



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-129

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Hampton Bays Union Free School District

Appearances:

Law Offices of Bonnie Spiro Schinagle, attorneys for petitioner, by Bonnie Spiro Schinagle, Esq.

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, by Garrett L. Silveira, 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 denied her request to be reimbursed for her son's tuition costs at the Equinox Residential Treatment Center (Equinox) for the 2017-18 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student attended the district's schools as a regular education student from kindergarten through fourth grade (see Dist. Exs. 3 at p. 1; 7 at p. 4).

In October 2013 (fifth grade), the student's mother referred him to the committee on special education (CSE) for an evaluation due to concerns about the student's academic progress, as well as concerns about attention deficit hyperactivity disorder (ADHD) (Parent Ex. D at p. 1). A psychological/educational evaluation conducted by the district yielded a full-scale IQ and academic achievement scores in the average range (id. at pp. 2, 6). The evaluator noted that the student's ability to process visual material quickly, as well as his ability to sustain attention, concentrate and exert mental control, were relative weaknesses compared to the student's verbal

reasoning ability, (*id.* at p. 6).¹ The CSE deemed the student ineligible for special education services (Dist. Ex. 3 at p. 1). Around this same time, the student underwent an auditory processing evaluation which resulted in a diagnosis of an auditory processing disorder (*id.*). The district reportedly developed an accommodation plan for the student pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794[a]) (504 plan) during the student's fifth grade school year and each year thereafter through eighth grade (Dist. Exs. 3 at p. 1; 6 at p. 4; 9). The student also reportedly received support classes in fifth through seventh grade (Dist. Exs. 6 at p. 4; 7 at p. 4; *see* Dist. Ex. 10 at pp. 1, 3-4).

In fifth grade the student passed all of his classes, was absent three days, and had one disciplinary referral (Dist. Exs. 10 at p. 1; 11 at pp. 6, 11). In sixth grade, the student passed all of his classes, had no absences, and had no disciplinary referrals (Dist. Ex. 10 at p. 3; *see* Dist. Ex. 11). The student passed all of his classes in seventh grade, was absent one day, and had one disciplinary referral (Dist. Exs. 10 at p. 4; 11 at p. 10).

In December 2015 (seventh grade), the student was "psychiatrically" hospitalized due to suicidal ideation (Dist. Ex. 4 at p. 1; *see* Tr. pp. 602-04; 833-35).² In March 2016, a 504 plan was developed for the student for the 2016-17 school year (eighth grade) (Dist. Ex. 9). The 504 plan indicated that the student had a central auditory processing disorder and ADHD that impacted his learning and academic achievement (*id.* at p. 1). The 504 plan recommended that the student receive integrated co-teaching (ICT) services for math and science, access to a sound field system in core academic classes during whole class lectures, and quarterly speech-language consultations to assist the core academic teachers (*id.* at p. 2). The 504 plan also called for testing accommodations of extended time and preferential seating (*id.*). The 504 committee did not recommend the student for support classes for the 2016-17 school year (*see* Tr. pp. 277-78, 570-72, 578; Dist. Ex. 9).

In September 2016, through a series of emails to the student's teachers, the parent expressed concern regarding the student's need for additional support in math (Parent Ex. P at pp. 1-7). According to the parent, by the third week of September the student's math grade was 39; she urged his teachers to provide him with extra help and to hold the student accountable as he would not seek help by himself (Parent Ex. P at pp. 5-6). In addition, in or around the third week of September, the parent called for a team meeting with the student's teachers to express her concerns (Tr. p. 584). She shared the student's history of anxiety and depression with the teachers and stressed to the math teacher the importance of her making a connection with the student (Tr. pp. 584-85). In November 2016, the parent exchanged several emails with district staff regarding the student's reluctance to seek extra help, failure to hand in work assignments, and an in school suspension (Parent Ex. P at pp. 8-18). The student had numerous infractions of school rules in

¹ The hearing record references "a history of familial discord, beginning when the student was in 5th grade" that potentially contributed to the student's difficulty in school" (Dist. Ex. 3 at p. 1).

² The student attended counseling outside of school and had been prescribed medication for depression (Dist. Exs. 4 at pp. 1-3; 6 at pp. 3-5).

October and November 2016, which included cutting class, using offensive language or gestures, engaging in disrespectful behavior, and "committing a dangerous act" (Dist. Ex. 11 at p. 10).³

According to the student's second progress report in eighth grade, dated December 23, 2016, the student had made improvement in Spanish "since parent contact," was displaying satisfactory achievement in academic intervention services (AIS) for math, but was in danger of failing math and science for the quarter (Parent Ex. J at p. 2). The student's science teacher reported that the student's homework was inadequate or incomplete and that the student did not seek help when needed (*id.*). The student's math teacher indicated that low test scores had hurt the student's grade and that his grade had "dropped substantially" (*id.*).

In December 2016 and January 2017, the student continued to engage in inappropriate and disruptive behavior in school (Dist. Ex. 11 at pp. 9-10). The parent requested a second meeting with the student's teachers (Tr. p. 763). The student received the following grades for the second marking period: English 81, Spanish 63, math 53, science 65, social studies 74, and technology 50 (Parent Ex. J at p. 1).

In a March 30, 2017 email to the district, the parent reported that the student was failing math, science, English, and Spanish, and "barely passing social studies" (Parent Ex. F at p. 2). The parent requested a team meeting to address the student's failing grades and suggested that it was time for "more testing, maybe an IEP, a period of support, something" (Parent Exs. F at pp. 2-3; Q at pp. 1-7).

By email dated April 5, 2017, the student's Spanish teacher advised the parent that the student's behavior had taken a turn for the worse and that the student arrived at class "with a chip on his shoulder" and "refused to even try on any assignment" (Parent Ex. Q at pp. 11-12). The parent responded that "[the student's] grades across the board [we]re terrible," and that she had "requested a meeting with the 8th grade team to come up with a course of action for the remainder of the year" (*id.* at p. 10). The district's disciplinary log showed that the student failed to attend mandatory "extra help" sessions three times in April 2017 (Dist. Ex. 11 at p. 7). On April 26, 2017, the parent sent two emails to the district (Dist. Ex. 13). In the first email the parent indicated that the student was doing well in all of his classes and thanked the staff for their efforts (*id.* at p. 1). In the second email, the parent advised the student's special education teacher that she had given the student permission to skip homework club as a reward for his hard work (*id.* at p. 2).

The district's disciplinary log shows that the student continued to skip mandatory help sessions in May and also cut class and engaged in disruptive behavior (Dist. Exs. 11 at p. 7; *see* Dist. Ex. 13 at pp. 3-4). The student received the following third quarter grades: English 68, Spanish 43, math 55, science 65, social studies 69, and technology 97 (Parent Ex. J at p. 1).

