dist. Ex. 72 at p. 2). The letter also identified that, according to the student, she believed her experience at the district in the 2014-15 school year was "not sufficiently supportive or structured or therapeutic," and that the "sheer size of the environment overwhelmed her with regard to physical plant, class size, and less supervision" (id. at p. 1). In addition, the student experienced "considerable social alienation in [the] school and did not feel a part of the school milieu" (id.).[43] In the June 2016 letter from private psychologist M. he stated that the student required a small, supportive and structured academic environment that included therapeutic assistance as needed throughout the day (id.).

[42] The hearing record reflects that the RLS school psychologist did not "specifically work with" the student at RLS (Dist. Ex. 61 at p. 1).

[43] The CSE reconvened in September 2016 to discuss the June 2016 letter (Dist. Exs. 72; 74 at p. 1; 75 at p. 1). While the September 2016 CSE meeting occurred after the parent filed her due process complaint, the concerns raised in the June 2016 letter do not alter my determination that the district offered the student a FAPE for the 2016-17 school year.

While private psychologist M. provided testimony related to class size, school size and school culture during the hearing, his testimony primarily summarized the June 2016 letter (Tr. pp. 1984-87). Private psychologist M. elaborated on the meaning of "culture" as used in the June 2016 letter, specifying that the culture of the district high school was not appropriate for the student because it was a very large school that "historically [had not] been customized [and] personalized" in such a way that the student felt "there were teachers, advisors or psychologists or social workers with whom she felt [a] connection, with whom she felt she could honestly open up to, and the culture of . . . flexibility . . . where she could have projects extended, projects customized to her interests and needs" (Tr. pp. 2105-06). Moreover, private psychologist M. also testified that based on the student's experience "and [the parent's] input, there was a feeling that th[e] atmosphere" at the district high school "was not sufficiently therapeutic when she needed it and wasn't as flexible as a private school" (Tr. p. 1987).[44]

In response to the concerns raised in the July 2016 letter, a CSE reconvened in September 2016, and the meeting information attached to the IEP reflected that the former director commented the district could offer "similar programming" (Dist. Ex. 75 at p. 1). Additionally, the CSE discussed that the student's schedule "could include some" core academic classes with class sizes of one to three students, from Monday through Friday from 3:00 p.m. to 5:00 p.m. (id.). The meeting information also indicated that student schedules were individualized based on student interest and graduation requirements, and that counseling incorporating DBT could be accommodated in the TSP (id.). Meeting information attached to the September 2016 IEP also showed that the CSE discussed private psychologist M.'s opinion that "[w]hat has proven to be most fulfilling and therapeutic about [RLS] is not . . . their DBT expertise," but rather it was "the small classes, the easy access to flexible and supportive teachers, who flex assignments, deadlines (as needed) and get to know each student individually and tailor assignments accordingly" (Dist. Exs. 72 at p. 1; 75 at p. 1).

The IHO was also persuaded by private psychologist M.'s statements that the student's experiences in the district high school traumatized the student. However, as noted by the district, the student's experiences at the school in the 2014-15 school year with respect to the sufficiency of therapeutic supports predated the district's determination that the student was eligible for special education. Accordingly, a determination that the student would be unable to attend based on past experiences, at a time when she was not receiving special education services designed to address her social/emotional needs, is not supported by the hearing record. Moreover, the IEP both reflected the student's anxiety and provided a significant number of supports, including services, annual goals, and programmatic aspects, to address her needs in this area (Dist. Ex. 62 at pp. 1-2, 5-9). To the extent private psychologist M. believed RLS to be a better fit for the student than the district TSP, the appropriateness of a district program is not measured by comparison to the services provided to the student at a unilateral placement (see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir.

[44] The district school psychologist indicated that she spoke to private psychologist M. on June 10, 2016, at which time private psychologist M. "said that he did not describe the program as inappropriate but that he felt it was insufficient to meet her needs; that she was really hitting her stride at RLS, that she had a peer group there; that there were a lot of students at RLS that are very different, that they look physically different and that she felt comfortable and accepted there. He didn't feel that she was far enough into her treatment to be able to manage a larger school environment" (Tr. pp. 503-04).

2014] [noting that "the appropriateness of the [district's] program is determined by its compliance with the IDEA'S requirements, not by its similarity (or lack thereof) to the [unilateral placement's] program"]).

The IHO was also persuaded that a large school was not appropriate for the student as a result of the parent's report to the psychiatrist that the student became "quiet and strange" in large groups and that a "panic attack followed" (IHO Decision at p. 49). In support of this determination, the IHO cites to a single email between the parent and the psychiatrist in relation to the student's attendance at a conference in May 2015 with "600-700 people" attending (Dist. Ex. 121). While the parent identified that the student became "a little quiet and 'strange'" in similar situations, she did not identify that a panic attack followed at the conference or that panic attacks had commonly occurred in similar situations (id.). To the contrary, the parent was seeking clarification regarding the student's reaction, questioning whether the student's behavior could be best described as "more like . . . claustrophobia," or a panic attack (id.). In addition, the parent sent an email to private psychologist B. on the same day that indicated the student "had a great time" at the conference (Dist. Ex. 120). Finally, the IHO did not specify what she considered to be a "large school," and as discussed above, the district indicated it would modify the student's schedule to permit her to avoid "large groups" (Dist. Ex. 62 at p. 2).[45] In addition, the hearing record does not reflect that the district was made aware of the student's reaction to her attendance at the conference at any time prior to the May 2016 CSE meeting.

