



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-149

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Frank J. Lamonica, Esq.

Law Office of Noelle Boostani, attorneys for respondents, by Noelle Boostani, 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 that portion of the decision of an impartial hearing officer (IHO) which found that SUWS Carolinas Seasons Program (SUWS) was an appropriate unilateral placement for the student and ordered the district to reimburse respondents (the parents) for their son's tuition costs at SUWS and the accompanying travel expenses for the 2020-2021 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received diagnoses of specific learning disorder with impairment in written expression; attention deficit hyperactivity disorder (ADHD), combined presentation; oppositional defiant disorder (ODD); disruptive mood regulation disorder; major depressive disorder; and generalized anxiety disorder (Parent Exs. C at p. 2; E at p. 2; L at p. 1; Z at p. 2).

During the student's early preschool and elementary school years he displayed a high level of aggressive, defiant and hyperactive behaviors (Parent Ex. Z at p. 2). In addition, he exhibited

"isolative behaviors" which made it difficult for him to initiate and maintain friendships and regularly eloped from his classroom (*id.*). When the student was in first grade the parent referred him to the CSE for an evaluation but he was found ineligible for special education services at the time (Tr. at p. 196; Parent Ex. Z at p. 2). The student's difficulties intensified and in third grade the parent obtained a private psychiatric evaluation which yielded diagnoses of ADHD and ODD (Tr. at p. 196; Parent Ex. Z at p. 2). The parent referred the student to the CSE once again for evaluation and the student was found eligible for special education services as a student with another health impairment (OHI) (Parent Ex. Z at p. 2). The student began receiving integrated co-teaching (ICT) services, along with counseling as a related service (Tr. pp. 196-97; Parent Ex. Z at p. 2). The student was retained in fourth grade due to the extent of his emotional, behavioral, and academic difficulties (Tr. pp. 197-198; Parent Ex. Z at p. 2). His resistance to engage in academic work delayed his growth in all areas; he experienced persistent difficulties managing his frustration, engaging in work he perceived as being too hard, participating in reading groups, and using organizational strategies (Parent Ex. Z at p. 2). The parent indicated that the student was "devastated" that he had to repeat fourth grade and began to express suicidal ideation (Tr. pp. 198-99).

According to the parent, when the student was in sixth grade, his math teacher informed her that the student's then-current placement was unable to implement his IEP (Tr. p. 201). In or around July 2019 the student began to engage in self-injurious behaviors and was hospitalized for ten days (Tr. pp. 200-05). Following the student's discharge, he engaged in additional self-harm and although the student's physician recommended a second hospitalization which the parent declined due to trauma the student experienced in relation to the first hospitalization (Parent Ex. Z at p. 2).

The student began seventh grade in the district's middle school but shortly after refused to attend (Tr. p. 207-08; Parent Exs. D; Z at p. 2). He was referred by his outpatient providers to the children's partial hospitalization program (CPHP) at Bellevue Hospital due to worsening symptoms of depression and self-harm, as well as school refusal and risk-taking behaviors that included stealing and lying (Tr. pp. 207-08; Parent Exs. E at p. 1; Z at p.2; BB at p. 1): The student attended the CPHP on school days and holidays from October 23, 2019, through January 3, 2020 (Parent Ex. BB at p. 1). Upon discharge the student returned to the district middle school (Tr. p. 209). The district program comprised a 40-day individualized education and behavior support outpatient program for emotionally disturbed students who were unable to function in a less restrictive school environment (Parent Ex. AA).

