



The University of the State of New York

The State Education Department State Review Officer

No. 08-021

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

Appearances:

Zelma & Berlin, attorneys for petitioners, George Zelma, Esq., of counsel

Shaw, Perelson, May & Lambert, LLP, attorneys for respondent, Lisa S. Rusk, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request to be reimbursed for their daughter's tuition costs at the John Dewey Academy (JDA) from January 2006 through June 2007. The appeal must be dismissed.

Preliminarily, I must address a procedural issue. In their petition, the parents included additional information about the student's current academic and social activities as a footnote (Pet. ¶15 n.1). Although the parents did not specifically request consideration of this information as additional evidence, respondent (the district) objects to its consideration on the ground that it was not introduced at the impartial hearing (Answer ¶15). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). I find that the additional information contained in the petition is not necessary to render a decision in this matter, and thus, I decline to consider it.

At the commencement of the impartial hearing on January 19, 2007,¹ the student was attending JDA where she had been enrolled by her parents since November 2005 (Tr. pp. 194-95; see Parent Ex. EEE). The Commissioner of Education has not approved JDA as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education services as a student with an emotional disturbance is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

The parents initially referred their daughter to the district's Committee on Special Education (CSE) by letter dated January 17, 2006 (Parent Ex. F). In the letter, the parents requested an evaluation because they had been "advised that [their daughter] needs a residential placement" and indicated their willingness to consider special education programs recommended by the district (id.). On March 17, 2006, the parents met with the district's CSE Chairperson and signed a consent form to permit the district to evaluate the student (Parent Ex. P at pp. 3, 5). On April 26, 2006, the district received a copy of the student's medical report of physical examination and a letter from the clinical director of the wilderness program that the student attended from September 1, 2005 through November 14, 2005 (Dist. Ex. 10 at pp. 1-3; Parent Ex. C at pp. 1-2; see Dist. Ex. 8 at pp. 25-26). The district's school psychologist conducted a psychological and educational evaluation of the student on May 15 and 16, 2006 (Parent Ex. E at pp. 1-8).

The letter from the clinical director² of the wilderness program, dated April 12, 2006, indicated that the student entered the program as an "emergency admission" in September 2005 (Parent Ex. C at p. 1). At that time, the clinical director noted that the student's difficulties with "depression and self-esteem manifested in cutting behavior, suicidal ideation and threats, and [substance] abuse" (id.). Upon her arrival to the program, professionals assessed the student and concluded that she required the "type of therapeutic program" the wilderness program offered to "youth with severe mental health and substance abuse problems," including "tight supervision" and a "structured program" (id.). The clinical director described the wilderness program as a "treatment facility" for children, who camp in small groups of eight to ten and receive "around the clock evaluation and therapy, seven days a week" (id.). He noted that the students participate in "two formal group therapy sessions each day and several individual counseling sessions each week" (id.). In addition to the therapeutic treatment, the wilderness program provided "an academic curriculum and the credits the student earns are transferable to the schools they attend after completing [the program]" (id.). He also noted that the therapeutic wilderness program provided a "necessary stepping stone to a residential treatment school" (id.).

The clinical director reported that while at the wilderness program, the student received weekly individual and group therapy and met with the program's medical director a minimum of once every three weeks (Parent Ex. C at p. 2). The program's medical director, therapist, and on-

¹ The parties convened on January 19, 2007 to conduct a prehearing conference; the first day of testimony occurred on February 28, 2007 (Jan. 19, 2007 Tr. p. 1; Feb. 28, 2007 Tr. p. 1).

² The clinical director of the wilderness program was a family therapist with a bachelor's degree in sociology, a master's degree in psychology, and a Ph.D. in marriage and family therapy (Parent Ex. C at p. 1). In addition, he practiced family therapy for "over a decade" and was a current member of the American Association of Marriage and Family Therapists (id.).

line staff consulted with each other every two days "about issues regarding [the student] in the course of her treatment" (id.). Upon discharge from the wilderness program, the clinical director recommended that the student receive additional therapeutic support "to ensure that the changes she started here were fully integrated into her life" (id.). He noted that the student required further assistance and support to address her "behavioral issues, minimization and denial, school issues, body image problems, oppositional/defiant issues, rage attacks, substance abuse, and expression of emotion" (id.). He also "strongly recommended" that the student "not return home, visit home, or have contact with any peers from home until she has integrated enough of the skills necessary to safely ward off the negative peer influence of her home environment" (id.). In his opinion, the student progressed well in the program, and although she had substance abuse problems in the previous spring and summer, he identified the student's "primary issues" as "emotional" (id. at p. 1). Finally, he indicated that after working with an educational consultant and the family, they identified JDA as an "ideal next step" for the student because it offered a "full academic program" along with "continuing therapeutic support" (id. at p. 2).

On November 11, 2005, the parents signed a "pre-enrollment/enrollment and financial agreement" to enroll their daughter at JDA, where she repeated eleventh grade during the remainder of the 2005-06 school year (Parent Ex. EEE at pp. 1-2; see Parent Exs. E at p. 2; X at pp. 1-2).