The parent requested an evaluation of the student in early May 2017 (Tr. pp. 789-90; *see* Dist. Ex. 3 at p. 1). In response, the district conducted a social history and a psychological evaluation of the student that included: a classroom observation; assessment of the student's

³ The student dared another student to tackle a peer during recess which resulted in the peer becoming injured (Dist. Ex. 11 at pp. 3, 5, 10).

cognitive, social/emotional, and behavioral functioning; assessment of the student's academic achievement; and assessment of his visual motor skills (Dist. Exs. 3; 7). Based on the results of the psychological evaluation, the evaluator reported that the student's cognitive abilities were in the average to low average range, his academic functioning was in the average to below average range, and the student exhibited significant social/emotional difficulties that may impact his academic performance (Dist. Ex. 3 at p. 7). A CSE convened in June 2017 and determined that the student was not eligible for special education services; however, at the urging of the parent the committee agreed to conduct a psychiatric evaluation to gather more information on the student's social/emotional status and its effect on the student's academic performance (Tr. pp. 210-11, 783-91; Dist. Exs. 4; 14; see Parent Ex. H).⁴

The district referred the student for a psychiatric consultation which took place on July 31, 2017 (Dist. Ex. 4). The evaluating psychiatrist reported that the student had depressive symptoms, attention problems, and oppositional behavior and opined that the student could be "classified" as having either an emotional disturbance or other health-impairment (id. at pp. 3-4).

The CSE convened on August 31, 2017 and determined that the student was eligible for special education as a student with an other health-impairment,⁵ and recommended that the student attend a general education class and receive integrated co-teaching (ICT) services in English, Living Environment, Global History, and Algebra (Dist. Ex. 5 at pp. 1, 5). The CSE recommended two math annual goals and testing accommodations, consisting of extended time ("2.0 Times"), use of a calculator for math and science tests, and directions simplified for tests and quizzes (id. at pp. 5-6). At the CSE meeting, the parent informed the district of her intention to place the student in a wilderness program (Tr. pp. 213-14, 806).

The parent also notified the district via email dated September 6, 2017 letter that she decided to place the student at the wilderness program, which she described as "a short-term residential therapy program," (Parent Ex. R; see Parent Ex. B). The parent indicated the student would "remain in their care until they deem it is appropriate for him to move on to an appropriate academic setting" (Parent Ex. R). A private psychological evaluation was conducted on October 16, 2017, while the student was enrolled in the wilderness program (Dist. Ex. 6 at pp. 1, 2).

On October 25, 2017, the parent notified the district via email that she did not believe the program developed by the district for the student would meet his needs and that she was planning to enroll the student in a residential therapeutic program when he completed the wilderness program (Parent Ex. T at p. 7). The parent and district exchanged emails (between late October and early December 2017) regarding scheduling a CSE meeting and the parent sharing the October 2017 private psychological evaluation report with the district (id. at pp. 1-7). On December 1,

⁴ The hearing record includes a June 15, 2017 CSE meeting notice regarding a June 21, 2017 initial eligibility meeting (Dist. Ex. 14). Witness testimony is unclear with respect to the date of the spring 2017 initial eligibility meeting as it is referred to as occurring in May or June 2017 by various witnesses (Tr. pp. 125, 129, 201-02, 210, 455-56, 785-86).

⁵ The student's eligibility for special education as a student with an other health-impairment is not in dispute in this proceeding (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

2017 the parent notified the district via email that she had transferred the student from the wilderness program to a residential treatment facility, Equinox (id. at p. 2; see Parent Ex. K at p. 3).⁶

The CSE convened on December 14, 2017 to conduct a program review (Dist. Ex. 8 at p. 1). Having determined the student continued to be eligible for special education as a student with an other health-impairment, the CSE recommended ICT services in the same core academic subjects as set forth in the August 2017 IEP but added two 30-minute sessions per week of individual counseling and two social/emotional annual goals (compare Dist. Ex 8 at pp. 1, 5-6, with Dist. Ex. 5 at pp. 1, 5). Testing accommodations consisted of extended time for all tests ("2.0 Times"), use of a calculator for math and science tests, and tests administered in a location with minimal distractions (Dist. Ex. 8 at p. 7).⁷

In a letter dated December 15, 2017, the parent notified the district that she was rejecting the December 2017 IEP as she did not believe it would serve her son's needs and that she would be filing a due process complaint notice and seeking tuition reimbursement; however, she also indicated that she was open to considering options the district offered (Parent Ex. C at p. 1). The parent also sent a December 15, 2017 email to the district indicating that she would provide a release for the district to speak with staff at the student's residential program and the psychologist who conducted the October 2017 private psychological evaluation if the district agreed to settle "the tuition issue" (id. at p. 2).

A. Due Process Complaint Notice

In an amended due process complaint notice dated March 19, 2018, the parent asserted that the district denied the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (Dist. Ex. 1 at pp. 1-6).⁸

The parent asserted that the district failed to refer the student for evaluation or convene a CSE to develop a program for the student during the 2016-17 school year when it became aware of a decline in the student's academics and behaviors (Dist. Ex. 1 at pp. 2-3). The parent also asserted that the district impeded the parent's participation in the development of an appropriate program for the student by disregarding the concerns expressed by the parent during the 2016-17 school year (id.).

With respect to the 2017-18 school year and the August 2017 IEP, the parent asserted that she did not receive a copy of the IEP until mid to late September and that the district did not have an appropriate IEP in place for the beginning of the 2017-18 school year (Dist. Ex. 1 at p. 5). In addition, the parent asserted that the CSE failed to consider the parent's concerns, which were

⁶ According to the admissions agreement, the student was enrolled in the out-of-State residential treatment program at Equinox on November 29, 2017 (Parent Ex. K).

⁷ The December 2017 IEP also included a postsecondary transition plan and provided that the student would be exempted "from the language other than English requirement" (Dist. Ex. 8 at pp. 5, 7-8, 9).

⁸ The parent's original due process complaint notice was dated February 5, 2018.

supported by the evaluative information and the student's declining performance and failed to recommend the related services the student required to make progress (id. at p. 4). With respect to the December 2017 CSE meeting and resultant IEP, the parent asserted that the CSE ignored the recommendations of the private psychologist—specifically, that the student be placed in a residential treatment program—and that the amount of counseling recommended by the CSE was insufficient to allow the student to make progress (id. at pp. 4-5). Further, the parent asserted that both of the IEPs developed for the 2017-18 school year failed to adequately address the student's need for behavioral interventions, emotional support through counseling, and related services (id. at p. 5). The parent also asserted that the IEPs' annual goals "were deficient and not reasonably calculated to produce meaningful progress academically, functionally or socially and emotionally" (id.).

Regarding the unilateral placement, the parent contended that Equinox was appropriate because the school provided the student with instruction specially designed to meet his unique needs via a therapeutic master plan with an academic component, an average class size of six students, academic tutoring, organizational and study skills support, and therapeutic counseling (Dist. Ex. 1 at p. 5). Concerning equitable considerations, the parent asserted that she cooperated with the district and provided the district with notice of the unilateral placements and her intention to seek tuition reimbursement for the private therapeutic program at Equinox (id. at pp. 4, 5). For relief, the parent requested reimbursement of the costs of the student's placement at Equinox for a portion of the 2017-18 school year (id. at p. 6).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 13, 2018, and concluded on August 29, 2018, after five days of proceedings (Tr. pp. 1-1004). In a decision dated October 9, 2018, the IHO found that the district offered the student a FAPE during the 2016-17 and 2017-18 school years (IHO Decision at pp. 1, 11-12, 16). With respect to the 2016-17 school year, the IHO found that the district did not violate its obligation under child find, because there was no basis to conclude that the student was exhibiting any clear signs of a disability that would have warranted special education, such that the district should have suspected that the student had a disability for which special education services were necessary (id. at pp. 11-12). With respect to the 2017-18 school year, the IHO found that the district offered the student a FAPE because the August and December 2017 IEPs were "reasonably calculated to enable [the student] to make progress in light of the circumstances" (id. at p. 12).

Although the IHO found that the district offered the student a FAPE, he went on to discuss the appropriateness of the unilateral placement and equitable considerations (IHO Decision at pp. 12-16). The IHO found that the parent had failed to sustain her burden to show that the student's unilateral placement at Equinox was appropriate, determining that the evidence did not support that the student required placement in a program as restrictive as a residential treatment center (id. at pp. 12-15). Lastly, the IHO found that equitable considerations did not weigh in favor of reimbursement and listed examples of the parent's dealings with the district that the IHO deemed to reflect a lack of cooperation (id. at pp. 15-16).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in failing to order tuition reimbursement for the portion of the 2017-18 school year during which the student attended Equinox. Initially, the parent questions the IHO's "[c]ompetency" on the grounds that the IHO did not contact the parties after the IHO's decision was returned to the IHO undelivered and was subsequently resent and because the IHO cited old rules pertaining to the process of appealing an IHO decision.⁹ Additionally, the parent asserts that the IHO made several errors of fact, which yielded erroneous conclusions. Next, the parent asserts that the IHO erred in finding that the district did not violate its child find obligations during the 2016-17 school year because the IHO overlooked the discrepancy between the student's performance during the 2016-17 school year and the student's three prior school years and contends that the student's "pervasive disengagement from instruction . . . should have raised a suspicion."

With respect to the 2017-18 school year, the parent asserts that the IHO erred in finding that the August 2017 and December 2017 IEPs offered the student a FAPE and argues that his conclusions were cursory in that he failed to address and discuss the content of the IEPs or what the evaluations revealed. Further, the parent alleges that the IEPs underreported the student's social/emotional needs revealed in the evaluations and that the IHO over-relied on the testimony of a single district witness with respect to the student's needs. Specific to the August 2017 IEP, the parent asserts that the IEP failed to address social/emotional needs revealed in the available evaluations, stating instead that there were "no social concerns at this time" and recommending only ICT services, accompanied by two math goals. Specific to the December 2017 IEP, the parent asserts that the CSE failed to adequately consider the private evaluation conducted while the student attended the wilderness program and failed to consider its recommendation for a therapeutic residential placement for the student. Further, the parent asserts that, although the IEP now provided counseling and two goals related to counseling, the amount was insufficient, the IEP did not set forth the student's needs revealed by the latest evaluation, and the student's other social/emotional needs in the school environment remained inadequately addressed. The parent also asserts that the student therefore began the 2017-18 school year without an appropriate IEP and the IHO erred in failing to consider each IEP independently.

The parent next asserts that the IHO erred in finding that the unilateral placement of the student at Equinox was overly restrictive. The parent contends that the IHO failed to consider whether Equinox met the student's academic and social/emotional needs and made his determination solely on LRE grounds. Specifically, the parent argues that the IHO ignored evaluative information stating that a that more restrictive placement may have been needed if the student's depressive, ADHD, or behavioral symptoms worsened. The parent asserts that the IHO erred in questioning the student's progress at Equinox and alleges that the evidence in the hearing

⁹ The parent requests no relief related to her allegations about the IHO except to request that, if the matter is remanded, that it be to a different IHO. Since this matter is not being remanded, it is unnecessary to discuss the parent's allegations further. Moreover, the parent does not appear to have been prejudiced by any delay in receiving the IHO's decision or in the IHO's attachment of a summary of an outdated appeal procedure to his decision, since the parent has timely appealed the IHO's decision.

record shows that the student had improved at Equinox, in light of two failing grades the previous school year.

Lastly, the parent asserts that the IHO erred in finding that equitable considerations did not weigh in favor of an award of tuition reimbursement and alleges that the parent provided notice of the unilateral placement at the wilderness program at the August 2017 CSE meeting and that the IHO ignored evidence reflecting a history of parental cooperation with the CSE and maintenance of an open mind with respect to a district placement for the student.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

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" (Andrew 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 Andrew 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]).¹⁰

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-

¹⁰ 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" (Andrew F., 137 S. Ct. at 1000).

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).

VI. Discussion

Initially, in the request for review, the parent asserts that the IHO made a number of factual errors in his decision with respect to evidence and testimony in the hearing record (see Req. for Rev. ¶¶ 6-9). To the extent the parent alleges that the IHO made factual errors based on a misstatement or misunderstanding of the evidence, I have conducted an independent review of the entire hearing record (see 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]).

A. 2016-17 School Year—Child Find

Turning first to the 2016-17 school year, the purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. 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. Dist. of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal

Nos. 11-092 & 11-094).¹¹ A district's child find duty is triggered when the district has "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660, quoting New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13). Additionally, the "standard for triggering the child find duty is suspicion of a disability rather than factual knowledge of a qualifying disability" (Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *12 [D. Conn. 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. of Fayette Cnty. v. L.M., 478 F.3d 307, 313 [6th Cir. 2007]; see A.P., 572 F. Supp. 2d at 225).

According to the hearing record, the student had a 504 plan during fifth, sixth, seventh, and eighth grades due to diagnoses of ADHD and central auditory processing disorder (Dist. Exs. 6 at p. 4; 9 at p. 1). The student attended school regularly, earned passing grades, and did not exhibit significant behavioral problems in fifth, sixth, and seventh grades (see Dist. Exs. 10 at pp. 1-4; 11 at pp. 6, 10-11). The student attended general education support classes from fifth grade through seventh grade (see Tr. pp. 366, 573-74, 774-76; Dist. Ex. 10 at pp. 1-4).¹² According to the parent, the student struggled with math, but did well when he was forced to do the work (Parent Ex. Q at p. 5). The parent requested that the student not attend an additional support class for math in eighth grade because she felt the students in the class were not a good influence on her son and the team agreed to give it a try (Tr. pp. 277-78, 570-72, 578). However, the student attended an AIS math class every other day during eighth grade (Tr. pp. 582-83; Dist. Ex. 10 at p. 5; see Tr. pp. 573-74).