While the student was attending the partial hospitalization program, the parent obtained a private neuropsychological evaluation of the student in December 2019 (Parent Ex. Z). , On December 20, 2019 a CSE convened and recommended that the student's disability classification be changed from other health impairment to emotional disturbance and his special education services be changed from ICT services in a general education classroom to a 12:1+1 special class in a New York State approved nonpublic day program (Tr. pp. 209; compare Parent Ex. D at pp. 1, 8; with Parent Ex. E at pp. 1, 9, 12-13). Identification of the nonpublic day school was deferred to the central based support team (CBST) (see Tr. pp. 27, 209, 229). The student returned to the partial hospitalization program from February 21, 2020, to March 18, 2020, at which time remote learning was initiated due to the COVID-19 pandemic (Tr. p. 210). The student's condition deteriorated during remote learning and he was admitted to the hospital on April 12, 2020 for three

weeks as an inpatient, following which he returned to the partial hospitalization program until July 10, 2020 (Tr. pp. 210-12, 228-29).

The CBST identified two approved nonpublic schools that agreed to accept the student on the condition that changes were made to either the recommended special class ratio or duration of counseling services (Parent Exs. EE at pp. 2-3; FF). The parents disagreed with the recommendations contained in the March 2020 IEP, as well as with the particular nonpublic school sites to which the student had been accepted for the 2020-21 school year (see Parent Exs. B at p. 5; F). On July 22, 2020 the parent signed an enrollment agreement with SUWS for the student to begin attending the program that same day (Parent Ex. M). There is no indication that the parents provided 10 days prior notice to the district of their intent to unilaterally place the student at SUWS, a residential wilderness program in North Carolina.

The student attended SUWS for 83 days from July 22, 2020, to October 12, 2020, at which point he transferred to the Wediko School (Tr. p. 70; Parent Exs. K at p. 1; Q at p. 1). By letter dated September 9, 2020 the student's mother advised the district that the student was attending SUWS and was scheduled to be discharged on October 6, 2020 (Parent Ex. GG). The parent noted that she had "tried in vain" to set up an CSE meeting over the summer to have the student's IEP modified so that he could attend a residential treatment center (id.). The parent requested help in obtaining an out of district residential placement for the student (id.). In a due process complaint notice, dated September 11, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (Parent Ex. B at p. 1). In a letter dated September 29, 2020, the parents provided an "updated" 10-day notice indicating their intent to unilaterally place the student at SUWS and Wediko (Parent Ex. HH).

An impartial hearing convened on February 24, 2021 and concluded on March 29, 2021, after three days of proceedings (Tr. pp. 1- 235).¹ In a final decision dated May 23, 2021, the IHO noted that at the impartial hearing the district did not present evidence during the proceeding (IHO Decision at pp. 3, 13). The IHO determined that the district failed to establish that it offered the student a FAPE for the 2020-21 school year (IHO Decision at pp. 13, 16). The IHO further found that the parent's unilateral placements at SUWS and Wediko were appropriate, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 15-16). As relief the IHO found that the parents were entitled to reimbursement for the services of an educational consultant to find programs for the student, reimbursement for the December 2019 private neuropsychological evaluation, as well as reimbursement for tuition and travel to the SUWS and Wediko programs (IHO Decision at pp. 16-17). The district appeals the IHO decision.

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parents' answer thereto is presumed and will not be recited here. The gravamen of the parties' dispute on appeal is whether SUWS was an appropriate placement and whether the IHO appropriately ordered the district to fund SUWS and the accompanying travel

¹ There are two page 37's in the hearing transcript.

expenses for the 2020-2021 school year (see FOFD at p. 17). The district challenges the aspects of the IHO's determination finding that SUWS offered specially designed instruction and individualized support to meet the student's needs, based on the alleged progress the student. The district argues the IHO should not have awarded tuition reimbursement for SUWS due to insufficient academic programming and insufficient counseling support by professional staff. The district further contends that the field staff with the student's in the wilderness who deliver the therapeutic programming have high school diplomas and otherwise lack appropriate credentials to support the needs of the student as specially designed instruction.

In an answer, the parents assert that the district raises its defenses to the parent's request for reimbursement for the first time on appeal and should have proffered rebuttal evidence during the impartial hearing to support its arguments. The parents assert that SUWS is state-approved in North Carolina and that case law supports reimbursement of a wilderness program under IDEA as a unilateral placement. Accordingly, the parents seek dismissal of the district's request for review.