The student's medical report of physical examination, dated April 20, 2006, described her as "well appearing" and as having regained the weight lost in the 1 1/2 years prior to 2004 in relation to an "eating disorder" (Dist. Ex. 10 at pp. 1-2). The report documented the student's reluctance to discuss the issues of self-cutting and substance abuse (id. at p. 1).

As noted above, the district's school psychologist conducted a psychological and educational evaluation of the student at JDA on May 15 and 16, 2006, which included interviews of the student and JDA staff, a classroom observation, and the administration of the Wechsler Adult Intelligence Scale—Third Edition (WAIS-III), the Wechsler Individual Achievement Test—Second Edition (WIAT-II), a Personal Problem Checklist for Adolescents, the Behavior Assessment Scale for Children—Second Edition (BASC-2), and the Beck Depression Inventory (Parent Ex. E at pp. 1-8). Administration of the WAIS-III, which assessed the student's cognitive abilities, yielded a verbal IQ score of 123 (superior range), a performance IQ score of 116 (high average range), and full-scale IQ score of 122 (superior range) (id. at pp. 3, 6). The evaluator identified no deficit areas, and he reported that the student exhibited the "cognitive potential to be an excellent student" (id. at p. 3). Assessment of the student's academic functioning and foundational skills using the WIAT-II yielded scores in the average to superior range for her age (id. at p. 4). Although the evaluator noted that her reading comprehension and listening comprehension skills were not as well developed as her other abilities (mathematics and expressive language), he concluded that the student's foundational academic skills indicated that she "learned in school over the years despite significant emotional challenges" (id. at pp. 4-5).

With respect to the student's social/emotional functioning, the school psychologist reported that at the time of his evaluation the student appeared "to be in a somewhat stable place emotionally" and her level of depression had "improved in the past year" (Parent Ex. E at p. 4). His report indicated that "despite feeling sad, she is performing well in school" (id.). The student

denied suicidal ideation and reported that she had formed positive relationships with peers and staff and maintained a healthy body weight (*id.*). She also reported dealing with her "body image issues" with a "more healthy diet and exercise habits" (*id.*). In addition, the student indicated that "for the past several months" she had eliminated self-cutting behaviors and had been substance free for "the past eight months" (*id.* at pp. 2, 4). The student did, however, express concerns about maintaining her ability to remain substance free "in colleges or other less structured environments" and maintaining her "emotional gains" if she went to a "more unstructured school environment" (*id.* at pp. 4-5). If she was not living in a residential setting, the student identified her "biggest concern" as "living at home" where she had experienced "a lot of conflict" with her parents, which often led to her self-destructive behaviors (*id.* at p. 5). The student reported that she was "not confident that she has made enough improvements in her issues with her family that she would be able to live at home with them" (*id.*). The school psychologist stated that due to the severity of the issues being addressed by the student, such as remaining substance free, "eliminating self destructive behavior, managing her mood and improving family relationships," the student needed a "small, therapeutic school program" (*id.* at p. 5).

The school psychologist described his classroom observation of the student as "unremarkable" and that the class consisted of five students and was conducted in lecture format (Parent Ex. E at p. 2). He also had the opportunity to observe a school community-wide "group meeting" from 2:15 p.m. to 4:00 p.m., where the "community as a whole" gathers to "address group and/or individual student concerns" (*id.*). At one point during the meeting, the student and her friend became the focus of the discussion when they were "confronted about the 'exclusivity' of their relationship" (*id.*). The school psychologist noted that the student responded "thoughtfully" and although the "very direct and confrontational" approach did not appear to "rattle [the student]," she later advised him that "the students 'get used to it' and sometimes 'we need it'" (*id.*).

As part of his evaluation, the school psychologist also gathered background information about the student (Parent Ex. E at pp. 1-2, 4-5). The student attended district schools for kindergarten through sixth grade (*id.* at p. 1). During that time, the student reportedly exhibited depression, strained relationships with her peers, and difficulty fitting in with her peers (*id.*). The student noted that in sixth grade, she had "more significant arguments with her family" (*id.*). The school psychologist reported that the student continued to achieve "good grades" despite having increasing difficulties with her family and with peers (*id.*). The student's parents transferred her to a private, out-of-state boarding school for the seventh and eighth grades due to "family and school issues" (*id.*). She returned to a district high school for ninth grade in the 2002-03 school year, where she continued to do "well academically" although she continued to have issues at home "which affected her mood" (*id.*; *see* Dist. Ex. 15).

While the student was at home during summer 2003, the arguments at home intensified and the student engaged in a physical confrontation with her mother (Parent Ex. E at p. 1). The student reported that this event led to her enrollment at another private, out-of-state boarding school for tenth and eleventh grades (*id.*). Although she continued to perform "well academically" during tenth grade in the 2003-04 school year, the student reported that she became "severely depressed, started abusing substances . . . and began to cut herself" (*id.*). She

also reported extreme weight loss (id.). In eleventh grade during the 2004-05 school year, the student reported reduced substance use, but increased self-cutting behaviors (id.). While the student was at home during summer 2005, she reported that her substance abuse and depression "intensified" and her parents considered hospitalization in a drug rehabilitation program (id. at p. 2). At that time, the student noted that she "became more hopeless about her life" and was hospitalized shortly thereafter for an episode of excessive alcohol consumption (id.). Following this hospitalization, her parents enrolled her in an out-of-state wilderness program (id.).

