



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 17-092

### **Application of the BOARD OF EDUCATION OF THE WEBSTER CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

#### **Appearances:**

Ferrara Fiorenza, PC, attorneys for petitioner, by Susan T. Johns, Esq.

Spencer Walsh Law, PLLC, attorneys for respondents, by Tracey Spencer Walsh, Esq. and Vida M. Alvy, Esq.

### **DECISION**

#### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Telos Residential Treatment Center (Telos) for the 2016-17 school year. The parents cross-appeal from the IHO's decision to allow certain documents into evidence. The appeal must be sustained in part. The cross-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 hearing record shows that the student performed well academically in elementary school, achieving scores in the 90th percentile on standardized tests, and also had "lots of friends" although was "shy" in new situations (Parent Ex. H at p. 2). In third grade, the student exhibited "occasional meltdowns," which were attributed to panic attacks, and the student was administered anti-anxiety medication and received "therapy" provided by a social worker (id. at pp. 2, 5). During middle school, the student continued to perform well academically and socially, although an "escalating pattern" of tardiness and absences was noted (id.; compare Dist. Ex. 4, with Dist.

Ex 6).<sup>1</sup> The parent discussed the student's absences and tardiness with the district's social worker in September 2015, including the student's sleep difficulties (Dist. Ex. 7). During the first quarter of the 2015-16 school year (eighth grade), the student's report card documented 2.5 days absent and 12 days tardy (Dist. Ex. 12).

On October 5, 2015, the student was hospitalized due to suicidal ideation (Parent Ex. EEE at p. 1; see Dist. Ex. 9 at p. 1). On Tuesday, October 6, 2015, the parents notified the district via email, that the student had been admitted to a hospital because the student had been "struggling with some health issues recently," and the student was discharged on October 9, 2015 (Parent Ex. EEE at p. 1; Dist. Ex. 8 at p. 1). On October 17, 2015, the student was readmitted to the hospital for suicidal ideation (Parent Ex. EEE at p. 1). On October 18, 2015, the parents notified the district of the student's readmission (Dist. Ex. 11). The student remained in the hospital until mid to late November 2015, when he was transferred to a children's psychiatric center (CPC) (Parent Ex. EEE at p. 13; Dist. Ex. 20 at p. 1).

In anticipation of a late January or early February 2016 discharge, the CPC CSE convened on January 7, 2016, to determine the student's initial eligibility for special education services (Dist. Ex. 25 at p. 1).<sup>2</sup> The CPC is a psychiatric facility administered through the New York State Office of Mental Health and has its own CSE (see Dist. Ex. 27). The January 2016 CPC CSE determined that the student was eligible for special education as a student with an emotional disturbance, and the resultant IEP recommended a 6:1+1 special class placement in a "hospital or other non-school" (Dist. Ex. 25 at pp. 1, 5, 7).<sup>3</sup> In addition, the CPC CSE recommended three 45-minute individual psychological counseling sessions per week (id. at p. 5). The recommendation regarding 12-month services was captioned as "deferred pending review" (id.).

The student was not discharged as planned, having suffered a setback in late January 2016 while at home on "pass" from CPC (see Parent Ex. EEE at pp. 23-25).<sup>4</sup> On March 7, 2016, while "on leave" from CPC, the student started attending a Board of Cooperative Educational Services (BOCES) class (Parent Ex. EEE at pp. 23-25; Dist. Ex. 38 at p. 1). On March 8, 2016, the district developed a new IEP that recommended a 6:1+1 BOCES special class placement and both individual and small group counseling (Dist. Ex. 32 at p. 5).

On March 16, 2016, the student was discharged from CPC, and CPC recommended a residential treatment facility (RTF) placement "due to the length of time in treatment and apparent lack of progress as evidenced by his significant aggression on passes" (Parent Ex. EEE at pp. 22-25, 27). Residential treatment was also recommended "in order to provide additional treatment and more gradual re-exposure to home and community" (id. at p. 28). The parents elected to

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<sup>1</sup> For example, during his sixth-grade year, the student was absent eight days, and late seven times, but during seventh grade, the student was absent 16.5 days and tardy 46 times (Dist. Exs. 4; 6).

<sup>2</sup> The school district's social worker participated in this meeting by telephone (Dist. Ex. 26 at p. 2).

<sup>3</sup> The student's eligibility for special education as a student with an emotional disturbance is not in dispute in this proceeding (see 34 CFR 300.8[c][4][i]; 8 NYCRR 200.1[zz][4]).

<sup>4</sup> The student became enraged, began throwing chairs, breaking things, and stated he felt like hurting himself (Parent Ex. EEE at pp. 22-25).

continue the student at the BOCES placement and provide outpatient therapy and medication management (id. at pp. 26-27).

The student's attendance was poor while at BOCES (Parent Ex. M at p. 1; see Tr. p. 77; Dist. Ex. 46). On April 19, 2016, the CSE subcommittee convened a meeting to conduct a requested review (Dist. Ex. 37 at pp. 1, 3). The April 2016 IEP reflected that the student's inconsistent attendance affected his academic performance and social interactions with peers, and the CSE continued its recommendation for a 6:1+1 BOCES special class with counseling services (id. at pp. 3-5, 7).

On June 14, 2016, the CSE convened an annual review to develop the student's IEP for the 2016-17 school year (Dist. Ex. 50). Information considered by the CSE reflected the student's recent emotional decline and his refusal to attend school since May 20, 2016 (Dist. Exs. 46; 50 at p. 2). According to the June 2016 meeting information summary, and notes compiled by the CSE director, the CSE determined that the student required a "more intensive level of support" through a "therapeutic day program," and recommended a 6:1+1 special class in an approved private school with individual and small group counseling (Dist. Exs. 46 at pp. 1, 5; 50 at pp. 1, 7, 10).<sup>5</sup> The summary also indicated that the parents consented to the CSE referring the student to two programs (Dist. Ex. 50 at p. 1).

According to notes prepared by the CSE director, on June 9, 2016, the parent notified the district that the student would be leaving June 17, 2016, to attend a "Wilderness Therapy Program," and that the average stay there was nine weeks (Dist. Ex. 68 at p. 5). The entry also noted the CSE director informed the BOCES program principal that the family was "functionally declining" 12-month programming due to the student being out of town (id.). The student entered an out-of-State wilderness program on June 17, 2016, upon referral by the parents' private educational consultant (Parent Ex. U at pp. 1, 5).<sup>6</sup>

On August 22, 2016, the parents notified the district that they had received verbal results of a private neuropsychological evaluation and would forward the written report to the CSE as soon as they received it (Dist. Ex. 55). The parents relayed to the district that both the evaluating psychologist and the student's therapist at the wilderness program recommended that the student transition directly from the wilderness program to a "therapeutic residential placement" (id.). The parents requested that the CSE reconvene to discuss the results of the private neuropsychological evaluation, and to also consider and locate an appropriate residential placement for the student (id.).

By letter dated September 2, 2016, the parents notified the district that, barring a timely and appropriate residential placement recommendation from the district, they intended to unilaterally place the student at Telos, and would seek reimbursement for all associated costs (Parent Ex. C). In the letter, the parents pointed to several factors that affected their decision,

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<sup>5</sup> The CSE director functioned as the CSE chairperson during the student's CSE meetings, and her titles are used interchangeably throughout the hearing record (see e.g. Dist. Exs. 37 at p. 1; 50 at p. 1; 68 at p. 1). For consistency, she will be referred to as the CSE director in this decision.

<sup>6</sup> The parents are not seeking any reimbursement for the costs associated with the student's time at the wilderness program (Tr. p. 11).

including a statement by the CSE director that the district could not recommend a residential placement because the student first had to "try out" a day treatment placement, and the fact that the district had yet to hold the requested CSE meeting (id.).