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]).²

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

² 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).

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. Scope of Review

Initially I note that in its request for review, the district does not challenge the IHO's determinations that the district denied the student a FAPE for the 2020-21 school year, that Wediko was an appropriate unilateral placement for the student or that equitable considerations weighed in favor of the parents. As such, those determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the issue remaining in dispute in this appeal is whether the unilateral placement at SUWS was appropriate for the student for the 2020-21 school year.

B. Legal Framework

Turning to the parties dispute over whether SUWS 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). 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. Student's needs

Turning the facts in this proceeding, a discussion of the student's education needs is necessary to evaluate the appropriateness of the parent's unilateral placement of the student at SUWS for the 2020-21 school year. Although the appropriateness programming selected by the parents is in dispute, the evidence in the hearing record regarding the student's strengths and weaknesses is essentially uncontested.

According to the December 2019 neuropsychological evaluation, the student had previously exhibited difficulty maintaining friendships, understanding boundaries, and taking responsibility for behaviors, as well as non-compliance, suicidal ideation, self-harm, lying, cheating, stealing, school refusal, aggression, defiance, hyperactivity, isolating, and eloping (Parent Ex. Z at p. 2). At the time of the December 2019 neuropsychological evaluation the student was attending the CPHP at Bellevue on a full-time basis (Parent Ex. Z at p. 3). The evaluation was conducted on December 5, 7 and 14, 2019 and consisted of a parent interview, record review, observation, and discussion with the student's therapist (Parent Ex. Z at p. 4).

In addition, the evaluator administered the Wechsler Intelligence Scales for Children, Fifth Edition (WISC-V); Wechsler Individual Achievement Test, Third Edition (WIAT-III), Selected

Subtests; Kaufman Test of Educational Achievement, Third Edition (KTEA-3; Form A); Conners Continuous Performance Test, Third Edition (CPT-3); Clinical Evaluation of Language Fundamentals, Fifth Edition (CELF-5), Selected Subtests; Behavioral Assessment System for Children, Third Edition, Parent Rating Scales (BASC-3; PRS); Behavioral Assessment System for Children, Third Edition, Self-Report (BASC-3; SRP); and Million Pre-Adolescent Clinical Inventory (M-PACI) Sentence Completion Test- Adolescent (Parent Ex. Z at p. 4). The evaluator reported that the student exhibited frequent and unpredictable changes in affect over the course of testing, as well as "highly" variable alertness, engagement, and motivation (Parent Ex. Z at p. 4). In addition, the student displayed poor frustration tolerance and oppositional behavior when tasks were difficult or not interesting to him (Parent Ex. Z at p. 4). The evaluator opined that the results of the evaluation were likely an underestimate of the student's true potential due to his difficulties in participation and motivation (Parent Ex. Z at p. 5).

The student's overall cognitive ability fell in the high average range at the 81st percentile (Parent Ex. Z at p. 6). The evaluator reported that the student exhibited strong verbal comprehension skills, nonverbal skills, and the capacity for complex reasoning (Parent Ex. Z at p. 6). The student's attention skills were "highly" variable, and greatly impacted by his emotional state (Parent Ex. Z at p. 6). The evaluator noted that by parent account, the student exhibited considerable weakness in executive functioning, including problem solving, attentional control, behavioral control, and emotional control (Parent Ex. Z at p. 6). The student's routine information processing fell in the average range but was revealed as a personal weakness relative to his overall cognitive profile (Parent Ex. Z at p. 6). The evaluator opined that given his weakness in attention and executive functioning, the student needed a small, supportive classroom environment in order to be successful in school (Parent Ex. Z at p. 6).

The evaluator found that the student exhibited "uneven" academic skills (Parent Ex. Z at p. 6). His reading skills were his strongest, and the student had a "strong" capacity for higher order comprehension tasks (Parent Ex. Z at pp. 6-7). The evaluator indicated that he was unable to accurately assess the student's calculation skills due to his "poor" frustration tolerance (Parent Ex. Z at p. 7). The evaluator reported that the student's writing skills were his weakest skill set due to undeveloped mechanics, and difficulty with open ended tasks that required initiation, planning, and organization (Parent Ex. Z at p. 6).