Finally, the school psychologist reported that the student's grades in March 2006 ranged from A to B in all academic subjects, and JDA's dean indicated that she regularly participated in class and completed her work (Parent Ex. E at p. 2). The student's primary clinician indicated that the student had made significant progress since her admission but opined that she still had "significant emotional issues" that needed to be addressed (id.).

By letter dated May 22, 2006, the district notified the parents about a CSE meeting scheduled for June 6, 2006, and by letter dated May 30, 2006, the district invited JDA's president to attend the June 6th CSE meeting (Dist. Exs. 5; 6).

On June 2, 2006, the district's social worker completed a social history with the student's parents (Dist. Ex. 9 at pp. 1-3). At that time, the parents reported that their daughter suffered from "serious emotional issues" and exhibited antisocial behaviors, an eating disorder, suicidal ideation, self-mutilation, depression, and an inability to relate appropriately to adults and peers (id. at p. 1).

On June 6, 2006, the district's CSE convened for the student's initial review and to prepare the student's individualized education program (IEP) for the 2006-07 school year (Parent Ex. B at p. 1). Participants at the meeting included the district's CSE Chairperson; a special education teacher; a general education teacher; a school counselor; the school psychologist who conducted the May 2006 psychological and educational evaluation; the president of JDA; and the parents, who were accompanied by an educational advocate (id. at p. 3). The CSE considered several reports, including the social history, the psychological evaluation report, the student's medical report of physical examination, and the letter from the clinical director of the wilderness program (id. at p. 4). In addition, the parents presented a May 15, 2006 letter from the student's private psychiatrist to the CSE for consideration at the June 2006 meeting (id.; see Parent Ex. D).

According to the private psychiatrist's letter, he provided "care intermittently" to the student between 2000 and 2005 (Parent Ex. D). He reported evidence of the student's behavioral difficulties as early as preschool and continued episodes of defiance, uncooperativeness, and "abusive/explosive/intermittently violent" behaviors at home (id.). The psychiatrist opined in the letter that the student suffered from a "complex psychiatric syndrome in the personality disorder range" and that the student's substance abuse was a "secondary and complicating factor" but did not constitute a "primary problem" (id.). In the past, the student was treated with different antidepressants, but "these trials were brief, marred by compliance problems, and over swept by other events" (id.). The psychiatrist further noted that despite the student's reported weight loss, "[a]norexia nervosa per se was not present" (id.). The psychiatrist reported diagnoses of

oppositional defiant disorder (ODD), major depression (noting remission at last contact), cocaine abuse, and borderline/hysteroidal/antisocial personality traits (id.).

Based upon the student's scores reported in the psychological and educational evaluation report, the CSE determined that the student did not present academic needs that required special education programs or services (Parent Ex. B at pp. 2-3).

Emotionally, the CSE noted that although the student was "bright and well-related," she exhibited many emotional problems including depression, anxiety, anger and family discord that interfered with school adjustment (Parent Ex. B at p. 3). The CSE described the student's history of negative coping skills, including self-cutting, an eating disorder, and substance abuse, that interfered with the student's ability to "manage her life" (id.). Based upon the information presented, the CSE concluded that the student's emotional fragility required a "therapeutic environment" to provide "psychological and emotional support" and further noted that while the student remained in a "fragile" emotional state, she had made a positive adjustment to JDA (id. at pp. 2-3). The CSE determined the student was eligible to receive special education services as a student with an emotional disturbance and recommended a program in a residential placement (id. at p. 4). The CSE recommended a functional behavioral assessment (FBA) of the student "upon any new school placement" (id. at p. 3). The CSE also discussed the student's social/emotional/behavioral annual goals "at length" and reached agreement on the annual goals (id. at pp. 4-5). The CSE also noted in the student's IEP that the CSE would reconvene upon determining an appropriate placement (id. at p. 4).

By letters dated June 7, 2006, the CSE Chairperson sent information packets to eight potential residential placements (Dist. Ex. 11 at pp. 1-8). The information packets contained all of the information considered by the CSE at the June 6, 2006 meeting (Tr. pp. 1835, 1838-39; Dist. Exs. 8 at pp. 1-26; 11; Parent Ex. D).

In separate correspondence all dated July 24, 2006, the parents informed the district's CSE Chairperson that they had unsuccessfully attempted to contact one potential placement, that five potential placements declined to accept their daughter, and that they rejected the two remaining potential placements because the placements would not meet the student's academic needs; would not provide appropriate social, academic, or emotional role models for their daughter; and would not provide a seven-day-per-week residential service (Parent Exs. G-N; AA). On August 18, 2006, the parents signed a "pre-enrollment/enrollment and financial agreement" to re-enroll their daughter at JDA for the 2006-07 school year (Parent Ex. T at pp. 1-2).