On September 14, 2016, the parents and CSE director toured The Avalon School (Avalon) as a possible day treatment placement for the student (see Dist. Ex. 67). On September 16, 2016, the CSE reconvened for a program review (Parent Ex. D at p. 1). The CSE recommended a 6:1+1 special class placement in a "therapeutic day program" and identified Avalon as the site to implement the IEP, pending the student's "successful completion of the school's intake process, for which [the student] must be present to participate" (id. at pp. 1, 8). The IEP meeting information summary also indicated that following acceptance, the Avalon treatment team would determine the student's specific treatment plan, and identify any additional services to meet his mental health needs; at which time the CSE would reconvene to discuss the recommendations and revise the IEP if necessary (id. at p. 1).

The student was discharged from the wilderness program on September 20, 2016, and on September 21, 2016, the student was admitted to Telos (Parent Exs. U at p. 1; BB at p. 1). In a letter dated October 14, 2016, the parents notified the district that they were rejecting the district's recommended placement at Avalon (Dist. Ex. 67 at p. 2).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated December 1, 2016, the parents alleged multiple violations of the IDEA by the district that prevented the student from receiving a free appropriate public education (FAPE) for the 2016-17 school year (see Parent Ex. A; Dist. Ex. 1; IHO Ex I).<sup>7</sup> The due process complaint notice contains roughly 18 pages of both generalized and specific claims and statements of facts, contained in roughly 107 enumerated paragraphs (see Parent Ex. A at pp. 7-17).

With respect to the identification and evaluation process, the parents asserted that the CSE misstated the student's progress in report cards, and failed to identify the student as a student with a disability over the course of several school years (Parent Ex. A at p. 16). The parents also asserted that the CSE failed to both timely conduct evaluations of the student and conduct certain evaluations, including an observation of the student (id. at pp. 8- 12). With respect to the evaluations that the CSE conducted, the parents asserted that they were inappropriate as the CSE failed to evaluate the student in all areas of disability, including emotional disturbance (id. at p. 14). The parents also asserted that the evaluations conducted by the district were inappropriate as they lacked baselines from which to determine the student's levels of disability (id. at pp. 10-11).

With respect to the conduct of the September 2016 CSE, the parents alleged that it was not properly composed, did not consider the full spectrum of services, and engaged in predetermination with respect to the student's program and placement (Parent Ex. A at pp. 8-12).

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<sup>7</sup> The IHO acknowledged counsel's comment during the marking and introduction of documents into the record that the hearing record contained multiple instances of duplicative exhibits (see Tr. pp. 6-7). The parties are encouraged to confer beforehand and submit joint exhibits to the extent practicable (8 NYCRR 200.5[j][3][xii][b]). The IHO is also reminded of his obligation to exclude from the hearing record any evidence he "determines to be irrelevant, immaterial, unreliable or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

The parents also alleged that the CSE prevented them from meaningfully participating in the creation of the student's educational program (*id.* at pp. 11, 13, 15). The parents also asserted that the CSE did not provide them with requested evaluation results in a timely manner, failed to provide them with minutes of the CSE meeting, and generally, failed to respond to their communications (*id.* at pp. 11, 14). The parents asserted that the CSE failed to consider the input and evaluations provided by the student's providers, as well as input from the parents (*id.* at pp. 8-12, 14).

With respect to the September 2016 IEP, the parents asserted that the IEP did not accurately reflect the student's then present levels of performance and management needs (Parent Ex. A at pp. 9-11, 14). Specifically, the parents asserted that the September 2016 IEP failed to reflect the student's psychiatric hospitalization and in-hospital school programming, as well as the lack of proper documentation of the student's progress (*id.* at pp. 9-11). The parents also asserted that the district did not conduct a functional behavioral assessment (FBA) or develop a behavior intervention plan (BIP) (*id.* at p. 14).

With respect to the annual goals contained in the September 2016 IEP, the parents asserted that the goals were generic, vague, inadequate, insufficiently challenging, not individualized, and lacked objective methods of measurement (Parent Ex. A at p. 13). The parents also asserted that the goals did not address the student's deficits (*id.* at pp. 12-13). For example, the parents asserted that the goals did not address the student's school avoidance, behaviors, or academics (*id.* at pp. 13-14). The parents also asserted that the IEP contained an insufficient number of mental health goals, and further, the IEP contained no short-term objectives (*id.*). Finally, the parents asserted that the September 2016 IEP lacked post-secondary transition goals (*id.* at p. 13).

The parents also asserted that the related services and accommodations recommended in the September 2016 IEP were insufficient and did not address the student's deficits (*see* Parent Ex. A at pp. 7-12). Among other things, the parents asserted that the September 2016 IEP: (a) provided the student with an insufficient amount and individualization of counseling, (b) provided for an insufficient amount of individualized supervision; (c) did not provide for exposure therapy, or any other methodology; (d) did not address the student's school refusal; and (e) failed to include an appropriate transition plan (*id.*).

With respect to the September 2016 CSE's recommendation for a 10-month, 6:1+1 special class day program, the parents asserted that the placement was inappropriate and not based on a fully developed IEP (Parent Ex. A at pp. 7, 8, 10, 16). Specifically, the parents asserted that (a) the student required extended school year (ESY) services in a 12-month residential program; (b) the placement offered was inappropriate given the student's lack of progress in prior programs; (c) a day program would not address the student's school refusal; (d) the placement was not the student's least restrictive environment; and (e) the placement would not provide the student with evidence-based treatment for his generalized anxiety disorder or his social anxiety (*id.*).

With respect to the school recommended by the September 2016 CSE, the parents asserted that the school and classroom were inappropriate, as: (a) it could not address the student's emotional needs; (b) the classroom contained inappropriate age, academic functioning, and social peer groupings; (c) it lacked the sufficient personnel required to implement the student's IEP; (d)

those staff members that were available lacked the proper training to implement the student's IEP; and (e) the school had a history of not fulfilling IEP mandates (Parent Ex. A at pp. 8, 9, 15).

As relief, the parents sought reimbursement from the district for: (a) tuition at Telos for the 2016-17 school year; (b) all related services required at Telos; (c) the student's transportation costs to and from Telos; and (d) the parents' transportation costs to and from Telos, including rental car and hotel expenses (Parent Ex. A at p. 18). The parents also requested compensatory education for "any and all educational services [student] is entitled to that the district failed to provide, including his pendency entitlements" (id.).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on April 5, 2017 and concluded on April 28, 2017 after four days of hearing (Tr. pp. 1-770). In a decision dated September 14, 2017, the IHO found that the district failed to offer the student a FAPE for the 2016-17 school year, that Telos was an appropriate unilateral placement for the student, and that equitable factors favored the parents (IHO Decision at pp. 6, 11, 12). The IHO ordered the district to reimburse the parents for tuition and services payments made to Telos for the period September 21, 2016 to June 30, 2017, as well as for travel expenses to and from Telos, including rental car costs (id. at p. 13).

With respect to his finding that the district failed to offer the student a FAPE, the IHO determined that the CSE "acted against the direct opinion of specialists who worked with the student," and that the student required a residential treatment center that took into account the severity of the student's mental health struggles (IHO Decision at p. 6). The IHO also determined that "consideration of the student's mental health needs must drive the quest" [in determining an appropriate program and placement], and that the student's need for around-the-clock supervision and interventions could only be attained in a residential program (id. at p. 8). The IHO declined to address the remaining issues raised in the parents' due process complaint notice (id. at p. 6).