The student's social-emotional functioning was significant for mood disturbance, suicidal ideation, self-harm, inattentiveness, impulsivity, oppositionality, strained peer relations (including being the victim of bullying), and school refusal (Parent Ex. Z at p. 7). Despite the student's strong cognitive potential, he was unable to demonstrate his abilities due to emotional barriers, which have impacted his academic functioning (Parent Ex. Z at p. 7). The student demonstrated low self-esteem and a negative outlook during a sentence completion activity (Parent Ex. Z at p. 7). The evaluator opined that given the longevity and severity of the student's emotional, social, and behavioral difficulties the student required a "supportive, therapeutic, and specialized school" within a comprehensive and integrated "therapeutic milieu" and that the student would be able to display his capabilities if he were appropriately supported in his educational environment (Parent Ex. Z at pp. 7-8). Finally, the evaluator reported that the student met the diagnostic criteria for diagnoses of major depressive disorder; disruptive mood dysregulation disorder; attention-deficit/hyperactivity disorder; combined presentation; oppositional defiant disorder; and specific learning disorder with impairment in written expression (Parent Ex. Z at p. 8).

According to the March 2020 IEP, the student was performing at or above grade level in all academic areas except math, and his academic functioning in the classroom was described as inconsistent (Parent Ex. F at p. 3). The student's classroom behavior varied between "engaged and gregarious" to "disruptive and rude," (*id.*). The IEP reflected the parents' concern that the student's emotional state impeded his ability to learn (*id.*). The student reportedly had a history of strained interpersonal relationships, severe emotional and behavioral issues, and poor frustration tolerance (*id.* at p. 4). The student had difficulty maintaining friendships and had frequent conflicts with peers, lacked self-control, tended to overreact, and struggled with transitions (*id.*). The student seemed unhappy most of the time, had poor self-esteem, and low self-confidence (*id.*). The student's parents were concerned about his ability to self-regulate and remain calm when engaged in nonpreferred tasks (Parent Ex. F at p. 4).

The student's March 2020 IEP featured seven annual goals that addressed the student's needs in the areas of math, writing, and social/emotional skills (Parent Ex. F at pp. 5-9). More specifically the goals targeted the student's ability to solve algebraic equations, take notes for a research project, follow the "writing process," respond to comprehension questions in writing, identify feelings and coping strategies, use coping strategies to avoid engaging in negative behaviors, and determine what regulating "tools" were beneficial given a certain set of circumstances (Parent Ex. F at pp. 5-9).

2. SUWS

Turning to whether the programming selected by the parents was appropriate, in her decision the IHO found that SUWS was specially designed to meet the student's social/emotional, and behavior needs by providing individualized support and therapeutic services in a small setting (IHO Decision at p. 15). Further, the IHO found that the goal of SUWS was to help the student regulate his emotions and behaviors in order to attend a traditional academic program (IHO Decision at p. 15). The IHO found that the student made enough progress at SUWS to be discharged into a traditional academic and therapeutic setting (IHO Decision at p. 15). On appeal the district argues that the IHO erred when she found that SUWS offered specially designed instruction and individualized support to meet the student's needs based on the alleged progress the student made at SUWS. The district further argues that that the IHO failed to account for the evidence in the hearing record that showed SUWS was inappropriate and that the parents failed to satisfy their burden.