On November 8, 2006, the district's CSE Chairperson met with the parents and their educational advocate, at their request, to discuss the student's IEP and residential placements (Dist. Ex. 2 at p. 2). On November 27, 2006, the district's CSE subcommittee convened at the parents' request (id.). Participants at the meeting included the following individuals: the district's CSE Chairperson, special education teacher, school psychologist, director of special education and related services, and counselor; an additional parent member; the student's parents, who were accompanied by an educational advocate; JDA's dean; and the student's current primary clinician at JDA (Dist. Ex. 14). According to the district CSE Chairperson's notes from the meeting, the

student's parents and the JDA staff expressed continued concerns about the student's emotional progress, her continued sobriety, dealing with her body image and eating issues, the student's "sig[nificant] history" of substance abuse, and whether she would be approved to graduate at the conclusion of the 2006-07 school year (Dist. Ex. 24 at pp. 1-3). Although the CSE advised the parents of the need to complete the intake process at the remaining potential residential placement, the student's father indicated there "wasn't any school" they could "look at again" (id. at pp. 3-4).

On December 11, 2006, the district received the parents' due process complaint notice, dated November 28, 2006, requesting an impartial hearing (IHO Ex. 2 at pp. 1-2). The parents alleged that the district's CSE failed to timely develop an appropriate IEP, the CSE meetings were "substantively and procedurally flawed," the district failed to recommend an appropriate residential placement, and JDA was an appropriate placement for the student (id. at pp. 2-3). In addition, the parents indicated that they cooperated with the district's CSE and thus, they were entitled to reimbursement for the costs of their daughter's tuition at JDA from January 2006 through June 2007 (id. at p. 3).

By response dated December 21, 2006, the district replied to the parents' due process complaint notice and among other things, asserted that the parents' failure or refusal to complete the student intake interview at one of the potential residential placements "thwarted" the CSE's ability to determine an appropriate residential placement and to finalize the student's IEP (Dist. Ex. 2 at p. 2). The district also alleged that the parents failed or refused to provide the district with prior notice of the student's unilateral placement, or continued placement, at JDA for the 2006-07 school year as required by law (id.).

The testimony at the impartial hearing began on February 28, 2007 and concluded on October 30, 2007 (Tr. pp. 1, 2341). Both parties presented testimonial and documentary evidence (Tr. pp. 1-2462; Dist. Exs. 1-24; Parent Exs. A-Z; AA; BB-1; BB-2; CC-MM; XX-YY; BBB-EEE; IHO Exs. 1-45).

In testimony, JDA's dean described the placement as a 12-month therapeutic college-preparatory school for bright, high-potential students who had not "made it" in traditional settings due to their emotional and learning difficulties (Tr. pp. 69, 71, 74). All JDA students have been diagnosed with psychiatric, psychological and/or learning difficulties (Tr. p. 72). JDA's dean also testified that the students have significant behavioral problems, which could be attributed to emotional dysfunction (Tr. p. 125). He noted that although JDA is a voluntary program, it is policy to recommend that students stay for a two-year period to prepare them emotionally, psychologically, and academically for attendance at college (Tr. pp. 119-20). At a minimum, JDA's program requires 18 months to complete (id.).

JDA's dean also testified that their program served approximately 30 students, aged 15 to 21, and offered instruction for grades 10 through post-graduate (Tr. p. 72). JDA employed eight to nine full-time and part-time teachers, 70 percent of whom received doctorates in their field of study and had college teaching experience (Tr. p. 73). None of the teachers had post-secondary certification in special education instruction (Tr. p. 102). Class sizes at JDA ranged from 1 to 12 students with an average of 6 to 7 students per class (Tr. pp. 75-76). Students selected their

classes with teacher approval (Tr. p. 76). JDA provided a structured environment that included classes, work responsibilities, and structured study halls (Tr. pp. 74-75).

With respect to the student, JDA's dean described her as a "self-destructive loser" when she entered the program, with a history of depression, self-cutting behavior, substance abuse, and at least one episode of binge drinking (Tr. pp. 106, 134-37). Early in her enrollment, he testified that the student tried to "get through [JDA]" but at some point in both group and individual counseling, she began to address her self-destructive behaviors and family relationships/conflict (Tr. pp. 85, 128). The dean expressed that as a result, the student became very involved in the community, in helping others, and in helping herself (Tr. p. 85). Based on his observation of the student, he opined that she was less depressed (Tr. pp. 105-06). When asked about the therapeutic interventions used at JDA, the dean testified that "we do consequences, we do groups, we do counseling. They are expelled if they're not willing to cooperate with the program" (Tr. p. 75).

During his testimony, the JDA president acknowledged the confrontational nature of its program and JDA's practice of making students wear signs that contained statements such as "don't speak to me, I'm a pathological liar" (Tr. pp. 151-52). He noted that if students were not willing to wear a sign, the students must leave JDA (Tr. p. 170). He stated that confronting someone in this manner is a "caring act" and although this form of therapy was often referred to as "attack therapy," it was used to rid the student of "malignant attitudes and behavior" (Tr. pp. 153, 155-56, 159).