With respect to the appropriateness of the parents' unilateral placement, the IHO reviewed the results and recommendations contained in an August 2016 neuropsychological evaluation report and a September 2016 report from the lead therapist at the wilderness program (IHO Decision at pp. 8-9). The IHO credited the findings and recommendations contained in those reports, and determined that the student required residential placement (id. at p. 9). The IHO noted the ways in which Telos addressed the student's deficits, including having "eyes on him" at all times, thus alleviating the monitoring gap that exists in day treatment programs, wherein teachers and staff only see the student for a brief period of time and may not sense when the student becomes overwhelmed (id. at p. 10). The IHO also considered the fact that Telos is an accredited school in the State of Utah, and it follows the common core curriculum (id. at pp. 9-10).

With respect to the issue of equities, the IHO noted the district's assertion that the parents signed the enrollment contract prior to the September 2016 CSE meeting and before they could tour an approved school; however, the IHO ultimately found that equitable factors favored the parents, as they testified credibly, they acted reasonably and in good faith with the CSE, and they did not impede the CSE process (IHO Decision at p. 12).

#### **IV. Appeal for State-Level Review**

The district appeals the IHO's findings that it failed to offer the student a FAPE for the 2016-17 school year, that Telos is an appropriate unilateral placement, and that equitable factors weighed in favor of reimbursement. The district asserts that the student's needs, including his needs related to attendance, could have been met within the recommended day program and that the IHO erred in finding the student's mental health needs necessitated a residential placement. With respect to the parents' placement of the student at Telos, the district contends that the IHO erred in finding that Telos offered round-the-clock supervision and had staff skilled in addressing the student's anxiety and behavioral concerns. The district also asserts that the IHO erred in his calculation of the number of school days the district should be required to pay for and in awarding travel expenses beyond what is required for residential placements.

In an answer and cross-appeal, the parents assert general admissions and denials, and assert that the IHO properly found that the district failed to offer the student a FAPE for the 2016-17 school year, that Telos is an appropriate unilateral placement, and that equitable factors weighed in favor of reimbursement. In their cross-appeal, the parents assert that the IHO improperly allowed the district to introduce into evidence, over their objections, documents that the district did not disclose within the required five-day rule. The parents also assert that, alternatively, the IHO should have excluded the documents as they were irrelevant, immaterial, unreliable, or unduly repetitious.

#### **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]).<sup>8</sup>

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. Initial Matters—Evidentiary Issues**

The parents cross-appeal the IHO's ruling allowing two documents into evidence, over their objections, that the district did not disclose to the parents five business days before the hearing. The parents also allege that the documents were irrelevant and repetitious. The documents the parents objected to were: (a) District Exhibit 71, which consists of various documents relating to insurance payments made to Telos by the parents' private insurance company; and (b) District Exhibit 72, which consists of various documents relating to, and including, intake documents and the enrollment contract between the parents and Telos (Tr. pp. 739-45, 753-57; see Dist. Exs. 71; 72).<sup>9</sup>

Pursuant to State and federal regulation "Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][3]). In the case of evaluative information, "Not less than five business days prior to a hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. An impartial hearing

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<sup>8</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

<sup>9</sup> To the extent that the parents are challenging the introduction of District Exhibit 72 strictly due to the contents of the contract, their challenge is without merit, as a review of the hearing record shows that they introduced the same contract (see Parent Ex. 8; compare with Dist. Ex. 72 at pp. 29-36).

officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party" (8 NYCRR 200.5[j][3][xii][a]; see 34 CFR 300.512[b]).

The district asserts that it was not required to introduce the documents because only evaluations and recommendations are subject to the disclosure rule. This contention is without merit. The district relies only on the regulation requiring the disclosure of completed evaluations and ignores the general rule that parties may prohibit evidence "the substance of which has not been disclosed to such party at least five business days before the hearing" (compare 8 NYCRR 200.5[j][3][xii], with 8 NYCRR 200.5[j][3][xii][a]).

However, the parents' argument does not support overturning the IHO's decision to include the documents as evidence. On the last day of the impartial hearing, the district attempted to introduce the two documents during cross-examination of the parent, who was also the last witness to testify during the impartial hearing (see Tr. pp. 739-45, 753-57). The parents objected on the basis that the district did not disclose, five business days prior to the parent's testimony, the fact that it intended to introduce the documents during the impartial hearing (id.). The parents' assertion fails to take into account that in order to preclude the introduction of evidence that violates the five-day rule, "the *substance* of [the evidence]" must not have been disclosed to them prior to the five business days before the hearing [emphasis added] (8 NYCRR 200.5[j][3][xii]). In this case, the parents disclosed both documents to the district as part of the discovery requirement, and as such knew, or should have known, the substance of those documents. District Exhibit 71 shows their medical insurance company's payments made to Telos, while District Exhibit 72 shows the admission application they filled out on behalf of the student, as well as a copy of the contract (Dist. Exs. 71; 72). As such, the parents knew the substance of the documents and did not suffer any harm from their introduction at the hearing.

## **B. Recommendation for 2016-17 School Year**

The district challenges the IHO's determination that it did not offer the student a FAPE for the 2016-17 school year because the student required a residential placement, and asserts that the recommended day treatment program offered to the student was appropriate. However, a review of the hearing record supports the IHO's finding that the district's recommended placement did not adequately address the student's needs, resulting in a denial of a FAPE (IHO Decision at p. 6).

The Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H., 296 Fed Appx at 128; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. L. § 4402[2][b][2]; 8 NYCRR 200.6[j][iii][d]). In general, the Second Circuit requires that a court point to objective evidence of a child's regression in a day-program before finding that a residential placement is required by the IDEA (Walczak, 142 F.3d at pp. 131-32).

The hearing record shows that in early October 2015, the district was aware that the student suffered from significant fatigue as the result of ongoing "sleep difficulties," on which he had been "working with his pediatrician" since the preceding school year (Dist. Ex. 7). District records show that the student exhibited a demonstrable increase in absences and tardiness from the 2013-14 to the 2014-15 school years (compare Dist. Ex. 4 with Dist. Ex. 6), and that this pattern of frequent absences and tardiness continued into the 2015-16 school year (see Dist. Ex. 12; compare Dist. Ex. 4 with Dist. Ex. 6). Also in early October 2015, the parents informed the district social worker that the student was admitted to the hospital after expressing his intention to "kill himself," and that, according to the parents, the student was "sicker than any of us realized" (Dist. Ex. 9 at pp. 1-2). Upon his release from the hospital, the parent reported to district staff that the student's sleep difficulties persisted and contributed to daily tardiness (Dist. Ex. 10 at pp. 1, 3-4). As detailed in a series of emails exchanged between the parent and school staff, the student was staying awake late into the night, "stress[ing] more and more about catching up with his schoolwork and facing the other kids" (Dist. Ex. 10 at p. 3).

On October 18, 2015, the parent informed district staff the student had been re-admitted to the hospital (Dist. Ex. 11). The student remained in the hospital until mid to late November 2015, during which time he was provided academic support from the hospital program's "certified teacher" (Tr. p. 669; Parent Ex. EEE at p. 1). In mid-November the student transferred to the CPC where he remained for approximately four months (Parent Ex. H at p. 5; Dist. Ex. 38).

On December 15, 2015, an educational evaluation was conducted, and the results indicated that while the student's performance on the evaluation tasks fell within the average range, his cluster scores on broad math, broad reading, and broad written language tasks appeared significantly above his grade level (Dist. Ex. 19 at pp. 3-4, 6). Specifically, the student's performance on the academic tasks yielded standard scores of 122 on the broad reading cluster, 118 on the broad math cluster, and 126 on the broad written language cluster (id.).