There is merit to the district's challenge that the IHO's decision was insufficiently reasoned with respect to SUWS. The record basis underlying the IHO's analysis the appropriateness of SUWS is citation to a single page of the hearing transcript, wherein the clinical director at SUWS stated "[a]nother way we might say it is that we're giving a student an opportunity for their nervous system to settle down, and we're assessing and learning about a student and how they individually learn so that they've got a stronger threshold to reenter academic life" (IHO Decision at p. 15; *see* Tr. pp. 118). That rationale is insufficient to uphold the IHO's decision, and no such assessment of the student's learning by SUWS appears in the evidence, if one was conducted. As detailed below, there is not enough evidence otherwise in the hearing record to find that SUWS provides the student with educational instruction specially designed to meet his unique needs, supported by such services as were necessary to permit the student to benefit from instruction.

The clinical director described SUWS as a "wilderness therapy intervention program," which served adolescents struggling with depression, anxiety, behavior management, learning difficulties, emotional regulation, attachment issues, and substance abuse (Tr. p. 58-59). The clinical director stated that the program featured outdoor behavioral health (OBH), which consisted of interventions that focused on "harnessing the power of the wilderness" and "experiential activities in nature" to "effect insight, development and change in students" (Tr. p. 64; see Parent Ex. I at p. 1). The program also included "milieu therapy" which the clinical director described as an environment where therapeutic outcomes and goals were supported by all the daily activities (Tr. p. 65). According to the clinical director, OBH was typically used "to shift a person into a new state of awareness" or move from the denial aspect to the contemplation stage of change (Tr. pp 66-67). OBH was used to treat emotional dysregulation, learning difficulties, substance abuse, poor executive function and frustration tolerance (Tr. p. 67). The clinical director reported that OBH was "great for working on attachment to the self and others" and helped students develop self-confidence (Tr. p. 67).

The clinical director testified that as part of the admissions process the student took part in an individual assessment where SUWS staff determined that he would be placed in the "Seasons" program (Tr. p. 70). SUWS described Seasons as a program that focused on the unique development of the wilderness program's youngest students, ages 10-14, who needed a solid foundation so they could learn the building blocks of adolescence (Parent Ex. I at p. 1). According to the program description, the clinical team in Seasons provided a therapeutic wilderness milieu while developing specific interventions that had a strong neurodevelopmental basis (id.). Students in the Seasons program had the chance to participate in dynamic treatment activities such as a ropes course, Theraplay, expressive arts, mind-body therapies, and experiential interventions (Parent Ex. I at p. 1; see Parent Ex. J). The program description indicated that students in the program were part of a "close-knit milieu" where they built developmental skills and formed vital relationships (Parent Ex. I at p. 1). Some of the most common issues treated in the Seasons program were: low self-esteem, lack of self-awareness, poor or non-existent social skills, defiant behavior, difficulty maintaining positive peer relationships, learning differences and challenges, manipulation/entitlement/lying, and family conflict (id.). According to the program description, Seasons used an integrated assessment and evidence based clinical model to address the unique needs of each student and develop treatment plans accordingly (id. at p. 2). The program used a strengths-based approach and placed emphasis on healthy development, attachment styles, emotional regulation, mindfulness/awareness, and building internal and external resources for success in life after the program (id.). The program description stated that Seasons' clinical model involved an integration of experiential, relational and cognitive/behavioral theories under the umbrella of a greater family systems perspective (id.). The clinical director testified that the student was placed in the Seasons program due to his age, developmental maturity, and treatment needs (Tr. p. 71). She indicated that the Seasons program was coeducational and at times there were girls in the student's group (Tr. pp. 91-92).

The clinical director stated that the duration of OBH or wilderness therapy programs was typically between eight to twelve weeks and was individualized for each student (Tr. pp. 67-68). She testified that the student worked on a curriculum that was individualized for his needs by his therapist (Tr. p. 101). The student was with his group at all times, worked with them to prepare meals, set up camp, and hike from one campsite to the other, while wilderness therapy was

occurring "24/7" (Tr. pp. 68-69). Each group of six to eight students had between two and four field staff working with them (Tr. p. 94, 114-15).