The student attended school regularly in eighth grade (2016-17 school year) and passed all classes in the first quarter (Dist. Ex. 10 at p. 5). The student failed technology, math, and Spanish in the second quarter, he failed math and Spanish in the third and fourth quarters, and he failed math and Spanish for the year (id.). In the third quarter the student's grade rose significantly in technology and remained high for the fourth quarter, and the student's grades rose significantly in English, science, and social studies in the fourth quarter (id.).

With respect to the student's academic difficulties during eighth grade, the middle school assistant principal recalled that his conversations with the student's mother revolved around what the district could do with the student's schedule "in terms of getting him additional interventions if we thought they were necessary" (Tr. p. 359). He did not recall conversations with the student's mother about the student being resistant to support, but he did recall that from the teachers' perspectives the student was not "fulfilling his end of what we put in place for him" (Tr. pp. 359-60). The assistant principal noted that the student was not in the math support class "that other students [we]re in that provide[d] additional support" (Tr. p. 327). He explained that putting a

¹¹ 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 regulation does not prescribe the form that a referral by a parent must take but does require that it be in writing (8 NYCRR 200.4[a]).

¹² The type of support the student received appears to have varied; the hearing record indicates that the student received academic intervention services (AIS), but also participated in support classes that included both general education and special education students and received the support of two teachers by virtue of having been a general education student placed in an ICT class (Tr. pp. 277-78, 774, see Tr. p. 65; Dist. Ex. 10 at pp. 1-5).

student in the support class meant removing them from an elective (Tr. p. 328). He testified that he spoke with the parent about the additional support class for math, but they agreed to leave the student in his electives because the district was providing the student with other services, such as math lab, that they wanted to give a try (Tr. pp. 327-28, 339, 350-51, 375-76; Parent Ex. P at p. 6). In addition, the assistant principal noted that they wanted to give the student a "social outlet where he could be in an elective like every other middle school kid" (Tr. p. 328). The assistant principal testified that, although he is always concerned when students are not meeting their expectations, most students in seventh and eighth grade struggled with math and it was not uncommon for students not to do as well in math across the grade level (Tr. p. 351).

Although the parent was concerned about the student's academic performance, she also removed the student from the mandatory after-school homework club in April 2017 as a reward for his good grades and, in May 2017, stated that he no longer needed to attend homework club (Tr. pp. 838-41; Dist. Ex. 13 at pp. 2, 4).¹³

With respect to the student's social/emotional needs, the parent testified that she met with the student's eighth grade teachers at various times and told them that the student had received diagnoses of anxiety and depression, was seeing a psychiatrist and taking medication, and that it was important for teachers to connect with the student to prevent him from shutting down (Tr. pp. 584, 770-71). The parent testified that the student's behavior was deteriorating at home but that, when she met with the district regarding his school performance, she was only told that he needed to put in more effort (Tr. pp. 763-67). She testified that she was not aware of the student's numerous disciplinary infractions or that he was being written up; however, she also testified that she was in frequent contact with school staff regarding the student's behavior (Tr. pp. 592-93, 780-82; see Parent Ex. Q at pp. 8, 10-16). The parent testified that she provided the student with a tutor for math but that the student was embarrassed by the tutor and, although he appeared to cooperate with her, the student threw his notes from tutoring sessions in the garbage (Tr. pp. 578-79, 605-06, 759-60). The parent opined that, based on the student's grades and attitude toward math, the tutor was not helpful (Tr. p. 760).

The student received 19 disciplinary referrals and a total of five days of in-school suspension during eighth grade (Dist. Ex. 11 at pp. 1, 3, 7-10). The middle school assistant principal testified that he was familiar with the student and was also familiar with the student's disciplinary record (Tr. pp. 304-05). He explained that, in comparison to other students, the majority of the student's disciplinary infractions lay within the lower levels of the district's code of conduct (Tr. pp. 308-09). He further explained that the code of conduct was broken up into four different categories with level one infractions consisting of lower level "instances" such as cutting class and disruptive behavior (Tr. p. 308). According to the assistant principal, as you moved up the levels to category four, the conduct progressively gets worse and included infractions such as

¹³ The parent described an incident in which the homework club teacher did not allow the student to leave the classroom to get the homework that he needed to complete (Tr. pp. 594-96). She testified that "[i]t was at that point I realized that forcing him to go to an after-school AIS . . . extra-help homework program was not helping him, it was only making him feel worse about himself" (Tr. p. 595). She indicated that, although she had initially agreed with the district to make it mandatory for the student to attend the club, she subsequently decided otherwise (Tr. pp. 593, 595-96).

setting fires or vandalizing the school (Tr. p. 308; see Tr. pp. 313-17). The assistant principal indicated that most level-one infractions did not rise to his level, were primarily dealt with by teachers, and the general consequence was lunch detention (Tr. pp. 308-10, 12). The assistant principal testified that the majority of the student's disciplinary infractions related to the student's failure to attend lunch detention and mandatory homework club and were specific to one teacher who ran these programs (Tr. pp. 308-10, 318-19).^{14, 15} He reported that the student's instances of disruptive behavior included crushing another student's food and making inappropriate swallowing noises, noted that they were addressed with lunch detention, but acknowledged that there was one instance that resulted in in-school suspension (Tr. p. 310). The assistant principal described the student's infractions as immature behaviors that were typical of middle school adolescent behavior and he noted that the student's immature behavior was not pervasive throughout his day (Tr. pp. 310, 319). The assistant principal did not believe the student's behavior was impeding his academic performance (Tr. p. 323). The assistant principal testified that he spoke to the student on many occasions and he noted the student was a "very likable kid" who never exhibited signs of social or emotional distress (Tr. p. 329).¹⁶ The assistant principal testified that he did not believe the student required counseling because the student had not exhibited a lack of self-control, emotional instability, or an inability to form healthy relationships with other students; rather, the student appeared to be well adjusted, popular, and athletic, but he struggled academically (Tr. pp. 364-66).

The assistant principal acknowledged that the student's disciplinary offenses increased and his grades declined in eighth grade (Tr. p. 362). He stated that the student's discipline profile was typical of seventh and eighth grade boys and would most likely not warrant a referral to the learning support team (Tr. p. 319; see Tr. p. 302). Further, the assistant principal noted that the student's behavior was not happening across all of his classes and the consequences were not severe enough to warrant a body of professionals getting together to address the student's behavior (Tr. p. 319). The assistant principal suggested that, in order to make a referral to the CSE, a student's behavior would have to reach level three or level four and the district would have had to exhaust the resources of the learning support team and instructional support team (Tr. pp. 322-24; see Tr. p. 302).¹⁷ Despite the number of disciplinary referrals the student received, the assistant principal indicated that he viewed the lunch detention as successful because the student's behavior did not

¹⁴ The assistant principal opined that the fact that most of the student's disciplinary infractions were issued by one teacher did not indicate that the student had a problem with the teacher herself; rather, he indicated the student had a problem with the system the teacher managed, the after-school homework club (Tr. pp. 330-31).