JDA's clinical consultant testified at the impartial hearing about JDA's use of other "therapeutic consequences" to address students' behaviors, such as "scrubbing" and "sitting the chair" (Tr. pp. 171-72, 2432-39). She described scrubbing as an isolation technique, which allowed the student to converse with adults and intentionally prevented the student's interactions with other students (Tr. pp. 2381-83, 2432-33, 2437-38). During scrubbing, the student remained in JDA's "atrium," which was described as a big, public, center room of the first floor of the school where "people walk by all the time" (Tr. p. 2433). According to JDA's president, the objective of scrubbing is for the student to see and hear other students interacting and to "hopefully feel very lonely," which, in turn, acts as an incentive for the student to return to the school community (Tr. pp. 157-58). A student's stay in scrubbing could range from a few hours up to a few weeks, and a student would be required to sleep on a mattress on the atrium floor during their stay in scrubbing (Tr. pp. 2433, 2438). While scrubbing, a student would follow prescribed rules and would engage in "therapeutic writing" and "journaling" (Tr. pp. 2434, 2437-38). JDA's clinical consultant testified that in scrubbing, a student ate meals alone in the atrium and was permitted to leave the atrium unaccompanied for two 20-minute periods per day to exercise (Tr. pp. 2434-35). Students in scrubbing did not receive constant supervision (Tr. pp. 2433, 2436-38). According to the clinical consultant's testimony, sitting the chair was virtually indistinguishable from scrubbing, except that sitting the chair occurred in the "music hall," which is a large room with a stage (Tr. pp. 2437-38).

The district's director of special education and related services testified regarding his observation of a community group session during a previous visit to JDA (Tr. pp. 2005-27, 2158-64). At the group session, JDA's president focused his attention on one particular student, read

his grades aloud, which included Ds and Fs, and then presented a question to the entire school community, which included the use of profanity (Tr. p. 2163). The district's director left the room at that point during the session because he found the experience "humiliating," and he felt "uncomfortable participating" and "witnessing" that situation (id.). He further testified that he believed his continued presence at the community group session would further aggravate what he believed to be an "exploitive" situation, and he did not want to imply to JDA's president or to any students that this was acceptable to him (id.). During that same visit to JDA, the director discussed JDA's philosophy of academic and therapeutic instruction, behavioral interventions such as scrubbing, and his observations of the community group session and a student wearing a sign, with JDA's president (Tr. pp. 2164-68). The director testified that while the scrubbing technique may result in a behavior change because it is "demoralizing" and "diminishing," it would not result in a therapeutic behavior change (Tr. p. 2168). He explained that a therapeutic behavior change was "some internal change that promoted the generalization of more adaptive behavior outside of that setting, ultimately back to the community or to college or to the work place" (Tr. p. 2169). In contrast, a behavior change that may occur in a therapeutic or correctional setting may not "carry over to another setting" and instead, "we learn what the rules are, we learn how to minimize harsh and severe consequences in that program" (id.).

The student's father testified that he selected JDA for his daughter because it was the "only one that had a serious track record for college" (Tr. pp. 175, 193). He further stated "as great and as profound" as his daughter's problems were emotionally and socially, he believed his daughter "could benefit" and "could recover and get right back on track, but that she needed to be placed in a very positive environment in terms of academics as well as emotional" (Tr. pp. 193-94). The student's father also testified that although the clinical director of the wilderness program wrote in his April 2006 letter that JDA was "the next ideal step" for the student, the clinical director had expressed "serious reservations" about the student attending JDA due to the "severity" of the program (Tr. pp. 197-98). The father admitted in testimony that the clinical director also expressed his reluctance in most cases to recommend JDA for students who attended the wilderness program because of the nature of JDA's program (Tr. p. 198). The clinical director had opined, however, that JDA's academic component and antim medication position were two factors that led him to conclude that "if someone deserves a shot at JDA [this student] is the one" (Tr. pp. 198-99).

During the impartial hearing, the parents submitted into evidence a psychological assessment report completed by a licensed clinical psychologist at the wilderness program, who evaluated the student on September 21, 2005, approximately two months prior to her enrollment at JDA (Parent Ex. GG at pp. 1-23).³ With respect to the student's intellectual and achievement functioning, administration of the WAIS-III to assess the student's cognitive abilities yielded a verbal IQ score of 137 (very superior range), a performance IQ score of 136 (very superior range), and full-scale IQ score of 141 (very superior range) (id. at p. 11). Administration of the

³ The evaluator interviewed the student and her family and evaluated the student using the following assessments: an adolescent history form; WAIS-III; WIAT-II; Conners' Parent Rating Scale—Revised: Long Version; Conners-Wells' Adolescent Self-Report: Long Version; Minnesota Multiphasic Personality Inventory—Adolescent (MMPI-A); Million Adolescent Clinical Inventory (MACI); Rorschach Inkblot Test; Beck Depression Inventory—II (BDI-II); Symptom Checklist; TeenAge Sentence Completion Test (TASC); and the Substance Abuse Subtle Screening Inventory (Adolescents) (SASSI-A) (Parent Ex. GG at pp. 1, 10-20).

WIAT-II to assess the student's academic functioning and foundational skills yielded scores in the high average to very superior range (id. at pp. 13-14).

With respect to the student's psychological and emotional functioning, the evaluator summarized the results of several assessments and noted that the student's "pattern of behaviors" warranted a diagnosis of ODD (Parent Ex. GG at pp. 14-23). He further noted that the student's patterns of behaviors included "her history of defiant behaviors at home and verbal and physical aggression" (id. at p. 20). The clinical psychologist indicated that the student did not have a "history of serious behavioral problems at school" and that presently, she had not been "overtly defiant" at the wilderness program (id.). In addition, the evaluator opined that the student's history and patterns of substance abuse reflected "her underlying emotional problems" and "an addiction" (id. at p. 21). He further noted that a "long history of very significant problems within the family . . . have had a tremendous impact" on the student (id.).