On December 16, 2015, a psychological evaluation was completed, which focused primarily on assessing the student's cognitive functioning, to assist in educational planning (Dist. Ex. 20 at p. 1). Administration of the Wechsler Abbreviated Scale of Intelligence-Second Edition, to the student yielded a verbal comprehension index score of 99 (47th percentile), a perceptual reasoning index score of 100 (50th percentile), and a full-scale IQ of 100 (50th percentile), all of which fell within the average range (id. at p. 2). In the summary, the psychological report indicated that the student presented with "significant emotional and behavioral problems most notably depression, anxiety, and suicidal tendencies" (id.). The psychological report included a recommendation to consider referring the student to a day treatment program "to ease his transition from this facility and to provide an emotionally supportive education environment" (id.).

The results of both evaluations revealed that the student did not exhibit deficits in cognition and academics (see Dist. Exs. 19; 20). Rather, the student's deficits were primarily in the area of social/emotional functioning (Dist. Ex. 20 at p. 2). On January 7, 2016 the CPC CSE determined the student's initial eligibility for special education as a student with an emotional disturbance and recommended a 6:1+1 special class placement at the CPC, and psychological counseling services (Dist. Ex. 25 at p. 5). In a letter dated January 7, 2016, the CPC provided the district's CSE director with the evaluative information it used to determine the student's eligibility and develop his IEP (Tr. pp. 25-27; Dist. Ex. 27; see Dist. Exs. 13-21; 23; 26).

On March 8, 2016, prior to his discharge from the CPC, the district developed an IEP for the student (Dist. Ex. 32 at pp. 1, 5). The IEP reflected the results of the December 2015 psychological and academic testing, and the CSE's recommendation for a non-integrated 6:1+1 BOCES special class placement (id. at pp. 1-2, 5, 7). The IEP also recommended the provision of one individual 30-minute counseling session per week, and two small group 30-minute counseling sessions per week (id. at pp. 1, 5).

Consistent with the district's March 2016 IEP, the student was enrolled in the BOCES program on March 8, 2016 while on "pass" from the CPC (Parent Ex. K; Dist. Ex. 68 at p. 3). The district was informed that the student was discharged from the CPC on March 24, 2016, and that before his discharge the CPC submitted a referral for a residential treatment facility "just in case" the BOCES special class and the student living at home "did not work out" (Dist. Exs. 30 at p. 20; 68 at p. 3).

On April 19, 2016, the CSE subcommittee convened a meeting to conduct a requested review (Dist. Ex. 37 at pp. 1, 3). In addition to the psychological and educational evaluation information presented in the January and March 2016 IEPs, the April 2016 IEP listed input from the parent, student, and teacher, and included reference to an ESY justification, a Level 1 assessment, as well as teacher and counseling reports (id. at p. 2; see Parent Ex. K; Dist. Exs. 19; 20; 36; 38; 40).

The April 2016 IEP repeated much of the April 15, 2016 teacher summary statement regarding the student's ability to complete grade level academic endeavors, while repeatedly stressing the negative impact of his poor attendance on his ability to fully master academic learning (Parent Ex. K; Dist. Ex. 37 at p. 3). The IEP also reiterated that the student "need[ed] emotional supports in place to continue academic success," as well as prompts and monitoring to ensure that he is "focused and present in the classroom" (Dist. Ex. 37 at p. 4).

The April 2016 IEP noted the student's management needs, indicating the student had "demonstrated that he [wa]s able to manage his own behavior in the classroom" (Dist. Ex. 37 at p. 5). It was further noted that the student benefitted from sitting within close proximity of the teacher, that he "respond[ed] well to consistent praise and encouragement," and that he also required a "structured classroom with a high student-staff ratio and behavioral supports to help [the student] regulate his emotions" (id.).<sup>10</sup> Additionally, the IEP indicated that the student's "[s]ignificant emotional challenges interfere with attendance and academic progress" (id.). Despite indicating the need for behavioral supports, the IEP also stated the student did not have a BIP based on an FBA, but that his behavior would be monitored and that the use of time out would be "for emergency situations only" (id.).

The April 2016 IEP maintained the BOCES 6:1+1 special class placement, increased counseling services from one 30-minute individual therapy session per week to three 30-minute individual therapy sessions per week, and maintained the recommendation for two 30-minute small

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<sup>10</sup> It appears the intended meaning of "high student-teacher ratio" is actually for a small student to teacher ratio, as the document makes multiple references the student's need for significant supports (see Parent Ex. D at pp. 5-6).

group therapy sessions per week (compare Dist. Ex. 32 at p. 5, with Dist. Ex. 37 at p. 7). As explained in a counseling report from the BOCES program, the student had recently presented with poor attendance and "need[ed] school-based counseling to support his efforts to express and cope with anxiety and to develop skills to self-regulate his emotions," thereby justifying the increased level of counseling services (Dist. Ex. 38).<sup>11</sup>

On June 14, 2016, the CSE subcommittee convened to conduct the student's annual review (Dist. Ex. 50 at p. 1). Participants in the June 2016 meeting included the parent, the CSE director, an educational specialist, a special education teacher, and a school social worker (Dist. Exs. 50 at p. 1; 51). The June IEP repeated the evaluation results and present levels of performance portions of the April 2016 IEP, and although the June 2016 IEP referred to new documents, such as a March 16, 2016 psychiatric evaluation report, a June 10, 2016 counseling report, and a June 10, 2016 progress summary, little of the information in these reports was reflected in the June 2016 IEP (compare Dist. Ex. 37 at pp. 2-5, with Dist. Ex. 50 at pp. 2-5; see Parent Exs. I; P, Q;).

Although the June 2016 IEP makes minimal note of the March 2016 psychiatric consultation report, the report warrants a presentation herein, as it provided a then-current depiction of the student's challenges and offered a discussion regarding program options that might meet the student's needs (compare Dist. Ex. 50 at p. 2, with Parent Ex. I). For example, the psychiatric consultation report recounted the student's candid comments that on most days, he was depressed, that he was "suicidal, but not daily," and that "part of what stops him [from attempting suicide] is that he might only hurt and incapacitate himself rather than actually die" (Parent Ex. I at p. 5). The student also confided that he engaged in self-injurious behavior out of frustration, such as cutting and punching himself in the face, which he indicated decreased his heightened frustration so that he could manage it (id.). The report also offered diagnoses of "[m]ajor [d]epression, [r]ecurrent with [p]sychotic [f]eatures: most likely, [b]ipolar [d]epression (continues to experience significant depression with only partial relief of symptoms), [a]nxiety [d]isorder, NOS (features of different types of anxiety)" (Parent Ex. I at p. 6; see Dist. Ex. 50 at p. 5).<sup>12</sup>

In addition, when he discussed the student's high absenteeism and tardiness in his report, the psychiatrist clarified that while the student was not acting out behaviorally in school, he was essentially "unable to attend regularly" (Parent Ex. I at p. 3). Furthermore, the psychiatric consultation report identified specific needs such as "ongoing monitoring...in that [the student] continues to exhibit self-harm behaviors and chronic suicidality. The chances of successful suicide increase around his age, along with the fact that he is male" (id. at p. 6).

The psychiatric consultation report also weighed the advantages and disadvantages of various program options, presenting a continuum from most supportive to least (Parent Ex. I at p. 6). As detailed in the report, the most supportive option was hospitalization, which would allow the student to be closely monitored, but this option could also be damaging to his self-esteem and "exacerbate his depression" (id.). The second option was partial hospitalization, but the parent

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<sup>11</sup> Despite a reference in the IEP to an "ESY justification," the April CSE subcommittee did not recommend special education programs or services for July and August (Dist. Ex. 37 at p. 7; see Dist. Ex. 40).

<sup>12</sup> The June 2016 IEP incorrectly indicated that one of the student's diagnoses was "rule out of [b]ipolar [d]epression" (Parent Ex. I at p. 6; Dist. Ex. 50 at p. 5).

was reported to be ambivalent about the student's willingness to attend such a program, or whether the family would agree with the treatment plan being outlined (id.). A day treatment program appeared unavailable at the time due to lack of openings, and the fourth option proposed was described as "intensive outpatient monitoring" along with medication adjustments and careful monitoring in a special education program (id.). While the psychiatrist laid out these options, he also wrote he did not have sufficient "first-hand knowledge of [the student], the family and the history to make a clear recommendation for where [the student] might best be treated" (id.).

As indicated above, the June 2016 IEP also listed a June 2016 counseling report and June 2016 progress summary, neither of which were reflected in the description of the student's present levels of performance, but both of which contribute to describing the student's anxiety, depression, and suicidality on the student's daily functioning and his diminishing ability to engage in purposeful educational endeavors (compare Dist. Exs. 50 at pp. 2-5, with Parent Ex. P, and Parent Ex. Q). Of particular note, the June 2016 progress summary report stated the student had attended the BOCES program "24% of total possible hours," he had an "[o]verall attendance rate of 43%," and as of June 10, he had not attended school since May 20 (Parent Ex. Q at p. 1). The June 2016 counseling report noted that at that time the student was experiencing "sleep disruption (sleep apnea), significant anxiety and depression, fatigue, obsessive thoughts and tendencies toward self-harm and social isolation" (Parent Ex. P). The report indicated that although the student's attendance improved slightly in April and May 2016, "he regressed emotionally," slept in class, and displayed a blunt affect; eventually refused and discontinued his medication, no longer got up for school, and was awake all night during which time he engaged in cutting behavior (id.). According to the report, the parents took turns supervising the student at night until a "more intensive treatment" could be secured (id.). In a final comment, the counseling report asserted the student "need[ed] extensive clinical support" (id.).

While there were some minor changes in the language of the annual goals within the June 2016 IEP, the goals continued to target motivation and similar aspects of the student's social/emotional/behavioral needs (compare Dist. Ex. 37 at p. 6, with Dist. Ex. 50 at pp 6-7). However, the June 2016 CSE recommended a 6:1+1 special class in an approved private day school instead of the previously recommended BOCES special class, with three 30-minute individual therapy sessions per week, and two 30-minute small group therapy sessions per week (Dist. Ex. 50 at pp. 1, 7, 10).

On September 16, 2016, the CSE subcommittee convened to conduct a review of the student's special education program and services (Parent D at pp. 1). Participants in the meeting included the parents, a BOCES education specialist, a BOCES principal, a BOCES special education teacher, two district administrators, a school psychologist, a regular education teacher, and by telephone, the psychologist who completed an August 26, 2016 neuropsychological evaluation, and the student's educational consultant (Tr. p. 174; Parent Ex. D at p. 1; Dist. Ex. 65; see Dist. Ex. 60 at p. 2).

The majority of the September 2016 IEP's narrative description of the student's then-current functioning remained unchanged from the preceding IEP; however, new evaluative information was listed, including updated parent and teacher input, a June 6, 2016 behavior support planning form, a June 17, 2016 report card, a June 17, 2016 IEP progress report, the private August 2016 neuropsychological evaluation, a September 13, 2016 report from the student's therapist at the

summer wilderness program, and an email from the principal of Avalon (compare Parent Ex. D at pp. 2-6, with Dist. Ex. 50 at pp. 2-5; see Parent Exs. H; J; R; S; Dist. Exs. 60; 62).

Although listed by title in the September 2016 IEP, little or no other reference was made to either the student's June 2016 report card or his IEP progress report in the IEP present levels of performance (Parent Exs. D at pp. 2-6; R; S). The report card documented the student's poor academic performance, with final grades ranging between 50 and 57, and it also reflected the student's "excessive class absence" (Parent Ex. S). Review of the June 2016 IEP progress report shows that the student's absences negatively affected his ability to demonstrate progress toward his annual goals (Parent Ex. R).

The September 2016 IEP also listed a June 6, 2016 behavior support planning form, which reflected the student's recent absences from the BOCES placement and parent reports that the student was "awake all night & has been cutting again (at night)" and that the student "sleeps during the day & will not get up for school" (Parent Ex. J). Although BOCES recommended that the district apply for a day treatment placement following the residential wilderness program, the form indicated that while the student continued to meet with his outside therapist he had "not been invested in treatment" (id.; see Parent Ex. U at p. 1).

Drawing upon a limited sampling of the August 2016 neuropsychological evaluation report, the September 2016 IEP listed the student's scores on the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V), as well as the Wechsler Individual Achievement Test (WIAT-III) (compare Parent Ex. D at pp. 2-3, with Parent Ex. H at pp. 7-10). Specifically, the student's performance on the WISC-V yielded index scores that ranged from average to very superior, with a fluid reasoning index standard score of 109 (average), a processing speed index standard score of 105 (average), a verbal comprehension index standard score of 116 (high average), a visual spatial index standard score of 122 (superior), and a working memory index standard score of 150 (very superior) (id.). The student's full-scale IQ was reported as 122, which falls within the superior range (id.).

Despite the student's extensive challenges attending the public school program, the student's scores on individual subtests of the WIAT-II as reflected in the September 2016 IEP fell within the high average to superior range (Parent Exs. D at p. 3; H at pp. 9-10). That is, he earned standard scores within the superior range on subtests assessing basic reading (120), essay composition (125), listening comprehension (126), math fluency (128), and numerical operations (126) (id.). The student's performance was within the high average range on subtests measuring reading comprehension (standard score 110), and sentence composition (standard score 113) (id.).

In addition to reporting the student's performance on these standardized tests, the IEP also listed the "diagnostic impressions" offered in the neuropsychological evaluation report, which included generalized anxiety disorder, social anxiety disorder, unspecified mood disorder, and ADHD, inattentive subtype (Parent Ex. D at pp. 5-6). However, the IEP did not include any information from the neuropsychological evaluation report regarding the student's specific, significant mental health concerns or the psychologist's impression that it was "essential that [the student] continue his academic work in a residential, therapeutic setting in order to access education and make academic progress" (Parent Ex. H at pp. 12-17). The psychologist further reported that the student's "anxiety, depression, and ADHD are interfering with [the student's]

ability to access the curriculum in a main stream or day treatment school setting," and that he "requires a residential school," due to "his declining academic performance, ongoing school refusal, frequent hospitalizations, and his increasing behavior challenges" (id. at p. 17). According to the psychologist, the student's "previous emotional support program was not a high enough level of support for [the student] to make academic progress" (id.). The report recommendations specified that the student required a residential setting that provided expertise in treating anxiety disorders, responses to the student's school refusal, and interventions to help manage the student's symptoms of anxiety, depression, perfectionism, and inattention (id.).

The September 2016 IEP also listed a final report from the student's therapist at the summer wilderness program, yet the description of the student's present levels of performance does not reflect any of the report information or otherwise show consideration of the input offered by staff at the student's most recent educational/therapeutic program (Parent Ex. D at pp. 1-6). The report provided a glimpse into the challenges the student faced when he first enrolled in the wilderness program on June 17, 2016 until his last day on September 20, 2016 (Dist. Ex. 60; see Parent Ex. U at p. 1). As described in the wilderness program report, upon arrival, the student presented with "symptoms of panic and anxiety," which manifested as chest pains (Dist. Ex. 60 at p. 2). The report also states the student was "cutting almost daily, he was eating very little...[and] was not able to make healthy choices" (id.). As noted by his therapist, due to "consistent exposure to stress" the student had "developed a pervasive mood disorder," and that due to its "pervasiveness," it was recommended the student "continue long-term residential treatment" (id. at pp. 2-3). The therapist further asserted that despite "substantial gains" made over the course of the student's enrollment, the student would experience "significant regression" if he returned "to his home or another setting without a robust therapeutic program" (id. at p. 3). In addition, the therapist opined the student would start employing "negative coping strategies," which he identified as "isolation from peers and family, anger outbursts, threats and actual self-harm behaviors, and significant increase in anxiety and depression symptoms" (id.). In sum, while acknowledging the student's "significant progress," he added it was "imperative" for the student to be involved in a "structured therapeutic program," and that treatment should be provided within a residential program that could target both the student's mental health challenges as well as his educational needs (id. at p. 4).

Turning to the placement offered for the 2016-17 school year, the September 2016 CSE recommended a 10-month therapeutic day treatment program at Avalon, with two 30-minute sessions of individual counseling per week and one 30-minute small group counseling session per day (Parent Ex. D at pp. 1, 8). The CSE director testified that in July 2016, the district provided the Avalon principal with numerous documents including those used by the June 2016 CSE to determine the student required a day treatment program (Tr. p. 187; compare Dist. Ex. 50 at pp. 2-3, 7, 10, with Dist. Ex. 53). Additionally, prior to the September 2016 CSE meeting, the district shared with the Avalon principal recommendations made by the private psychologist in August 2016, and the wilderness program therapist (Tr. p. 188; Dist. Ex. 62; see Parent Ex. H; Dist. Ex. 60). The CSE director and parents took a tour of Avalon with the Avalon principal on September 14, 2016 (Dist. Ex. 68 at p. 8).

In a September 15, 2016 email to the CSE director, the Avalon principal indicated that she had read the recommendations from the private psychologist and wilderness therapist and felt "confident in stating that I continue to support the referral to Avalon and believe there is a good chance we can meet [the student's] mental health treatment needs and educational goals" (Dist. Ex.

62). The email went on to describe Avalon's program as being "very much like a residential milieu model (just in an "outpatient" setting)," which included social workers integrated into the classroom activities, daily counseling groups, weekly individual counseling, school psychologist and psychiatric services available during the school day, and a variety of therapeutic techniques (id.).

The CSE director testified that following the Avalon tour she was of the opinion that Avalon could meet the student's needs (Tr. pp. 94-95). Despite her review of the private neuropsychological evaluation report wherein the psychologist "referenced the word 'residential,'" the CSE director viewed the components of the therapeutic day program at Avalon as sufficient to address the student's needs as identified in the report (Tr. p. 95). The CSE director testified that at the September 2016 CSE meeting, the private psychologist discussed her recommendations, and CSE members shared input regarding a residential placement recommendation, including the parents' view that the professionals who had most recently worked with the student—the private psychologist and the wilderness therapist—both recommended a residential placement (Tr. p. 99).

Despite the CSE director's testimony that the private psychologist's recommendations "qualitatively could be met within the therapeutic day program," the information detailed above does not support that conclusion, nor did the September 2016 IEP otherwise address the student's most pressing educational need: his inability to attend school or access learning on a consistent basis due to social and emotional needs that required supports not limited to the academic school day (Tr. pp. 99-100; Parent Exs. D; H at pp. 5-6, 12-17; I; J; P; Q; Dist. Ex. 60 at pp. 2-4). According to the CSE director, during the Avalon tour the student's school avoidance was discussed with the Avalon principal, and she was asked what supports Avalon could provide to address that issue (Tr. p. 106). The CSE director testified that Avalon would "partner with the family," and "partner with community-based services that the family was using" to support the student in making the transition to day treatment; however, other than a passing reference to the student's "chronic school refusal," and one annual goal that the student will demonstrate sustained motivation by "consistently attending school," the IEP did not otherwise describe or provide services to address his poor attendance (Tr. pp. 106-07; Parent Ex. D; see Tr. p. 82).<sup>13</sup> The evaluative information available to the September 2016 CSE did not indicate that a day treatment program—without additional extended day supports—would have addressed these specific needs (see Parent Exs. D; H at pp. 5-6, 12-17; I; J; P; Q; Dist. Ex. 60 at pp. 2-4).

Based on the above, I agree with the IHO that the student's medical, social, and emotional problems were intertwined with his ability to access his education and that residential placement was necessary for the student to benefit from education (Mrs. B., 103 F.3d at 1120; see Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 694 [3d Cir. 1983] [residential placement may be considered necessary for educational purposes if the medical, social or emotional problems leading to such placement are not segregable from the learning process]; see also Indep. Sch. Dist. v. A.C., 258 F.3d 769, 777 [8th Cir. 2001] ["If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it."]). As a result, the hearing

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<sup>13</sup> The hearing record reflects the community support came through county programs such as "Skill Builders" and "Waiver" (see e.g. Tr. pp. 56, 59-60, 82, 157-58). Supports offered through county programs are "completely separate and apart" from the district (Tr. pp. 164-65).

record supports the IHO's determination that the district failed to offer the student a FAPE for the 2016-17 school year, because it did not recommend a residential placement.

### **C. Unilateral Placement**

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a

handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

On September 21, 2016, the parents enrolled the student at Telos Academy, which is a nonpublic school located within the Telos Resident Treatment Center and is accredited by the Utah State Office of Education, as well as by AdvanceEd Northwest Association of Schools (Parent Exs. X at p. 1; Z).<sup>14</sup> In a statement prepared by its academic director, Telos is a "comprehensive school," for up to 60 male students in the grades 7 through 12, who typically stay at Telos for 10-12 months (id.). Students who attend Telos may present with problems including depression, anxiety, trauma-related disorders, addictive behaviors, ADHD, learning disabilities, oppositional defiance, personality disorders, and attachment disorders (id.). Telos offers "smaller, individualized classes" that provide college preparation, an honors track for students in grades 9 through 12, and accommodations/modifications for students with specialized learning needs (id.).

The academic director's statement indicates the staffing ratio at Telos is four students to one staff member; in addition, each student is assigned an academic advisor, and all have access to "one-to-one coaching through the executive function coach" (Parent Ex. Z). Although "not a lock down facility" the academic director characterized Telos as "very staff intensive" and "high structure," adding that staff keeps students "in line of sight at all times" (Tr. pp. 531-32; Parent Ex. Z). Academic instruction is provided to students for 320 minutes per day on Monday through Thursday, and 200 minutes on Fridays, and the school follows the Utah Core Curriculum (Tr. p. 515; Parent Ex. Z).

The clinical program provides up to 20 hours of various therapies per week, which includes individual, family, group, and activity therapy (Parent Ex. Z). Specifically, the therapy schedule includes at least one individual session per week, at least one family session per week, two group sessions each week (one on Monday, the other on Friday), and recreational or activity therapy on weekends (Tr. pp. 431-32, 456). In addition, Telos schedules four family weekends at the school, during which families and their student participate in 90 minutes of family therapy, as well as an additional 16 hours of "therapeutic group sessions" (Tr. pp. 736-37, 750-52).

According to the primary therapist, when a new student begins at Telos, he is assigned a primary therapist, who is responsible for identifying "the big-ticket items that we're going to be working on with this boy" (Tr. p. 426). The primary therapist assesses the "root causes" of the student's difficulties, conveys information and assessment questions to each area of the residential treatment center, gets information back, and develops the treatment plan with the Telos staff and the student and his family (id.). Staff have access to student treatment plans, so that they will know how to best support a struggling student (Tr. pp. 444-45).