¹⁵ The assistant principal explained that mandatory after-school homework club was for students who met a certain threshold for missing homework and were, therefore, mandated to stay after to complete their homework under the supervision of a teacher (Tr. pp. 321, 334-35). He indicated that the homework club did not include an instructional component, although the teacher who ran the club would provide assistance to students who needed it (Tr. p. 335).

¹⁶ The assistant principal reported that he was a former counselor and that, in his professional opinion and experience, he did not see the student as a student who was crying out for help (Tr. p. 329).

¹⁷ The assistant principal testified that he did not believe that the student was ever referred to the instructional support team (Tr. p. 327).

escalate to a higher level (Tr. p. 332). Also, the behaviors for which the student was given detention did not reoccur (Tr. p. 333).

The parent points to the testimony of her experts, a social worker and a registered nurse, regarding changes in grades, behaviors, and social associations as being indicators of mental health needs in children (Tr. pp. 672-75, 718-22), as well as the testimony of the Equinox admissions and academic director (Equinox director) that the student's grades in eighth grade, disciplinary referrals, and academic decline should have raised questions (Tr. pp. 526-27). Notwithstanding these perspectives, the observations of district staff who worked with the student in the school environment during the 2016-17 school year may be afforded some amount of deference relative to the after-the-fact impressions of the outside experts (see Z.D. v. Niskayuna Cent. Sch. Dist., 2009 WL 1748794, at *6 [N.D.N.Y. June 19, 2009] [explaining that deference is frequently given to the school district over the opinion of outside experts]; cf. Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 592 F.3d 267, 270 [1st Cir. 2010] [noting that "the underlying judgment" of those having primary responsibility for formulating a student's IEP "is given considerable weight"]; J.E. & C.E. v. Chappaqua Cent. Sch. Dist., 2016 WL 3636677, at *16 [S.D.N.Y. June 28, 2016], aff'd, 2017 WL 2569701 [2d Cir. June 14, 2017], citing E.S. v. Katonah-Lewisboro Sch. Dist., 742 F. Supp. 2d 417, 436 [S.D.N.Y. 2010] ["The mere fact that a separately hired expert has recommended different programming does nothing to change [the] deference to the district and its trained educators"], aff'd, 487 Fed. App'x 619 [2d Cir. July 6, 2012]).

Based on a review of the hearing record, the parent and teachers communicated throughout the 2016-17 school year to address the student's behavior and academic performance (Tr. pp. 323, 359, 376-77, 593-94, 765; Parent Exs. F; G; P; Q; Dist. Ex. 13). The parent stated that she had several meetings with the student's teachers to make plans to help the student succeed and, when she felt the student was getting worse emotionally, she asked for an evaluation (Tr. pp. 593-94, 596, 763). The parent requested an evaluation in early May 2017 and the student was evaluated in May 2017 (Tr. pp. 789-90, 846-48; Dist. Ex. 3).

In summary, the hearing record reflects that, although the student received some failing grades in eighth grade, his grades fluctuated and he responded at least in part to interventions. In addition, while the student received significantly more discipline referrals in eighth grade, the infractions were mostly described as immature behavior. Even assuming that the district had reason to suspect a disability at some point before the parent's referral and request for evaluation of the student in May 2017, the parent's referral did eventually result in the CSE classifying the student before the start of the 2017-18 school year, and the parent only seeks relief for the 2017-18 school year. Based on the foregoing, I decline to overturn the IHO's conclusion that the district did not deny the student a FAPE by violating its obligation under child find prior to the parent referral in May 2017.

B. 2017-18 School Year

Initial comment regarding the parent's challenges to the August and December 2017 IEPs is warranted. As referenced above, the student's 2017-18 school year can be broken into two periods, his attendance at the wilderness program after the August 2017 CSE meeting, and his attendance at Equinox beginning November 29, 2017. Additionally, the parent's request for relief

in this matter is limited to a request for tuition reimbursement for the student's attendance at Equinox.

On October 25, 2017, the parent communicated to the district that the student would be completing the wilderness program within a month, that she did not believe the program set forth in the August 2017 IEP would allow the student to make progress, and that she planned to enroll him in "a residential therapeutic program" (Parent Ex. T at p. 7). The district school psychologist from the high school responded that she would schedule a CSE meeting for early November to discuss the student's IEP and placement and requested copies of any privately obtained evaluations (*id.* at pp. 6-7). The CSE meeting was initially scheduled for November 15, 2017 to accommodate the parent's request for a meeting in mid-November; however, the parent requested that the meeting be rescheduled due to a work commitment (*id.* at pp. 5-6). The district emailed the parent on November 17 and November 30, 2017 agreeing to reschedule the meeting at the parent's convenience and acknowledging its receipt of the private psychological evaluation (Parent Ex. T at pp. 3-4; *see* Dist. Ex. 6). The student was enrolled in the residential treatment program at Equinox on November 29, 2017 (Parent Ex. K). On December 1, 2017, the parent emailed the district regarding scheduling the CSE meeting and indicated she was delayed in her response because she "was getting [the student] transferred from Wilderness Therapy to his residential treatment facility" (Parent Ex. T at p. 2). Ultimately, the meeting was scheduled for December 14, 2017 (*id.* at pp. 1-2). As discussed in more detail below, the CSE convened on December 14, 2017 to conduct a program review (Dist. Ex. 8 at p. 1). Subsequently, in a letter dated December 15, 2017, the parent notified the district that she was rejecting the December 2017 IEP and for the first time informed the district in writing that she intended to seek tuition reimbursement for the student's placement at Equinox (Parent Ex. C at p. 1).

Based on this timeline, the December 2017 IEP is the IEP that should be considered in assessing the parent's rejection of the district's program in favor of the unilateral placement of the student at Equinox. The parent was aware that the district wanted to reconvene the CSE in anticipation of the student's completion of the wilderness program and the parent did not object to reconvening the CSE (*see* Parent Ex. T at pp. 3-7; *see also* M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *25 n.3 [S.D.N.Y. Sept. 28, 2018]). However, despite the mutual understanding that a CSE meeting was imminent, the parent requested the rescheduling of the CSE meeting and moved the student to the residential program before the CSE reconvene occurred (*see* Parent Ex. T at pp. pp. 2, 5-6). Under these specific circumstances, the August 2017 IEP was superseded as result of the December 2017 IEP, which became the operative IEP for the 2017-18 school year for purposes of the impartial hearing and subsequent State-level review (*see* M.P. v. Carmel Cent. Sch. Dist., 2016 WL 379765, at *5 [S.D.N.Y. Jan. 29, 2016]; McCallion v. Mamaroneck Union Free Sch. Dist., 2013 WL 237846, at *8 [S.D.N.Y. Jan. 22, 2013]). Additionally, the parent is not prejudiced by the use of the December 2017 IEP as the operative IEP for the purposes of assessing her decision to place the student at Equinox since the district could have amended the August 2017 IEP during the resolution period subsequent to the parent's due process complaint notice to include the revisions ultimately reflected in the December 2017 IEP and because the parent also rejected the December 2017 IEP (M.P., 2016 WL 379765, at *5).¹⁸