In his report, the clinical psychologist noted that although the assessments provided no evidence that the student suffered from "more serious psychiatric illnesses," the student's history of "temper tantrums, somatic complaints, anxiety, panic, irritable moods, anger outbursts, wide swings in mood, sensitivity to stimuli, periods of depressed mood, and periods of grandiosity" were similar to those symptoms of "adolescents who have been diagnosed with pediatric-onset Bipolar Disorder" (Parent Ex. GG at p. 21). However, the evaluator concluded that "this diagnosis [was] difficult to ascertain" at the present time due to the student's long history of family conflict and substance abuse (id.). He concluded that "[t]hose involved in [the student's] long-term treatment should be aware of this and help clarify this diagnosis as these issues become clearer" and that as the student remains sober, the "impact" of her substance abuse "will become more obvious" (id.). Finally, the evaluator "strongly recommended" that upon the student's discharge from the wilderness program, she should continue in a "therapeutic environment" that is "highly structured" and "therapeutically nurturing" (id. at p. 22). He indicated that the student required a "clinically savvy and sophisticated treatment team that can provide individual and group interventions as well as substance abuse-specific treatment" (id.).

The impartial hearing officer rendered her 97-page decision on February 13, 2008 (IHO Decision at p. 97). The impartial hearing officer determined that the district failed to offer the student a free appropriate public education (FAPE)⁴ for the 2006-07 school year, but that the parents failed to sustain their burden to establish that JDA was an appropriate placement for their daughter and thus, denied their request for tuition reimbursement (id. at pp. 78-97).

In particular, the impartial hearing officer found that the student did not fit the self-described profile of JDA students, that is, "academic underachievers or even failures" who had

⁴ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]).

"underperformed academically for months or years" and who may have been "incarcerated or convicted of crimes" prior to their enrollment at JDA (IHO Decision at p. 94). The impartial hearing officer was disturbed by the lack of supervision of students at JDA, especially given that "every" JDA student "has been diagnosed with a psychiatric or psychological problem," that JDA's president characterized the students as 'psychiatric casualties' and many of JDA's students were "acknowledged to be self-destructive and/or suicidal" (*id.*). The impartial hearing officer further noted in her decision that parents are contractually "required to acknowledge and accept JDA's policy" that although students attend JDA for "24 hours per day, 7 days per week," they do so "without 24 hour per day, 7 day per week supervision" (*id.*).

The impartial hearing officer found it inappropriate to allow the student's "older peers" to act as therapists during the "'self-help peer counseling' sessions" where students are confronted by other peers in an unsupervised setting (IHO Decision at pp. 94-95). The impartial hearing officer agreed with the district's position that given the student's "significant emotional needs" and "fragile emotional state," the lack of supervision and peer counseling posed a risk to the student's "safety and well-being" (*id.*).

Addressing JDA's behavioral interventions of scrubbing and sitting the chair, the impartial hearing officer found that given the student's history of self-injurious behaviors, these unsupervised methods of intervention were inappropriate (IHO Decision at p. 95). The impartial hearing officer also noted that the student's assignment to JDA's president, who was the student's primary clinician from approximately November 2005 through May 2006, was inappropriate (*id.*; *see* IHO Exs. 33 at p. 3; 34 at pp. 1-2; 35 at pp. 1-4).

The impartial hearing officer also concluded that the evidence that the student's "medical conditions" diagnosed by her private psychiatrist were "exacerbated when she lived at home with her family" and that "she was less symptomatic at school for many years" overshadowed the parents' and JDA staff's belief that JDA's "methodologies" were the reason for the student's success at JDA (IHO Decision at p. 95). The impartial hearing officer noted that based upon the evidence, the student was "equally likely to succeed in any one of a number of therapeutic, residential, special education environments, as long as she did not return home" (*id.* at pp. 95-96).

In summary, the impartial hearing officer determined that based upon the evidence and her findings, JDA was neither "highly structured nor therapeutically nurturing," both of which the clinical psychologist who evaluated the student at the wilderness program believed were "necessary" for the student upon her discharge from that program (IHO Decision at p. 96). She noted that although the evidence demonstrated that the student successfully completed coursework at JDA, that should not be used as "an indicator of the school's appropriateness, given that the [s]tudent consistently received excellent grades prior to her attendance at JDA as a result of her superior cognitive ability" (*id.*). The impartial hearing officer noted that after one full year of attendance at JDA, the JDA staff expressed continued concerns about the student's sobriety and eating disorder at the November 2006 CSE meeting, and questioned the student's preparedness to be "independent, self-directed or drug-free" (*id.*). She also noted that according to the student's own self reporting to the district's school psychologist, the student had continued to cut herself upon her admission to JDA (*id.*). Thus, the impartial hearing officer determined

that the parents did not sustain their burden to establish the appropriateness of their unilateral placement of the student at JDA (id.).

On appeal, the parents assert that the impartial hearing officer erred in her determination that JDA was not an appropriate placement for their daughter. The parents argue that placement at JDA was reasonably calculated to confer educational benefits upon the student, that the student required a placement with peers who have high academic potential, and that the student required challenging academics. In addition, the parents challenge the impartial hearing officer's finding regarding whether their daughter fit the student profile at JDA, and argue that the impartial hearing officer failed to account for the peer-based therapy, peer-based supervision, and adult supervision during the day and night. The parents assert that the impartial hearing officer distorted information about JDA and that her decision was incorrect, arbitrary, and must be reversed.

The district seeks to uphold the impartial hearing officer's decision in its entirety and requests dismissal of the petition and the parents' request for tuition reimbursement.

A central purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) is to ensure that students with disabilities have available to them a FAPE (20 U.S.C. § 1400[d][1][A]; see Schaffer v. Weast, 546 U.S. 49, 51 [2005]; Bd. of Educ. v. Rowley, 458 U.S. 176, 179-81, 200-01 [1982]; Frank G. v. Bd. of Educ., 459 F.3d 356, 371 [2d Cir. 2006]). A FAPE includes special education and related services designed to meet the student's unique needs, provided in conformity with a written IEP (20 U.S.C. § 1401[9][D]; 34 C.F.R. § 300.17[d]; see 20 U.S.C. § 1414[d]; 34 C.F.R. § 300.320).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007]).

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 (Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). 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 (Burlington, 471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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 C.F.R. § 300.148).

The burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer, 546 U.S. at 59-62 [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).⁵

Initially, I note that neither party appeals from the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2006-07 school year (IHO Decision at pp. 10-11). An impartial hearing officer's decision is final and binding upon the parties unless appealed to a State Review Officer (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]). Consequently, the impartial hearing officer's determination that the district failed to offer the student a FAPE for the 2006-07 school year is final and binding upon the parties (Application of the Bd. of Educ., Appeal No. 07-135; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073).

I now turn to the second criterion for an award of reimbursement, namely, whether the parents met their burden to establish that JDA was an appropriate placement (Burlington, 471 U.S. 359; Frank G., 459 F.3d at 363). A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370); that is, the private school offered an educational program that met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 363-64; Cerra, 427 F.3d at 192; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek, 471 F. Supp. 2d at 419). Parents are not held as strictly to the standard of placement in the least restrictive environment (LRE) as school districts are; however, the restrictiveness of the parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21 [1st Cir. 2002]; M.S. v. Bd. of Educ., 231 F.3d at 105). A parent's failure to select a program approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). The test for a parental placement is that it is

⁵ New York State amended its Education Law to place the burden of proof upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement would continue to have the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007. In this case, the amended law does not apply because the impartial hearing was commenced prior to the effective date of the amendment.

appropriate, not that it is perfect (Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80, 84 [3d Cir. 1999]; see also M.S. v. Bd. of Educ., 231 F.3d 96, 105 [2d Cir. 2000]).

After carefully reviewing the entire hearing record, I find that the impartial hearing officer, in a thorough and well-reasoned 97-page decision, correctly determined that JDA was not appropriate to meet the student's special education needs (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 363; Walczak, 142 F.3d at 129; Cerra, 427 F.3d at 192; Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121-22 [2d Cir. 1997]; Application of the Bd. of Educ., Appeal No. 05-081). No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364-65, citing Rowley, 458 U.S. at 207). While evidence of progress at a private school is relevant, it does not itself establish that a private placement is appropriate to meet a student's unique special education needs (Gagliardo, 489 F.3d at 112). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). They need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction" (Frank G., 459 F.3d at 364-65, citing Rowley, 458 U.S. at 188-89).

The decision shows that the impartial hearing officer carefully considered all of the testimonial and documentary evidence submitted by both parties and that she analyzed the evidence with the proper legal authority to determine whether the parents sustained their burden to establish the appropriateness of the unilateral placement at JDA (IHO Decision at pp. 1-97). In short, based upon my review of the entire hearing record, I find that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no need to modify the determination of the impartial hearing officer (34 C.F.R. § 300.510[b][2]; Educ. Law § 4404[2]). Therefore, I adopt the findings of fact and conclusions of law of the impartial hearing officer (see Application of a Child with a Disability, Appeal No. 06-136; Application of the Bd. of Educ., Appeal No. 03-085; Application of a Child with a Disability, Appeal No. 02-096).

In addition to the findings and rationale expressed by the impartial hearing officer to support her conclusion that JDA was not an appropriate placement, I note the following further supports for her determination that JDA was not an appropriate placement for the student. As noted above, the student's private psychiatrist diagnosed the student with ODD, major depression, substance abuse, and borderline/hysteroidal/antisocial personality traits, and further noted that she suffers from a "complex psychiatric syndrome in the personality disorder range" (Parent Ex. D). The licensed clinical psychologist who evaluated the student at the wilderness program diagnosed the student with ODD, polysubstance dependence, and parent-child relational problems, while including post-traumatic stress disorder and bipolar disorder as two potential diagnoses to rule out (Parent Ex. GG at p. 23). The hearing record reflects that the student's enrollment in the wilderness program in September 2005 was precipitated by a suicidal gesture requiring hospitalization and several years of self-destructive behaviors and negative coping skills, such as substance abuse, self-cutting, and an eating disorder (id. at pp. 2-9, 20-23; Parent Ex. C). In addition, the student's private psychiatrist noted previous failed attempts to treat the student with medications (Parent Ex. D). The clinical director of the wilderness program, who