As part of the residential program, Telos has morning and evening staff who provide supervision during the morning and evening hours (Tr. p. 468). In the morning, one staff member

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<sup>14</sup> For the most part, the hearing record does not differentiate between Telos Academy or Telos Residential Treatment Center, but rather simply refers to the student's placement as Telos (see Tr. pp. 509-10; Parent Ex. X). Accordingly the student's placement is referred to as Telos in this decision.

and a supervisor are assigned up to 12 boys, ensuring the students wake up, complete their chores, and eat breakfast (Tr. p. 468). As elaborated by the academic director, morning staff help students "get up in the morning, get prepared, get their stuff together, walk them down, . . . work through the low motivation of some students, and just help them get to where they need to be" (Tr. pp. 531-32). In the evening, three individuals are assigned to work with the students, including two staff members and one "residential lead," maintaining the "one-to-four ratio" of students to staff (Tr. p. 468).

Residential staff are college students, and have received training in the five main interventions utilized at Telos, and residential training that they go through with the residential supervisors (Tr. pp. 469, 495-96). The primary therapist testified that he provides training to the residential staff every week, where residential staff can "ask whatever questions they would like about students" and the primary therapist has the chance to teach the residential staff how to ensure they are using interventions correctly (Tr. p. 448). He further testified that Telos staff are "constantly" providing training to residential staff about the interventions (Tr. p. 496). One of the goals worked on in the residential setting is to increase the student's assertiveness (*i.e.* "get his opinion out and be able to ask for help"). (Tr. pp. 436-37). Residential staff observe, chart data, and report on student goals, and monitor progress towards those goals (Tr. pp. 436, 446-47, 487-89).

Staff have also received training to observe the students and ask if they are experiencing suicidal ideation (Tr. pp. 471-73). If a student admits he has had "thoughts about that," the staff member queries further and the exchange is reported to the primary therapist, who follows up "within at least 24 hours" and completes a required suicide assessment (Tr. p. 472). If the assessment confirms the student is at greater risk, he is placed on "suicide watch" and monitored more closely (Tr. pp. 472-473).

Typically, students stay at Telos for 10-12 months, and then transition to a variety of possible settings from home and their local school district to more supportive settings such as a "step-down program," boarding schools, and in some cases, college (Parent Ex. Z).

The student's needs as reflected in the September 2016 IEP include "a structured classroom with a high student-staff ratio," "emotional supports in place to continue academic success," and "extensive clinical support," as well as improved attendance and prompts to remain focused and initiate academic endeavor (Parent Ex. D at pp. 4-6).<sup>15</sup> In addition, despite the absence of an FBA and BIP, the September IEP also denoted a need for the student's behavior to be monitored (*id.* at p. 6).

As noted above, Telos provides a highly structured program, that is "very staff intensive with a ratio of 4 students to 1 staff," a model that addressed the IEP's assertion the student required a structured program with a high level of support (Tr. pp. 510, 531-32; Parent Exs. D at p. 6; Z). In addition, as stated earlier, the Telos clinical program provides an array of therapeutic services

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<sup>15</sup> It appears the intended meaning of "high student-teacher ratio" is actually for a small student to teacher ratio, as the document makes multiple references the student's need for significant supports (*see* Parent Ex. D at pp. 5-6).

designed to address student, family, and group needs; these services were provided for "up to 20 hours per week," including weekends (Tr. pp. 431-32; Parent Ex. Z).

The primary therapist testified that therapeutic services were shaped by the student's individualized treatment plan, which evolved as the student's needs changed (Tr. pp. 432-33; Parent Ex. BB ). As reported by the student's primary therapist, the treatment plan provided guidance to residential staff on how best to provide individualized support to address the student's specific needs (Tr. p. 445). For example, as described by the student's primary therapist, if the student was seen struggling emotionally, a residential staff member could access the student's treatment plan, see the student was "supposed to be journaling," and then "coach" the student to use that strategy (*id.*). The primary therapist added that journaling improved the student's ability to "fight" negative thoughts, because it helped "slow down that thinking, and instead of trying to fight his battles in his head, he fights them on paper" (Tr. p. 450). The therapist asserted that as the student improved at journaling, so too, did he improve at dealing with the negative thoughts (*id.*).

As detailed by the hearing record, the student exhibited ongoing difficulties related to attendance while in the district's school and at the BOCES program, which in turn contributed to gaps in his academic learning (Parent Exs. D at p. 4; K; M at p. 1; Dist. Ex. 46). As described above, morning residential staff provided support and helped students through their morning routines, including helping them through instances of low motivation as they prepared for the day ahead (Tr. pp. 531-32). Telos staff were aware of the student's personal challenges with attending school and included a goal directed at improving the student's attendance at a variety of school-based events in his master treatment plan, and about which his progress was noted in update reports (Parent Ex. BB at pp. 2, 3, 5). For example, the student's attendance was tracked in class, at therapy sessions, and sports activities (Parent Exs. BB at pp. 2-7; CC at pp. 1-2, 4-6, 8-9, 11, 13-16). Although the school tracked student attendance, the academic director explained that mid-year, the attendance record method changed, and admitted that with the older method, a student might miss a small portion of a class, but the attendance card would indicate he was absent for the whole class (Tr. pp. 537-38). Despite the attendance record keeping challenges, the parent reported the student had "great attendance" at Telos, and offered an example that while the student previously exhibited difficulty becoming overwhelmed after missing school work, at Telos, the student was able to catch up in missed school work after missing two days of school due to an injury (Tr. pp. 732-33). Finally, the Telos academic director addressed the need for ongoing supervision and behavior monitoring, when he explained that all students are closely supervised, and that "students are in line of sight at all times" (Tr. pp. 531-32).

As discussed in detail above, review of the hearing record does not support the district's specific assertions on appeal that Telos lacks faculty skilled in addressing the student's anxiety and behavioral concerns (Tr. pp. 425, 430-31, 535-36; Parent Exs. Z; BB; MM), or "around-the-clock" supervision (Tr. pp. 444-46, 530-32 Parent Ex. Z). Based on review of the hearing record, I find that Telos provided the student with the appropriate levels of support that he required in order to benefit from education, including, as demonstrated by his unsuccessful BOCES special class placement, the student's need for ongoing supervision, continual behavioral monitoring, and access

to counseling as needed (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129, 131-32).<sup>16</sup>

#### **D. Equitable Considerations**

The district asserts that the IHO erred in determining that equitable considerations favored the parents' request for reimbursement. Specifically, the district asserts that the parents committed to unilaterally placing the student at Telos prior to the student's discharge from the wilderness program, their tour of Avalon, and the convening of the September 2016 CSE meeting. The district also asserts that the cost of Telos as well as the awarded transportation costs are unreasonable, including the funding of a "trust account," a road bike, and other undefined expenses. For the following reasons, I find that most of the district's assertions are without merit; however, a determination of the reasonableness of the cost of tuition and travel expenses requires remand to the IHO for further consideration.

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

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<sup>16</sup> To the extent that the district asserts in its memorandum of law that the cost of Telos should not be borne by the district because "it is a placement made for *medical* reasons" (Dist. Mem. of Law at p. 24), any argument included solely within a memorandum of law has not been properly asserted (see Application of a Student with a Disability, Appeal No. 17-026). Additionally, while some Circuit Courts of Appeal have taken the position that that in order for a unilateral residential placement to be reimbursable it must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process (Mary T. v. Sch. Dist. of Philadelphia, 575 F.3d 235, 242-44 [3d Cir. 2009]; Burke Cnty. Bd. of Educ. v. Denton, 895 F.2d 973, 980 [4th Cir. 1990] ["if residential placement is necessitated by medical, social, or emotional problems that are segregable from the learning process, then the local education agency need not fund the residential placement"]), in considering the appropriateness of a unilateral residential placement the Second Circuit has employed the analysis set forth above considering the "totality of the circumstances," (D.D-S. v. Southhold Union Free Sch. Dist., 2012 WL 6684585, at \*1 [2d Cir. Dec. 26, 2012] [holding tuition reimbursement was not warranted for a residential placement because the parent did not present evidence that the placement was appropriate to address the student's educational needs]; see Mrs. B., 103 F.3d at 1120-22).

that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

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

Within the Second Circuit, early application or enrollment—in and of itself—is not a factor that weighs against an award of tuition reimbursement; rather, the examination focuses on how the parents conducted themselves with respect to the CSE and IEP development process (C.L., 744 F.3d at 840; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878-79 [2d Cir. 2016]).