The IHO further found that the evidence in the hearing record showed the student was extremely vulnerable to other people's perceptions of her and that the constant anxiety from the possibility that someone would find out that she was in a special program rendered the program inappropriate. To support this, the IHO noted that the student reported to RLS on her student interview form that she felt self-conscious and that people were judging her (IHO Decision at p. 49; Parent Ex. W at p. 12). The IHO also cited an email message from the parent to staff at RLS and private psychologist M. indicating the student wanted to speak with a counselor but did not because someone was in the counseling office, and the parent opined that the student did not want anyone to know she was there (Parent Ex. Y at pp. 271-72). However, the emails between the parent and RLS staff postdate both CSE meetings held for the 2016-17 school year, and there is no indication in the record that the district had the RLS student interview form available to it before the impartial hearing (Parent Ex. Y at p. 271; Dist. Exs. 62 at p. 1; 75 at p. 1). The IHO referred to a parent report that the student had anxiety about other students "knowing about her circumstances and her intent to lie to prevent that" (IHO Decision at p. 49). However, the IHO provided no explanation why this would render the TSP program inappropriate. To the contrary, the management needs in the May 2016 IEP identified that the student required "ongoing support [and] opportunities to practice and generalize coping skills and specific strategies to address anxiety . . . to integrate socially with peers," and that she required therapeutic and clinical support to make progress in these areas (Dist. Ex. 62 at p. 5). To address these needs, the student's goals specifically targeted the identification and implementation of coping strategies to address situations that caused her anxiety (id. at pp. 7-8). Under these circumstances, to hold that the student's anxiety regarding the possibility of her disability becoming known to her peers sufficient

[45] During the hearing, the TSP psychologist could not recall how many students attend the district high school (see Tr. p. 606).

to render the TSP recommendation inappropriate, regardless of the supports provided to the student, would be to hold the district to a burden beyond that required of it by the IDEA: to develop a program "reasonably calculated" to enable the student to receive educational benefit and make progress in light of the student's circumstances, rather than guarantee a particular outcome (Rowley, 458 U.S. at 192, 206-07; see Endrew F., 137 S. Ct. at 995-96, 998-99).

Finally, the hearing record supports the IHO's finding that the student reported having past daily panic attacks and constant irritability and agitation which were associated with her diagnosis, and that the student's panic attacks were triggered by both people and places (IHO Decision at p. 49). A "discharge summary" from hospital S, dated June 30, 2015, indicated that the student reported having "anxiety/panic attacks" that could be "triggered by people or places" (Parent Ex. V at p. 235). The July 2015 psychological evaluation report also identified that the student reported "daily panic attacks" at the time of the evaluation (see Tr. p. 484; Dist. Exs. 6 at p. 1). However, as set forth above, the services recommended by the district were appropriate to address the student's needs relating to anxiety at the time of the May 2016 CSE meeting, which did not include information that the student was experiencing daily panic attacks, constant irritability and agitation. With respect to the IHO's reference to setbacks the student encountered as a result of a driver's education course at the district high school, private psychologist M. testified that the student had a "full-on panic attack[]" that was "triggered by past memories of what had happened the year prior," and that the student "really decompensated after coming back to" the district high school (Tr. pp. 1966, 1990, 2112). An email between the parent and private psychologist M. indicates that this event occurred on September 23, 2016, after both the May and September 2016 CSE meetings (see Parent Ex. Y at p. 283). In addition, speculation that the student's inability to attend a nonacademic activity at the high school without special education services or supports necessitates a determination that the student would not have been able to receive academic benefit with the supports available to her in the TSP is not supported by the hearing record.

Based on the foregoing, the IHO's determination that the district failed to establish that the district offered "a program reasonably calculated to enable the student to make meaningful educational gains" for the 2016-17 school year is not supported by the hearing record and must be reversed (IHO Decision at p. 50).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the district offered the student a FAPE for the 2015-16 school year. For the 2016-17 school year, the hearing record shows that the student did not require 12-month school year services. Furthermore, the hearing record supports a finding that the district offered the student a FAPE for the 2016-17 school year. Accordingly, the necessary inquiry is at an end and I need not determine whether RLS was an appropriate unilateral placement or equitable considerations favor reimbursement for the costs of the student's tuition at RLS.[46] I have considered the parties' remaining contentions and find them to be without merit or that they need not be addressed in light of the determinations made herein.

[46] Nonetheless, a full review of the hearing record provides no basis on which to depart from the IHO's determinations with respect to these issues.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated February 13, 2018 is modified, by reversing the portions which found that the district failed to offer the student a FAPE and awarded the parent reimbursement for the costs of the student's tuition at RLS for the 2015-16 and 2016-17 school years.

Dated: **Albany, New York**
June 25, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER