



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 20-084

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education**

### **Appearances:**

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioner, by Lauren Eisler, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the WayPoint Academy (WayPoint) for the 2018-19 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

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

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

### **III. Facts and Procedural History**

The hearing record contains little evidence regarding the student's educational history and as such, this information is primarily gleaned from the parent's October 30, 2018 notice of unilateral placement (see Parent Ex. B). According to the parent, the student repeated kindergarten because of "academic problems," received a diagnosis of attention deficit disorder (ADD) in the second grade, and subsequently was found "eligible for an IEP" by the district as a student with a speech or language impairment (id. at pp. 1-2). Within the October 2018 notice, the parent indicated that starting in fifth grade the student began displaying an increase in emotional issues and was exhibiting school refusal (id. at p. 2).

Reportedly, in September 2017 (sixth grade) the student began attending and subsequently refused to attend two different middle schools, at which time he displayed "an exacerbation of

emotional disturbances" such that the parent requested in writing "an immediate and emergency" CSE review meeting (Parent Ex. B at p. 2). The parent indicated that prior to the November 10, 2017 CSE meeting she submitted an updated neuropsychological evaluation report to the CSE, which identified that the student exhibited significant anxiety and depression, and that at the time of the meeting the student's emotional disturbance was so severe that he could not attend school (id.). According to the October 2018 notice, the November 2017 CSE maintained the student's eligibility for special education as a student with a speech or language impairment and recommended that the student receive four periods of special education teacher support services (SETSS) and two periods of counseling; however, "as a result of his psychiatric issue," the student received home instruction through the district for the remainder of the 2017-18 school year (id.).

The parent reported that in June 2018 she met with the middle school guidance counselor to discuss the student's psychiatric issues and school placement (Parent Ex. B at p. 2). On August 14, 2018, after an extended time of not coming out of his room, the student was placed in an inpatient treatment facility and the parent notified the district about that placement (id.). According to the parent, on October 3, 2018, as the student's release date approached and he "needed a therapeutic school placement," she requested in writing, an immediate and emergency CSE review meeting (Parent Ex. B at p. 2; Dist. Ex. 2 at p. 1).

Within the October 2018 notice, the parent stated her disagreements with the "prior" IEP developed by the district including the "incorrect" classification, and the "inadequate" program offered to the student and stated that unless the district created a valid IEP and recommended an appropriate therapeutic residential school at the upcoming CSE meeting, she would unilaterally place the student at WayPoint as of November 14, 2018 and seek tuition reimbursement (Parent Ex. B at p. 3).<sup>1</sup> The parent executed an admission contract with WayPoint on November 1, 2018 (Parent Ex. F at pp. 1-6).

On November 2, 2018, the CSE convened to conduct the student's annual review and develop his IEP (Dist. Exs. 1 at pp. 1, 11; 2 at p. 1). The CSE changed the student's eligibility classification to emotional disturbance and recommended a 12:1+1 special class in a State-approved residential placement with individual and group counseling (Parent Ex. B at p. 2; Dist. Ex. 1 at pp. 9, 12). According to the parent, at the meeting she informed the CSE that the student's discharge from the inpatient treatment facility was "imminent[]" and that she would place him at WayPoint on an interim basis to allow the district "time to secure an appropriate program" (Parent Ex. A at p. 3). The student began attending WayPoint on November 6, 2018 (Parent Ex. K; see Parent Ex. F at p. 1).<sup>2</sup>

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<sup>1</sup> WayPoint is a residential treatment center located in Utah (Parent Ex. E), however, the Commissioner of Education has not approved WayPoint as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> According to the IHO decision's list of exhibits, parent exhibit K, which was not marked as such but described as the tuition statement for WayPoint dated March 3, 2020, was "admitted into evidence post-hearing, without objection" (see IHO Decision at p. 18).

The CSE referred the student to the district's Central Based Support Team (CBST), which subsequently sent the student's "packet" to seven possible residential placements (*id.*). The parent indicated that one school responded to her but declined to interview the student due to his age, no other schools contacted her, and she received no further contact from the CBST (*id.* at p. 4). The student attended WayPoint for the remainder of the 2018-19 school year (*see* Parent Exs. I; K).

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

By due process complaint notice dated April 16, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year based on procedural and substantive violations and denied the parent an opportunity to meaningfully participate in the educational program of the student (Parent Ex. A at 1-2). Although the parent alleged that the district had determine that the student was eligible for special education during the 2014-15 school year, the parent nevertheless alleged that the district failed to fulfill its "child find obligation" under the IDEA, and indicated that "[w]e also maintain that the prior IEP was incorrect in its classification of him as Speech and Language Impaired and that at the November 2018 CSE meeting the student was not offered a program that was "reasonably calculated to confer a benefit" to him (*id.* at pp. 2, 4). The parent argued that the district had failed to locate and place the student in a school within 30 days of the CSE's recommendation after deferral of the student's case to the CBST for placement in a State-approved or out-of-State private school (*id.*). The parent also maintained that as of the date of the due process complaint notice, the district failed to issue an IEP to the parent as a result of the November 2018 CSE meeting (*id.*). Finally, the parent argued that her unilateral placement of the student at WayPoint was "reasonably calculated to confer a benefit" to the student and "that there were no equitable bars to reimbursement" (*id.* at p. 5). For relief, the parent requested full tuition reimbursement for the student's placement/program at WayPoint, as well as the cost of four round-trip visits to the program in order for the parent to participate in the student's education (*id.* at pp. 2, 5).

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

On July 18, 2019, the parties proceeded to an impartial hearing, which concluded on February 24, 2020, after six days of proceedings (*see* Tr. pp. 1-119).

At the July 18, 2019 hearing, the parties reported that a possible settlement was under consideration and requested an extension of the timeline for issuing a final decision, which the IHO granted (Tr. pp. 3-4). At subsequent hearings on September 23, November 4, and December 18, 2019, the parties stated that the case had been approved for settlement, that they were currently negotiating "to come up with the dollar amount," and that the parent was waiting for an offer from the district, and requested extensions of the compliance timeline, which the IHO repeatedly granted until the January 17, 2020 hearing date at which time the IHO stated that she "had no confidence in these settlement offers moving us forward in any kind of expeditious manner" and that she was going to schedule the parties to reconvene for a hearing in the matter (Tr. pp. 8, 13-14, 18, 23-24). The parties reconvened on February 24, 2020 for presentation of witness testimony and documentary evidence (Tr. pp. 26-119).

In a decision dated April 6, 2020, the IHO found that the district failed to sustain its burden with respect to providing the student with a FAPE during the 2018-19 school year (IHO Decision at p. 12). The IHO stated that the district rested on the documents and made no argument

concerning the district providing an appropriate program for the student, and that there was no dispute that the district had failed to provide a program and services for the student following deferment to the CBST to arrange a residential placement for the student (IHO Decision at p. 12). The IHO further found that the district failed to meet its child find obligations in this case (IHO Decision at p. 12).<sup>3</sup> The IHO stated that she made no determination concerning the parent's receipt of an IEP (IHO Decision at p. 12).

With respect to the appropriateness of the parent's placement, the IHO found that the parent had not met her burden showing that the program at WayPoint was appropriate for the student's special education needs in noting that: there was no evidence of a therapeutic program for the student other than the clinical director's testimony of a schedule of individual and group sessions; the clinical director was only able to offer general statements of improvement with mood and anxiety, emotional control and coping skills, and was unable to identify the student's master treatment plan goals; and that the treatment plan, monthly progress reports concerning therapy, a written report of the student's treatment or progress in treatment, and a citizenship grade assigned weekly which would provide a measure of the student's progress, were not submitted by the parent (IHO Decision at pp. 13-14). The IHO found that given the absence of these many documents critical to the student's education, general statements of better emotional skills and coping mechanisms were not "sufficient to prove educational instruction specifically designed to meet [the student's] unique special education needs" (IHO Decision at p. 14).

Regarding equitable considerations the IHO found that while the parent was a credible witness, her memory of the tuition amount was uncertain and the receipts were not produced, the tuition affidavit lacked valid authentication, and no proof of payment was provided to the hearing officer (IHO Decision at p. 15). The IHO noted that there was no dispute that the parent cooperated with the district, nor that the district had not secured a placement for the student, and found that while a tuition determination might merit additional scrutiny, analysis of equities would not prevent an award for the student's tuition at WayPoint (IHO Decision at pp. 15-16).

The IHO denied the parent's claim for reimbursement for tuition at WayPoint for the 2018-19 school year as well as the parent's request for the cost of four round-trip visits to the program, "as there was no evidence produced concerning any visits or associated costs" (IHO Decision at pp. 11, 16).

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<sup>3</sup> Although it has no bearing on the fact that the district failed to locate a nonpublic school program for the student as envisioned by the CSE and thereby denied the student a FAPE, it is unclear why the IHO ventured into the issue of "child find" at all. On the face of her due process complaint, the parent admits that the student was already identified as special education eligible at the time of this dispute (see Parent Ex. A at p. 2; B at p. 2). Thus, the student was already "found," so to speak, long before the events of this case, and his eligibility for services was not an issue. Even if the parent believed that "emotional disturbance" was a better description of the student than "speech or language impairment," special education services cannot be dictated by a student's "category" and which is why an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix][*emphasis added*]). Furthermore, there were no claims by the parent in this case that the school district inadequately evaluated the student.

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

The parent appeals, arguing that the IHO erred in finding the parent did not meet her burden of proof to show that WayPoint was appropriate for student's special education needs. Specifically, the parent argues that the IHO erred in finding that the educational program was "abbreviated," the clinical director's statements regarding the student's progress were "general" and the clinical director's statements regarding the student's program and progress "were not sufficient to prove education instruction specifically designed to meet the student's unique education needs," and that the WayPoint classroom reports were "unreliable to demonstrate the student's progress" at WayPoint. In addition, the parent argues that the IHO erred in finding the post-hearing submission of the notarized tuition affidavit required further proof of payment and lacked authentication. The parent asserts that the IHO's findings and order denying reimbursement for the student's tuition at WayPoint were made with disregard for the credible testimony of the clinical director and the documentation regarding the therapeutic and academic educational programming offered to the student at WayPoint, as well as his progress, and the costs associated with his attendance at WayPoint during the 2018-19 school year.

The parent requests an order directing the district to reimburse the parent for the cost of the student's tuition at WayPoint in the amount of \$86,147.25 and additional relief deemed appropriate.

The district answers, alleging that the parent's request for review fails to comply with State regulations that require an explanation of why or how the IHO's findings "were incorrect or unsupported by fact or law" and requesting that the request for review be dismissed. The district also asserts that the IHO correctly determined that the parent failed to meet her burden to prove that WayPoint was an appropriate placement to meet the student's special education needs.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>4</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**

As the district has not cross-appealed from the IHO's determination that it failed to offer the student a FAPE for the 2018-19 school year, that issue is deemed abandoned and has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).

### **A. Unilateral Placement**

Accordingly, I turn next to the issue of whether WayPoint was an appropriate unilateral placement. For the reasons that follow, the evidence in the hearing record does not adequately support the conclusion that WayPoint provided the student with instruction specially designed to meet his unique needs. Additionally, although not dispositive, the record does not persuasively indicate that the student made progress in his areas of greatest need during the 2018-19 school year. Therefore, the evidence in the hearing record supports the conclusion that the IHO did not err in determining that the parent failed to meet her burden to show that WayPoint was an appropriate unilateral placement for the student.

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).

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<sup>4</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).

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).

## 1. The Student's Needs

While the student's needs are not in dispute in this matter, a brief description thereof provides context for the discussion regarding whether the student's unilateral placement at WayPoint for the 2018-19 school year was appropriate.<sup>5</sup>

The November 2018 IEP present levels of performance stated that according to results of an October 2017 neuropsychological evaluation, the student's nonverbal reasoning, logic and problem-solving skills were above age expectations and that his working memory skills were within age expectations (Dist. Ex. 1 at p. 1). Regarding reading skills, the November 2018 IEP stated that the student's decoding skills were within grade expectations, that assessment results indicated he had a strong sight word vocabulary, and that while his oral reading fluency was above expectations for rate, it was slightly below expectations for accuracy due to impulsivity while reading quickly (*id.*). The November 2018 IEP noted that the student's reading comprehension skills were "strong" (*id.*).

The November 2018 IEP's present levels of performance indicated that the student's math skills were variable, in that he was able to perform multi-digit addition and subtraction, and single digit multiplication problems as well as add negative integers; however, he was unable to multiply numbers with more than one digit or perform long division (Dist. Ex. 1 at p. 2). On an untimed problem solving task that involved practical applications presented as oral word problems, the student's performance was above grade expectations, while when solving multiplication problems within time constraints, the student performed below grade level and was found to have made some impulsive errors (*id.*).

In the area of written language, the November 2018 IEP present levels of performance stated that the student's spelling skills were slightly below grade expectations (Dist. Ex. 1 at p. 2). With respect to sentence combining tasks, the student's performance fell below average as he did not use commas, was unable to combine three sentences appropriately, and wrote run-on sentences (*id.*). The November 2018 IEP stated that on tasks that required the student to generate original sentences using a target word and compose a creative essay, the student's performances were found to be average and above average respectively (*id.*).

Regarding social development, the November 2018 IEP present levels of performance cited the student's 2017 IEP which indicated that he experienced anxiety about homework demands and overall academic performance, and withdrew when confronted with tasks he was "uncomfortable with" or found difficult (Dist. Ex. 1 at p. 2). The November 2018 IEP also cited to results of an October 2017 neuropsychological evaluation, which indicated that, at that time, the student was "experiencing significant emotional distress" (*id.*). Specifically, the IEP reflected parent ratings that indicated "significant concerns about negative mood, somatic symptoms, adaptability, activities of daily living, functional communication, irritability and anger control at home" (*id.*). Additionally, the student reported experiencing several symptoms of depression and anxiety and

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<sup>5</sup> Review of the April 2019 due process complaint notice does not reflect an allegation that the November 2, 2018 IEP is not appropriate due to the inaccuracy of the descriptions of the student's present levels of performance (see Parent Ex. A at pp. 1-6).

it appeared "that his depressed mood in conjunction with his anxieties about his mother being harmed and feeling socially isolated at school [were] the major contributors to his school refusal" (*id.*). Although the IEP noted that the student "ha[d] been open to therapeutic interventions and was able to [use] some specific coping skills for stress reduction," "it [was] clear that [the student's] negative mood symptoms [were] having a detrimental impact on his daily functioning across settings," and, at that time, he was "experiencing clinically significant symptoms of depression and anxiety" (*id.*). According to the IEP, in October 2017, the student received diagnoses including major depressive disorder, single episode, moderate; generalized anxiety disorder; and attention deficit hyperactivity disorder, combined type (via history) (*id.* at pp. 2-3).

The WayPoint clinical director, who testified he is a licensed clinical social worker, stated that he screened the student for admission and that WayPoint staff had contact with the parent regarding the student's then-current treatment center placement—with which WayPoint staff were familiar and where the student was being treated for anxiety disorder and avoidance (Tr. pp. 49-50, 62). The clinical director testified that WayPoint was provided with "information," a psychosocial history, and psychological testing and that it "was reviewed" (Tr. p. 62).<sup>6</sup> In addition, the clinical director stated that he believed that the parent came and toured the school and that they discussed the student's background and history (*id.*).

With respect to identified learning needs, the clinical director stated that the student was behind in school due to a significant amount of school refusal, school avoidance and procrastination and that he "had a tremendous amount of attentional difficulties" (Tr. p. 63). Specifically, the clinical director testified that the student had difficulty staying focused, was easily distracted, fidgeted, exhibited a lot of executive function difficulties, and had difficulty getting started, and also with goal directed perseverance, emotional control, and emotional flexibility (*id.*). The clinical director noted that the student was discouraged "very easily" and that when faced with tasks or concepts that were difficult for him, the student would either "avoid it" or make "half-hearted" attempts and then quit (*id.*). Lastly, the clinical director noted that the student struggled with time management and avoided assignments in favor of spending time gaming "in front of the screen" (*id.*).

## 2. WayPoint

The clinical director described WayPoint as an accredited, out-of-State residential treatment center and private independent school for approximately 44 young men, ages 13 to 18, who were dealing with anxiety disorders (Tr. pp. 53, 80, 84-85; *see* Parent Ex. E at p. 1). The clinical director stated that the most frequent type of disorders that WayPoint saw in their students were social anxiety disorder, generalized anxiety disorder, and obsessive-compulsive disorder and he also noted that WayPoint worked with young men that had co-occurring difficulties like depression, learning disorders, sensory integration difficulties or physical ailments or diseases (Tr. p. 53; *see* Parent Ex. E at pp. 3, 6-7). Students who engaged in "pervasive avoidance" often also lacked basic social, coping, communication, self-advocacy, problem solving, and executive

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<sup>6</sup> The clinical director testified that he "believe[d] there would have been" academic test results submitted regarding the student (Tr. p. 77).

functioning skills (Tr. p. 53). The clinical director noted that the "tipping point" that caused most students to go to WayPoint was typically school refusal (id.).

According to the clinical director, therapy was primarily provided by five full-time licensed therapists who were "typically" licensed clinical social workers (LCSW); a psychiatrist and a psychiatric nurse practitioner provided medication management to students taking medication (Tr. pp. 60, 81-82; see Parent Ex. E at pp. 10-11, 14). The clinical director stated that all of the school's five full-time teachers and one academic director had a Utah teaching license and teaching certificate, but that, at the time the student attended WayPoint, none of the teachers were certified in special education (Tr. pp. 60, 81). The clinical director acknowledged that he was not certified in teaching and was not an "academic teacher," and that he taught "more from an emotional growth standpoint, therapeutic standpoint" (Tr. p 76).

### **A. Specially Designed Instruction**

The parent argues on appeal that the IHO erred in finding that the student's educational program at WayPoint was "abbreviated" and that the clinical director's statements regarding the student's program "were not sufficient to prove education instruction specifically designed to meet the student's unique education needs."

As noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

The clinical director testified that the student's day began at 7:00 a.m. with a cardio or fitness workout which would last for an hour and was followed by time for "hygiene," breakfast, and morning chores (cleaning his room, making his bed, doing laundry) (Tr. p. 64). The clinical director testified that on Monday, Wednesday, and Friday the student went to a group therapy session, then to academic counseling or support, next he would go to class from 11:00 a.m. to noon and then to lunch (id.). According to the clinical director, after lunch the student would be back in different classes from 1:00 p.m. to 3:00 p.m. with each class lasting about an hour in duration, and, after a snack, the student would go back to class with school being "over" at 5:00 p.m. (Tr. pp. 64-65). The clinical director noted that the student's academic classes were composed of between five and ten students with one teacher per class (Tr. p. 68).

The clinical director explained that, in the evening, the student had less structured time to interact with peers and that he would participate in "some type of" life skills group or community meeting (Tr. p. 65).<sup>7</sup> In addition, the clinical director stated that the student worked in the kitchen and participated in off-campus activities (id.). According to the clinical director, on the weekends, the student participated in various recreational activities geared toward helping him develop an

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<sup>7</sup> The clinical director stated that the life skills group included 10-12 students and two teachers (Tr. pp. 68, 84).

interest, passion or hobby that would help him in his social and emotional development as it was noted that the student was "sitting at home" and leading a very sedentary life (Tr. pp. 66-67).

A review of the student's 2018-19 class schedule reveals that it offered daily classes in ELA from the student's start date in October 2018 through June 2019 and daily classes in world history South America, and earth science January through June 2019 (Parent Ex. H at pp. 1-3). While the student's schedule made no mention of a math class, the student's progress reports and final report card for the 2018-19 school year indicated that in addition to the subjects noted above, the student participated in a seventh-grade math class, PE – Fitness for Life, PE – Individual Life Activities, Food and Nutrition I and II, and Foundations of Art (Parent Exs. H at pp. 1-3; I; J at pp. 1-9).

While the parent may be justified in contesting the IHO's determination that the student's program was "abbreviated," review of the hearing record shows that the parent did not provide sufficient evidence to demonstrate that the student's program provided educational instruction specifically designed to meet his unique education needs.

Specifically, the clinical director opined that he could report with "a high degree of accuracy" about the student's academic strengths and weaknesses; however, he acknowledged that he was not "that person in the classroom observing" and did not have direct firsthand knowledge (Tr. p. 86). The clinical director stated that he was in the staff meeting to hear the progress reports being "brought out" and noted that the student was a "smart kid" who was "interested" and "very curious about things" (*id.*). According to the clinical director, the student's "struggle was really from an executive functioning standpoint, staying focused, getting started," and with "goal directed perseverance" (Tr. pp. 86-87). In addition, the clinical director stated that the student "really struggled with follow through" and "needed a lot of monitoring and hand holding to make sure that he was doing the work" (Tr. p. 87).

The clinical director explained that "homework class" was a time where the student would get "additional work to make sure he's doing his homework" and additional support from a teacher or a peer mentor (Tr. p. 90). The clinical director added that it was not a mandatory class but if students were not caught up, they did attend and that the student "would have" attended homework class during the 2018-19 school year (Tr. pp. 90-91).<sup>8</sup> Additionally, although the clinical director stated that the student "would have" received tutoring and "may have" received tutoring on a specific topic, the clinical director acknowledged that he did not know for certain (Tr. p. 79). The clinical director also acknowledged that he did not conduct any of the grading for the student's academic classes (Tr. p. 80).

The student's progress reports do not include evidence that his teachers addressed the student's academic needs identified in his November 2018 IEP or any other individual needs identified at WayPoint, but rather followed along with the general curriculum (see Parent Ex. J at pp. 1-9). At one point within the progress report, the English teacher indicated that the student had ELA skill deficits but did not identify those needs or what she did to address the deficits (*id.* at p. 4). The student's science teacher identified that the student was "easily distracted in class and

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<sup>8</sup> While the student's progress report revealed that all of the student's teachers noted that at times the student had difficulty with homework completion, other than the clinical director's testimony that the student "would have" attended homework class, the hearing record lacked information about how frequently the student attended, and what type of assistance he received during that class (see Tr. p. 90; Parent Ex. J at pp. 1-8).

ha[d] a hard time focusing on the task at hand," yet the progress report did not indicate how the teacher addressed those needs (id. at p. 7). The student's art teacher stated that when the student missed a class, she would have liked to have seen him "taking on more responsibility" for his academics, such as "checking in on what he missed, when [was] it due, how [could] he bring his grade up etc.," but provided no additional information on ways that could have been accomplished (id. at p. 6). One teacher comment indicated that the student's grade could potentially rise if he completed and submitted an assignment and noted "that will be up to him" (id. at p. 2). The few "interventions" or "supports" found within the progress reports included letting the student work at his own pace, providing extra time and prompting, using a planner, and talking with the teacher (see id. at pp. 5-8).