By letter dated September 2, 2016, the parents notified the district that, barring a timely and appropriate residential placement recommendation from the district, they intended to unilaterally place the student at Telos, and would seek reimbursement for all associated costs (Parent Ex. C). The parents entered into an enrollment contract with Telos on September 4, 2016, at which time the parents also paid a non-refundable deposit to hold the student's spot (Tr. pp. 717-28; Parent Exs. X; LL). The student was admitted to Telos on September 21, 2016 (Parent Exs. X at p. 1; BB at p. 1).

The district does not point to, nor does the hearing record demonstrate, any evidence that the parents impeded the district's ability to evaluate the student and formulate an IEP. Further, the only proof offered by the district that the parents never intended to place the student in a public school is the submission of an application and deposit to Telos prior to the September 2016 CSE meeting, and as noted by the Second Circuit, this alone is not a factor that weighs against an award of tuition reimbursement (T.K., 810 F.3d at 878-79).

Turning next to the district's assertion that the IHO erred by including non-school days in the reimbursement calculation, the Telos contract requires payment for all days, including days when the student "is not present on campus" (e.g., on an off-grounds visit, off for a medical procedure, off due to an immigration-related delay) (Parent Ex. X at p. 3). Having already determined that the student required residential placement to benefit from education, an award must also include reimbursement for days the student resided at the facility but did not receive formal instruction.

With respect to the district's assertion that the IHO erred in ordering reimbursement for travel expenses, State regulations authorize expenditures related to suitable transportation of the student "from the student's home to the school at the commencement of the school year, from the school to the student's home at the conclusion of the school year, and no more than three additional trips to and from school for students enrolled in a 10-month program, . . . except as additional trips may need to be provided for the periods during which residential care is not provided to the students attending such school" (8 NYCRR 200.12[a]). The Office of Special Education Programs (OSEP) of the United States Department of Education has also opined that the reimbursement of a child's parents for other transportation expenditures not involving transporting the child to and from school, such as to attend conferences at the school, must be determined on a case-by-case basis (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Letter to Dorman, 211 IDELR 70 [OSEP 1978]). OSEP guidance indicates that parental trips to and from school which contribute to the achievement of the student's IEP annual goals are included within the federal definition of the term "related services" to be provided at no cost to the parents as part of the student's FAPE (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Luke P. v. Thompson R2-J Sch., 46 IDELR 70 [N.D. Ill. Nov. 25, 2003] [expenses must relate to genuine educational concerns in order to justify reimbursement]; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir. 1994] ["the language and the spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]).

In this case, the student's mother testified that between her and her husband, they had made at least six trips to Telos for various reasons, including skiing and snow tubing with the student, watching the student play basketball games, and taking the student sight-seeing; however, the student's mother also testified that they only sought reimbursement for the four "family day" trips that are a part of the student's programming (Tr. pp. 747-49).

As the parents have demonstrated that Telos was an appropriate unilateral placement, they are entitled to be reimbursed for reasonable travel expenses for the student to Telos at the start of the school year, and from Telos at the end of the school year, and for the reasonable costs of no more than four trips for the parents (8 NYCRR 200.12[a]). However, the hearing record does not provide any rationale that would enable a calculation for the reimbursement. For example, neither testimony nor documentary evidence was elicited to determine what the parents' costs were for lodging, airfare, or car rentals, or whether such costs were reasonable. Nor did the IHO determine whether the "family day" events were required as part of a normal contract for every student, or were part of the student's individualized program and were necessary in "contributing to the achievement of the student's IEP annual goals," and thus potentially reimbursable as a related service (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]).

Finally, with respect to the reasonableness of the tuition at Telos, the hearing record indicates that the IHO did not determine what constituted a reasonable rate. The inquiry is important, as the IHO noted during the hearing, the daily rate charged by Telos appears to vary greatly depending on what entity (school, state, private insurance, or parents) is responsible for the cost of tuition (see Tr. pp. 740-41; Parent Ex. X at pp. 3-5). The parents' contract with Telos indicates that the contracted tuition rate for the school is \$1,500 per day; however it also provides that "[t]he typical contracted rate for school districts is \$499 per day" and that the rate for the parents is \$395 per day (after deducting an "Underinsured Scholarship" of \$1,095 per day and a cash discount of \$10 per day) (Parent Ex. X at pp. 3-5). Additionally, while the parents have stated

the cost of the tuition at Telos to them is \$395 per day after insurance and that they are only seeking reimbursement for their costs after insurance (Answer ¶37), the hearing record indicates that the parents have also been credited or reimbursed for a portion of the \$395 daily fee after making payment to Telos (Tr. pp. 737-38, 742; see Dist. Ex. 71 at p. 1). Considering that at this point in the proceeding, the student was admitted to Telos over fifteen months ago (Parent Exs. X at p. 1; BB at p. 1), and students typically stay at the school for 10-12 months (Parent Ex. Z), the parties should have a good understating of the total cost of the student's stay at Telos, in order to determine the amount that the parents should be reimbursed for the cost of the student's stay at Telos. Under these circumstances, if the parties cannot otherwise agree as to an appropriate amount for reimbursement of the costs of the student's tuition at Telos, a determination must be made as to what the district is expected to pay and whether the cost is reasonable (see E.M., 758 F.3d at 461 ["whether there was any fraud or collusion in generating (or inflating) the tuition to be charged to the [district]" is a factor to be considered in making an equitable determination]).

Based on the above, this matter is remanded for further administrative proceedings regarding the reasonableness of the parents' costs for travel and related expenses and the cost of the student's tuition at Telos (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9 n.4 [S.D.N.Y. Nov. 27, 2012]). On remand, the IHO shall determine (a) if any travel expenses for the parents, outside of the regulatory visits allowed under 8 NYCRR 200.12(a) should be authorized, specifically, the IHO is to determine if the four "family days" the parents seek reimbursement for contribute to the achievement of the student's IEP annual goals; and if so, what family members were required for the visits; (b) should the district be required to reimburse the parents for all four "family day" trips and if so, what was the required length of the visit(s); (c) what were the parents' costs for lodging, airfare, and rental car, and are the costs reasonable; (d) what were the parents' actual out-of-pocket tuition expenses at Telos that should be reimbursed; and (e) unless agreed to by the parties, were the tuition expenses reasonable, and what is the IHO's rationale used in making that determination.

## **VII. Conclusion**

Based on the above, the district failed to offer the student a FAPE for the 2016-17 school year and Telos was an appropriate unilateral placement for the student. This matter is remanded to the IHO for further administrative proceedings to determine whether equitable considerations support an award of reimbursement for the cost of the parents' travel expenses and the student's tuition at Telos, including how much the parents paid and the reasonableness of those expenses.

I have considered the parties' remaining contentions and find that I do not need to address them in light of my decision herein.

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that that portion of the IHO's decision dated September 14, 2017 which found that equitable considerations favor the parents, and which ordered reimbursement for tuition

and travel expenses for the student, as well as reasonable travel, lodging and rental car expense reimbursement is vacated; and

**IT IS FURTHER ORDERED** that, this matter is remanded to the IHO for further proceedings in accordance with this decision and in the event that the IHO cannot hear the matter upon remand, the district shall appoint a new IHO.

**Dated:**           **Albany, New York**  
                          **December 7, 2017**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**