treated the student as her primary therapist, indicated that upon her discharge from its program the student required "assistance and support in addressing her behavioral issues, minimization and denial, school issues, body image problems, oppositional/defiant issues, rage attacks, substance abuse and expression of emotion" (Parent Ex. C at p. 2). In his evaluation report, the licensed clinical psychologist at the wilderness program strongly recommended a therapeutic environment that was "highly structured" and "therapeutically nurturing" with a "clinically savvy and sophisticated treatment team that can provide individual and group interventions as well as substance abuse-specific treatment" (Parent Ex. GG at p. 22). An appropriate placement which meets this student's special education needs must take into account these serious medical issues and prior treatments.

While the hearing record contains sufficient evidence of the student's significant social-emotional needs, the hearing record does not contain sufficient objective evidence to support a determination that JDA's methodologies and/or therapeutic setting were appropriate to meet the student's identified special education needs in the area of her social-emotional functioning. According to information provided on JDA's website, JDA employs group, individual and "caring community" group therapy sessions (Parent Ex. YY at p. 5). In general, students are either assigned to, or select, a primary clinical therapist, who coordinates and oversees the students' care, has relationships with parents, and facilitates group therapy sessions (Tr. pp. 2425-26). The primary therapist meets with students individually on a schedule determined by the student, or one to three times per week (Tr. pp. 74, 2425-26, 2453; Parent Ex. YY at p. 5). Three times per week students attend the one hour and 45-minute community group session with the entire student population (Tr. pp. 72, 75, 2162; Parent Ex. YY at p. 5). Once per week for 1 to 1 1/2 hours, female JDA students attend a group led by a female facilitator (Tr. pp. 2385-86). JDA's dean testified that students engage in "a lot" of self-help peer counseling and attend nightly 60-minute self-help peer groups without the presence of clinical staff (Tr. p. 75). JDA's president stated that JDA operates on the principle of positive peer pressure, which in his opinion, is the only way to help this population of students (Tr. p. 129; Parent Ex. B at p. 3).

Considering the above information, I note that while the hearing record provides general information about the form and type of therapy available to all students at JDA, the hearing record fails to specifically indicate the amount and type of counseling provided to the student, or what progress, if any, the student made as a result of the therapy she received. Notwithstanding these insufficiencies, however, I find that given the JDA staff's own descriptions of their students as "very angry," "depressed," "self-destructive," and "psychiatric casualties," the degree to which JDA's program focused on peer-based and large group interventions, and the lack of adult supervision, JDA was not appropriate to meet the student's significant social-emotional needs (Tr. pp. 69, 73, 123-125).

The parents' assert their daughter's progress at JDA as evidence that JDA was an appropriate placement for her. However, the hearing record does not provide information about how JDA contributed to the reported progress. The clinical consultant described the student as "less angry" and "more functional" in May 2006 than when she entered JDA in November 2005 (Tr. pp. 2444-45). She did not specifically recall how the student managed problems with depression, lack of energy, crying episodes, lack of satisfaction with her life, and her "eating disorder," which she reportedly continued to experience in May 2006 (*id.*; Parent Ex. E at p. 4).

The clinical consultant indicated that the student did not engage in self-cutting behavior but the hearing record indicates she continued to cut herself after her admission to JDA, ceasing only "a few months" prior to the district's May 2006 psychological evaluation (Tr. pp. 2445-46; Parent Ex. E at p. 4). JDA staff testified that the student was "substance-free" the entire time she was enrolled at JDA, but again, the hearing record suggests that the student's substance abuse ceased during her stay in the wilderness program (Tr. pp. 87, 133, 2445-46; Parent Ex. E at p. 4). In addition, the student's mother testified that her daughter had "great difficulties" committing to the therapy at JDA in summer 2006, and further, that July, August, and September 2006 were "low points" for the student (Tr. pp. 705, 834-36, 1090).

In this case, the parents failed to present sufficient objective evidence to establish that JDA's methodologies and/or therapy met the student's special education needs in the area of her social-emotional functioning as identified by the student's private psychiatrist, the clinical director of the wilderness program, and the clinical psychologist at the wilderness program. In addition, the parents failed to present sufficient objective evidence regarding the student's therapy sessions at JDA, how the JDA therapy sessions addressed the student's significant social-emotional needs, or how JDA conferred an educational benefit to the student in the area of her social-emotional functioning.

To the contrary, the hearing record reflects that the parents selected JDA primarily due to its reputation as a rigorous college-preparatory school (Tr. pp. 198-99, 1079-81). Notably, however, the hearing record also reflects that the student required special education services in a residential placement to address and to meet her social-emotional needs, not academic needs (Parent Exs. B at pp. 2-3; D; E; GG). Thus, based upon the findings and rationale set forth by the impartial hearing officer in her determination and the additional information noted above, I concur with the impartial hearing officer's determination that the parents did not sustain their burden to establish that JDA was an appropriate placement for their daughter.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
April 25, 2008**

**PAUL F. KELLY
STATE REVIEW OFFICER**