While teachers at a unilateral placement need not be State-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]), there must be objective evidence of special education instruction or supports that are specially designed by the student's providers at the private school who have reasonable qualifications that are specifically related to the student's deficits (see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 387 [2d Cir. 2014] [noting that general evidence regarding a student's psychological progress from a student's private counselor with a master's degree but who lacked certification in New York or his home state was insufficient to support tuition reimbursement]). In this case, the parent has not provided evidence that WayPoint provided instruction specially designed to meet the student's unique academic and executive functioning needs.

Next, review of the hearing record also revealed that it did not include evidence that the student's social/emotional needs were being addressed. The clinical director recalled that during the 2018-19 school year, the student had received diagnoses of social anxiety disorder, ADHD, and intermittent explosive disorder (Tr. pp. 68-69). According to the clinical director, while at WayPoint the student struggled to identify the salient points of what was said in group situations, exhibited avoidance and procrastination behaviors, required a lot of reassurance and monitoring, struggled to integrate past experiences into a current one, was prone to give up easily, and demonstrated limited emotional maturity and awareness (Tr. pp. 71-73).

The clinical director testified that WayPoint provided the student with two individual therapy sessions per week, three one-hour group therapy sessions per week, and one hour-long family therapy session per week via Skype (Tr. pp. 61, 82-83).<sup>9</sup> According to the clinical director, therapy sessions occurred at different times during the week (Tr. p. 65). The clinical director stated that there were eight to ten other students in the student's group therapy session, with a traditional group therapy being led by one therapist (Tr. pp. 67, 83). He further indicated that there were "different groups that occur where other therapists may join . . . that involves issues happening within the community" including where the "boys are showing a lack of respect towards one another, or they're joking about things that were hurtful in nature" (Tr. p. 67). The clinical director explained that a lot of the groups, which he referred to as "exposure therapy" were conducted to both address issues taking place in the community and also to help raise social and emotional

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<sup>9</sup> According to the clinical director, parents were provided with academic updates over the course of the month (Tr. p. 61).

awareness for the student so that he would recognize what was wrong or right about a particular situation occurring within the community (Tr. pp. 65, 67-68).

However, although the clinical director's testimony indicated that WayPoint provided counseling to the student, the hearing record lacked specificity regarding what the counseling sessions entailed, such as the content, methodology or interventions employed by the WayPoint staff to meet the student's social/emotional needs (see generally Tr. pp. 1-119). Specifically, the clinical director stated that there was a master treatment plan for the student that set goals and objectives for the student's treatment progress (Tr. pp. 70, 88-89). However, the master treatment plan with goals and objectives was not included by the parent as evidence in the hearing record and the clinical director stated that he "can't with 100 percent accuracy comment on what [the therapist] had for that," although he stated that he knew the goals at the time were to reduce the student's anxiety and improve distress tolerance (Tr. pp. 88-89). When the IHO asked about the presence of progress reports regarding the student's performance in therapy, the clinical director responded that "there should be a monthly progress report that talks about the progress that occurred[d]" (Tr. p. 88), but similar as with the master treatment plan, those counseling progress reports were not offered as evidence by the parent, and there is otherwise no testimonial or documentary evidence in the hearing record regarding how WayPoint met the student's social/emotional needs. In addition, regarding what the clinical director called the "tipping point" for residential placement at WayPoint, namely school refusal, the hearing record provided no evidence that WayPoint staff specifically addressed or targeted this topic aside from the residential nature of the placement itself.

The clinical director was able to speak to the school in general, but provided very little detail regarding the student's specific special education programming. Based on the foregoing, the available evidence contained in the hearing record does not convincingly or objectively show that WayPoint provided the student with specially designed instruction to address his unique special education needs during the 2018-19 school year. Rather, the evidence tends to show that WayPoint provided the student with the types of advantages—including a small class size, a general education curriculum, tutoring, community activities—"that might be preferred by the parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451-52 [2d Cir. 2015]).

## **B. Progress**

Next, the parent contends that the IHO erred in finding the clinical director's statements regarding the student's progress were "general" and "not sufficient to prove education instruction specifically designed to meet the student's unique education needs." In addition, the parent argues that the IHO erred in finding the WayPoint classroom reports were "unreliable" to demonstrate the student's progress.<sup>10</sup>

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<sup>10</sup> While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at \*11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

The clinical director explained that the student's progress was measured by "what he's doing or not doing" and by the degree of support the student needed, which was the measurement of everything the student did during the course of his day (Tr. p. 69). The clinical director testified that the student received a weekly "citizenship grade," which was a measure of his "involvement in the community and the classroom" (Tr. pp. 69-70). However, as the IHO noted, the student's citizenship grades were not included as evidence in the hearing record (IHO Decision at p. 14; see Parent Exs. A-K; Dist. Exs. 1-3).

The clinical director stated that the student "made quite a bit of progress during that time from the baseline of where he was when he started" noting improvement with mood and anxiety and that while "[c]ertainly anxiety issues remained," the staff saw a decrease from baseline (Tr. 70). The clinical director further noted that the staff saw an improved self-esteem in the student; some improvements in his ability to follow through, although he continued to need "a lot of support"; improvement in time management; and that the student developed better emotional awareness, distress tolerance, coping skills, communication skills, emotional control, and interpersonal skills (Tr. pp. 70-71, 73-74).

However, the clinical director's testimony was not objective; for example, it does not provide baseline information about the student nor was it included in the student's progress reports, which as the IHO pointed out, lack "any reference to [the student's] anxieties and depression" (IHO Decision at p. 14; see Tr. pp. 1-119; Parent Ex. J at pp. 1-9). Further, the progress reports that were included in the hearing record do not squarely support the clinical director's description of the student's progress. Year-end progress reports indicated that the student continued to struggle in the areas of need identified by the clinical director (Parent Ex. J at pp. 6-8). For example, in May and June the student reportedly struggled with time management and turning in assignments, was easily distracted and had a hard time focusing, and difficulty getting along with peers (Parent Ex. J at pp. 6-8). In this case, the IHO did not err in reaching the conclusion that the clinical director's statements were insufficient.

In conclusion, despite the IHO's inquiries at the impartial hearing for more information regarding the services offered to, and the progress made by, the student, there is not enough evidence in the hearing record that convinces me to disturb the IHO's finding that "WayPoint failed to offer an education program designed to meet [the student's] special education needs" (IHO Decision at p. 15).

## **VII. Conclusion**

Although I am sympathetic to the parent's good faith attempt to select an appropriate unilateral placement for her son after the district failed to provide the student with a placement for the remainder of the 2018-19 school year, tuition reimbursement for a unilateral placement is only available if that risk pays off and the evidence shows that the private school objectively and demonstrably provides the student with specialized instruction designed to address his unique needs. The case law is clear that this risk lies with parents in these circumstances (see W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 133 [2d Cir. 2019], cert. denied, 140 S. Ct. 934 [2020] [indicating that "[p]arents who believe a child has been denied a FAPE may enroll the child in a private school at their own financial risk and seek retroactive reimbursement from the school district for the cost of the private school"]). Here, however, the parent did not establish the appropriateness of WayPoint for the 2018-19 school year and, therefore, the IHO was correct in

denying tuition reimbursement. Given this determination, I need not reach the any concerns that may be remaining with regard to equitable considerations.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

**THE APPEAL IS DISMISSED.**

**Dated:**           **Albany, New York**  
                          **July 22, 2020**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**