¹⁸ Even assuming that the August 2017 IEP denied the student a FAPE, equitable considerations would warrant a

Notwithstanding the foregoing, the August 2017 CSE and IEP are discussed to the extent they inform the discussion of the operative December 2017 IEP.¹⁹

1. August 2017 IEP

According to the August 2017 IEP, in determining the student's eligibility for special education services the CSE considered an October 2013 psychological and educational evaluation report, a February 2017 speech-language progress summary report,²⁰ a May 2017 psychological and educational evaluation report,²¹ and a July 2017 psychiatric evaluation report (Dist. Ex. 5 at pp. 2-3; see Parent Ex. D; Dist. Exs. 3; 4).²²

According to the May 2017 psychological evaluation report, the student obtained low average to average scores on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-

denial of tuition reimbursement at Equinox as the parent did not provide the district with notice of her intent to seek tuition reimbursement until December 15, 2017, after the student was placed at Equinox and after the development of the December 2017 IEP (see Parent Exs. C at p. 1; K). Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although the parent notified the district on October 25, 2017 that the student would be transferred to a residential program, this communication did not put the district on notice regarding the parent's intent to seek reimbursement of the costs of the residential program or provide sufficient information to put the district on notice of the parent's concerns regarding the August 2017 IEP in order to give the district an opportunity to cure any deficiencies, which is the intent underlying the 10-day notice requirement (Parent Ex. T at p. 7; see Greenland Sch. Dist., 358 F.3d at 160). While inaction in response to a 10-day notice on the part of a district will not enhance its position in the weighing of equitable factors (see e.g., Application of a Student with a Disability, Appeal No. 15-112), the reverse must also be true.

¹⁹ On appeal, the parent reasserts her argument, from the due process complaint notice, that the August 2017 IEP was untimely. However, as discussed above, the parent does not seek reimbursement for the student's placement in the wilderness program, and the analysis of the appropriateness of the district's recommendation is based on the December 2017 IEP. Additionally, the parent acknowledges in the request for review that the August 2017 IEP was "in effect" before the start of the school year, but argues that, because it did not meet the student's needs, the student began the school year without an "appropriate" program in place (Req. for Rev. ¶ 17; Parent Mem. of Law at pp. 13-14). This argument runs to the appropriateness of the IEP, rather than its timeliness, and, therefore, does not require separate discussion.

²⁰ The hearing record does not include a copy of the February 2017 speech-language progress summary.

²¹ The May 2017 psychological and educational evaluation report references the scores from the cognitive and achievement testing reported in the October 2013 psychological and educational evaluation report (Dist. Ex. 3 at pp. 2-3).

²² The district special education teacher testified that he administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) to the student in May 2017 and the results of the WIAT-III were included in the May 2017 psychological evaluation report (Tr. pp. 456-57; see Dist. Ex. 3 at p. 5).

V) indices, with a full-scale IQ in the low average range (Dist. Ex. 3 at pp. 4-5, 7-8). According to the evaluator, teachers reported that the student demonstrated strengths in solving math equations and in verbal comprehension, and weaknesses in understanding basic math facts and in writing (id. at p. 2). The May 2017 psychological evaluation report included teacher comments from the student's fourth quarter progress report which ranged from "has 'made great improvement'" in English and social studies to "is 'in danger of failing for the year,'" in math and science as well as comments such as "not working to potential" and "does not seek help when needed" (id.).

Academically, the student scored in the average range on reading and spelling subtests and in the below average range on mathematics subtests of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Ex. 3 at p. 5). The special education teacher who administered the WIAT-III testified that the student struggled in math and he was reluctant to receive help at times; however, based on his test scores he felt that, with work, the student was capable of passing math (Tr. pp. 441-42, 458). The special education teacher knew the student because he was his football coach and he taught in the student's eighth grade math and science classes, and he testified that the student was a typical eighth-grade student who did not present with any atypical social/emotional concerns (Tr. pp. 437-38, 471-72).

Regarding the student's attending and in-school behavior, the May 2017 psychological evaluation report included the following teacher comments: overall the student demonstrated good behavior; the student could be easily distracted and appear disinterested; at times he needed to be refocused; when focused, teachers believed the student was capable; and the student completed his work sometimes but with inconsistent quality and effort (Dist. Ex. 3 at p. 2). Results of student self-ratings on the Behavior Assessment System for Children-Third Edition (BASC-3) indicated clinically significant scores in the areas of attitude to teachers, relations with parents, locus of control, sense of inadequacy, self-esteem, and attention problems, and at-risk scores in the areas of attitude to school, sensation seeking, atypicality, social stress, anxiety, depression, and hyperactivity (id. at pp. 5-6, 9). Based on the BASC-3 results, the evaluator opined that the student "exhibit[ed] significant social and emotional difficulties that may . . . negatively impact[] his academic progress and performance" (id. at p. 6). Teacher ratings on the Conners 3rd Edition (Conners 3) were within the very elevated range in the area of defiance/aggression and in the elevated range in the area of inattention, while parent ratings were in the very elevated range in the areas of learning problems and defiance/aggression and in the elevated range in the areas of inattention and hyperactivity/impulsivity (id.).²³ Based on the results of the Conners 3, the evaluator suggested that the student "exhibit[ed] inattentive and defiant tendencies" at school and home that also may negatively affect his academic performance (id. at pp. 6-7).

The CSE chairperson testified that, when the CSE reviewed the May 2017 psychological and educational evaluation results in spring 2017, the committee did not believe the student required special education services based on his low math scores; however, due to concerns resulting from his social/emotional test scores, the committee decided that a psychiatric evaluation

²³ The classroom teachers' responses indicated that the student tended to become argumentative and may defy requests from his teachers (Dist. Ex. 3 at p. 6). They further indicated that the student may have poor concentration or difficulty keeping his mind on his work and may avoid schoolwork (id.).

be conducted to determine whether social/emotional concerns were having an impact on the student academically (Tr. p. 210).

A psychiatric evaluation was conducted in July 2017 and the student received diagnoses of an unspecified depressive disorder, ADHD-combined presentation, and "rule out" oppositional defiant disorder (Dist. Ex. 4 at pp. 1, 3). The evaluator indicated that the student was struggling with attention problems and that, while his academic problems appeared to be related to mood and ADHD symptoms, the depression appeared to be the more prominent factor in his behavior (id. at p. 2). The evaluator opined that the student met the criteria to be classified as a student with either an emotional disturbance due to his depression diagnosis or an other health-impairment due to his ADHD diagnosis, and that the student's 504 plan accommodations should be continued (id. at p. 3). The evaluator also recommended pharmacological interventions, continuation of outpatient counseling, and a more restrictive setting if the student's symptoms became more severe (id.).

The CSE chairperson testified that, after reviewing the July 2017 psychiatric evaluation report, the August 2017 CSE determined the student met the criteria for classification as a student with an other health-impairment because of the ADHD diagnosis and the impact it had on the student's ability to access the curriculum (Tr. pp. 211-12). The August 2017 CSE recommended ICT services daily for English, science, mathematics, and social studies (Dist. Ex. 5 at p. 5). The CSE chairperson opined that, for a student with average intelligence, but a weakness in math and an ADHD diagnosis, ICT services were appropriate because the student would have access to a special education teacher to reteach any material he did not understand, redirect the student to task, and refocus him when needed (Tr. pp. 218-19). The CSE chairperson stated that math goals were included in the August 2017 IEP because that was the student's main area of deficit (Tr. pp. 217-18; see Dist. Ex. 5 at p. 5).

The district school psychologist from the high school, who attended the August 2017 CSE meeting, testified that the CSE determined the student was eligible to be classified as a student with an other health-impairment based on a review of the updated evaluations, which confirmed the student's diagnosis of ADHD as well as some mood concerns, and parent concerns, which included the student's failing math and Spanish grades and his behavior over the summer (Tr. pp. 52-59; see Dist. Ex. 5 at p. 1). The school psychologist testified that the math goals that were developed were appropriate because they addressed the student's biggest area of need (Tr. pp. 60-61).²⁴ The school psychologist opined that the recommended ICT services were appropriate because the student would be educated in the LRE with support from a special education teacher to address his attention, concentration, and organizational skills (Tr. pp. 62-69). The school psychologist testified that social/emotional goals were not included in the August 2017 IEP because, based on the student's behavior during the school year, the CSE determined the student did not require social/emotional goals or counseling at that time (Tr. pp. 132-35). The parent testified that she raised concerns about the need for social/emotional goals at the August 2017 CSE meeting, stating that, from her perspective, that was the intent of the meeting (Tr. p. 870).

²⁴ Likewise, the special education teacher who attended the August 2017 CSE meeting testified that she developed math goals for the student because she knew the student "had a weakness in math" (Tr. pp. 475-76).

Information contained in the present levels of performance section of the August 2017 IEP indicated that the student: was very inconsistent with going to get extra help in math to offset his struggles; needed to improve his ability to perform grade level math concepts; had good relationships with peers; had a difficult time trusting teachers and would only open up and give his best when trust was developed; had good social skills, and did not present with social concerns (Dist. Ex. 5 at p. 3). The August 2017 IEP indicated that the student had difficulty maintaining attention and concentration, which negatively impacted his educational functioning (*id.* at p. 4). The August 2017 IEP included intelligence (WISC-V) and academic achievement (WIAT-III) test scores; however, social/emotional test scores were not included on the IEP (Dist. Ex. 3 at pp. 2-3). The August 2017 IEP did not include information regarding the student's diagnoses of ADHD or depression (*see* Dist. Ex. 3).

Given that the August 2017 CSE determined that the student was eligible for special education services due to the student's ADHD diagnosis and its impact on his ability to access the curriculum, it is unsettling that the August 2017 IEP mentioned the student's difficulty maintaining attention and concentration, but the IEP did not otherwise address his needs in these areas. The August 2017 IEP did not include the student's diagnoses from the July 2017 psychiatric evaluation, social/emotional scores, or descriptive information from the May 2017 psychological evaluation report, or management needs/goals to address the student's attention and concentration. While ICT services would have provided some support to the student, considering the lack of information regarding the student's social/emotional needs or management needs related to the student's attention and concentration, the August 2017 IEP did not describe how those services would have met the student's unique needs. Additionally, while the August 2017 IEP indicated that the student had good relationships with peers and some difficulty with relating to teachers, the IEP did not include information regarding the student's feelings about himself and his social adjustment to school (particularly as described in the evaluation reports), nor did the IEP include parent concerns. Notwithstanding these shortcomings in the August 2017 IEP, as set forth above, the operative IEP for the purposes of examining the parent's request for reimbursement for the cost of the student's attendance at Equinox is the December 2017 IEP.

2. December 2017 IEP

Specific to the December 2017 IEP, the parent asserts that the CSE failed to adequately consider the private psychological evaluation conducted while the student attended the wilderness program and failed to consider its recommendation for a therapeutic residential placement for the student. Further, the parent asserts that, although the December 2017 IEP recommended counseling and two goals related to counseling, the amount was insufficient, the IEP did not set forth the student's needs revealed by the latest evaluation, and the student's other social/emotional needs in the school environment remained inadequately addressed.

In addition to the evaluations considered by the August 2017 CSE, the December 2017 IEP indicated that the CSE considered the October 2017 private psychological evaluation (Dist. Ex. 8 at pp. 2-3; *see* Dist. Ex. 5 at pp. 2-3; *see also* Dist. Ex. 6). The private psychological evaluation took place when the student was attending the wilderness program and included a background and historical information about the student, psychological and achievement testing, an assessment of the student's attention and executive functioning, personality testing, and substance use testing (Dist. Ex. 6). According to the October 2017 psychological evaluation report, the student's full-

scale IQ and general ability index on the WISC-V indicated borderline intellectual functioning and the evaluator opined that the student had likely struggled academically for many years and that his behavioral and emotional issues may be rooted in his cognitive issues (id. at pp. 7, 25-26). Academic achievement testing using the WIAT-III yielded: average to above average scores in reading; average scores in writing, spelling, and math fluency; and a below average score on numerical operations (id. at pp. 11-13).

The October 2017 psychological evaluation report included the results of multiple social/emotional questionnaires that the evaluator concluded were consistent with ADHD symptoms, struggles with executive functioning skills, symptoms of depression, and a pattern of sensation-seeking, immediate gratification, and impulsivity (Dist. Ex. 6 at pp. 15-17, 21). Social/emotional test results also suggested that the student had a strong tendency to suppress his thoughts and feelings, ruminated over emotionally upsetting events, exhibited a pattern of negative self-talk, and tended to not reach out to others for emotional support (id. at pp. 21-24). The student also reported significant substance use, and the evaluator opined that the student was at considerable risk for future drug and alcohol related problems (id. at pp. 24-25). The evaluator determined the student met the criteria for diagnoses of borderline intellectual functioning, ADHD-combined presentation, other specified neurodevelopmental disorder: nonverbal learning disorder, persistent depressive disorder with intermittent major depressive episodes, a mild substance use disorder, and parent-child relational problems (id. at pp. 25-28). He recommended, upon the completion of the wilderness program, that the student: attend a specialized program to address his therapeutic needs with a supportive residential academic environment; receive individual, group, and family therapy; undergo a neurological examination to rule out any organic issues related to his cognition; attend a small class setting; receive a variety of accommodations; receive tutoring; pursue follow-up treatment with a psychiatrist; and obtain clearance from a doctor who specializes in concussions and traumatic brain injuries prior to engaging in any further contact sports or activities (id. at pp. 27-31).

The CSE convened in December 2017, considered results of the October 2017 psychological evaluation report, and recommended adding two 30-minute sessions of individual counseling per week to the student's IEP (Dist. Ex. 8 at pp. 2, 6). In addition, two social/emotional goals were added to the student's IEP, which focused on his ability to identify feelings, verbalize strategies to deal with feelings, identify behavioral triggers, and explain the impact of his behavior on the behavior of others (id. at pp. 5-6).

The district school psychologist at the high school, who chaired the December 2017 CSE meeting, testified that the committee considered the October 2017 private psychological evaluation report but that, because the committee had major concerns about the report, they interpreted it with caution and did not make recommendations based solely on the report (Tr. pp. 90-91; see Dist. Ex. 8 at p. 1). The school psychologist did not agree with the recommendation for a residential placement because it was a highly restrictive placement and the student's performance up until the end of eighth grade did not appear to necessitate a residential setting (Tr. p. 91). The school psychologist indicated that the December 2017 CSE did not have any current teacher or counselor reports describing the student's functioning in his then-current setting; however, due to social/emotional and attention concerns, the December 2017 CSE recommended counseling services to offer support to the student and help him transition back to the high school (Tr pp. 93-

94).²⁵ The CSE chairperson testified that the December 2017 CSE believed that the student would be successful in the high school with ICT services and counseling (Tr. p. 92).

The school psychologist from the middle school who attended the December 2017 CSE meeting testified that the committee considered the October 2017 psychological evaluation report, but that the validity of the report was questioned due to the number of evaluations that were conducted in one day and the discrepancies between the student's cognitive and achievement scores in the October 2017 psychological evaluation report versus previous evaluations (Tr. pp. 225-26; see Tr. p. 230).²⁶ The school psychologist stated that counseling services were added to the December 2017 IEP to help the student transition back to the district and to offer him support for family problems that were reported to be a central focus of his difficulties in the October 2017 psychological evaluation report and which might affect the student in the classroom (Tr. pp. 232-34). In addition, the school psychologist noted the difficulty of returning to school in the middle of the school year (Tr. pp. 233-34). The school psychologist testified that social/emotional goals were added to the December 2017 IEP based on a review of the October 2017 psychological evaluation report (Tr. pp. 234-35). The school psychologist opined that the December 2017 IEP was appropriate because the student's social/emotional needs were addressed by counseling, his deficits in math were addressed by math goals, and assistance the student required in the classroom for reteaching and refocusing was provided by the special education teacher in the classroom (Tr. p. 235).

The parent testified that the student finished the wilderness program on November 30, 2017 and the wilderness program staff recommended that the student not return to the district because he was not stable enough to access the curriculum, he needed a small class setting, and he had more therapeutic work to do (Tr. pp. 809-10; see Parent Ex. B). The parent testified that she enrolled the student in the residential program at Equinox on December 1, 2017 (Tr. p. 812; see Parent Ex. T at p. 2). The parent testified that she did not recall discussing social/emotional goals at the December 2017 CSE meeting and the goals that were included were "a good start. but . . . based on his current condition, w[ere] not going to be sufficient" (Tr. pp. 812-13). The parent testified that she disagreed with the December 2017 CSE recommendation of an ICT setting, stating that she believed the student needed a lot more, such as a therapeutic setting "that would focus on students with emotional disturbance" (Tr. pp. 818-22). She further explained that the district could have offered a "BOCES-type setting, "like "a day program where he . . . lived at home but then would travel to a more restrictive setting with smaller class sizes" (Tr. pp. 820-21).

The December 2017 IEP included some updated information in the present levels of performance section, such as the October 2017 private psychological evaluation was listed under

²⁵ The school psychologist testified that, when making its recommendation, the committee took into account the fact that the student had not been attending the public school for three months (Tr. p. 94). She indicated that committee members felt it would be difficult for the student to come back to school mid-year and wanted to provide him with support and counseling (id.).

²⁶ In the October 2017 evaluation psychological evaluation report, the evaluator opined that the student's full-scale IQ scores from this evaluation and prior testing "'hang together' with fair stability," as the scores were within a 95% confidence interval and he was "more concerned about [the student's] declining math achievement scores" (Dist. Ex. 6 at p. 6).

evaluations/reports; however, no scores from the evaluation report were included in the IEP (Dist. Ex. 8 at p. 2). The IEP indicated that the student: was recommended to attend extra help in math and attended sporadically throughout the year; had many friends; had difficulty interacting with certain teachers; had a difficult time putting forth maximum effort when he did not connect with a particular individual; enjoyed many age-appropriate hobbies and sports; and had some difficulty interacting with certain authority figures and needed to work on maintaining motivation, effort, and confidence in school even when interacting with teachers he did not prefer (*id.* at pp. 3-4).

It is unclear from the hearing record if the district could have cleared up concerns regarding the October 2017 psychological evaluation report, as the parent provided permission to the district to communicate with staff at the wilderness placement on September 6, 2017, but later withheld permission for the district to speak to staff at the residential placement or the psychologist who conducted the October 2017 evaluation on December 15, 2017 (Parent Exs. C at p. 2; R). Therefore, the December 2017 CSE's decision to consider, but give less weight, to the October 2017 evaluation report relative to other information regarding the student was reasonable. While the December 2017 IEP did not include the student's diagnosis of ADHD, the IEP acknowledged the student's needs regarding organizational skills and his ability to focus (Dist. Ex. 8 at p. 3). The December 2017 IEP included social/emotional goals and counseling support to address the student's social/emotional needs (i.e. interacting with authority figures and maintaining motivation, effort, and confidence in school when interacting with teachers he doesn't prefer) (*id.* at pp. 3-6).²⁷ Although the student's academic performance and behavior during the 2016-17 school year declined from the years prior, his behavioral infractions were described as minor and district staff familiar with the student believed his needs could be met in a general education setting with special education and related services. While the December 2017 IEP could have included more detail, based on information available to the December 2017 CSE, the IEP was reasonably calculated to meet the student's needs in the LRE.

VII. Conclusion

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein. Having found that the district met its burden to demonstrate that it offered the student a FAPE during the portion of the 2017-18 school year wherein the student attended Equinox and the parent seeks tuition reimbursement, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 20, 2018**

**STEVEN KROLAK
STATE REVIEW OFFICER**

²⁷ The annual goals focused on the student's ability to identify his emotions and feelings and strategies for dealing with them and the student's ability to identify behavioral triggers and their impact (Dist. Ex. at pp. 5-6).