According to the clinical director, when the student began attending the wilderness program he would often get into conflicts with others, shut down, and become frustrated, stubborn, argumentative, defiant, and uncooperative (Tr. p. 83). In addition, the student had difficulty taking the perspective of others or showing empathy (Tr. p. 83). The clinical director reported that SUWS addressed these issues by encouraging the student to produce an "I feel" statement to help orient him to his thoughts and feelings, to provide him a moment to calm himself, and to make a "mindful" choice in how to respond (Tr. p. 84).

The clinical director stated that the student was actively engaged in "milieu therapy" at all times (Tr. p. 108). She noted that he received individual therapy once per week from a provisionally licensed social worker and participated in weekly group therapy (Tr. pp. 72, 108). The clinical director reported that the student's therapist worked with him on the standard Seasons curriculum which included taking responsibility, resolving conflicts, building communication skills, engaging in experiential activities, participating in leadership activities, and helping others with organizational issues (Tr. p. 73). The therapist gave the student individual assignments for journal topics to help him understand his thoughts, feelings, choices, and patterns (Tr. p. 74). In addition, the student engaged in "psychoeducation," conflict resolution activities, and check-ins multiple times daily (Tr. pp. 108-09). The modalities used for student therapy included cognitive behavioral therapy (specifically acceptance and commitment), motivational interviewing, dialectical behavioral therapy, and experiential and play-oriented modalities (Tr. pp. 110, 116-17). There were no therapy notes or therapy progress documentation included in the record.

Notably the clinical director testified that SUWS did not employ any teachers, but that licensed clinical mental health counselors and licensed clinical social workers provided programming for the students (Tr. pp. 87-88). The student's October 12, 2020 SUWS report card, described SUWS as a program designed to be a "powerful intervention for students that need[ed] structure, supportive counseling, motivational improvement, and the development of self -esteem, self-reliance, and self-respect." (Parent Ex. K at p. 1). The report card indicated that all students were expected to complete "a rigorous course of experiential instruction" that addressed the "fundamental curriculum areas" of creative writing, healthy living, psychology, physical education, social studies, outdoor leadership, English, environmental studies, first aid, personal development, and home economics (Tr. p. 74; Parent Ex. K at p. 1).³ With regard to English, the SUWS clinical director testified that she "would n[o]t say that we teach it," but staff did speak to it when students were working on their assignments (Tr. p. 104). She explained that staff would speak to students about how they were constructing sentences, using grammar, and help them with their handwriting if necessary (Tr. pp. 104-05). The SUWS report card, which notably does

³ The report card stated that the students were "immersed" in the identified subjects and although they successfully completed "a written Search and Rescue Manual and Academic Curriculum," the majority of the students' knowledge was gained through experiential, hands on learning (Parent Ex. K at p. 1). The report card included course descriptions and the number of hours the student spent covering each course (Parent Ex. K at p. 1). The report card noted that it was SUWS's intention to provide the best possible documentation of coursework and time spent in each study area, in order to assist schools in assigning school credit to the student, if the institution could grant it (Parent Ex. K at p. 1).

not include any individualized assessment or grades, stated that the areas of study were taught "continuously or concurrently" and not as an unrelated bit of knowledge but "as an integrated part of the whole living experience" (Parent Ex. K at p. 1). The clinical director testified that progress at SUWS was not measured "through an academic lens," and that progress and grades were not documented, as SUWS was not an "academic institution" (Tr. pp. 105-06). The director testified that the report card was provided when students completed the program to provide "information regarding interventions and activities that are done in the field that are academically related" in order for subsequent academic programs to give students "some credit for the work" they performed at SUWS (Tr. pp. 74-75).

The course descriptions included in the SUWS report card provided a generic overview of each course but did not include any information specific to the student's participation in the courses the number of hours associated with each course description (Parent Ex. K at p. 2). For example, the "[c]reative [w]riting" course description indicated that each student kept a personal journal throughout the program about their experiences and internal processes and instructors assigned journal assignments designed to address "specific issues, beliefs and obstacles students [we]re dealing with" (Parent Ex. K at p. 2). In "[h]ealthy [l]iving" students were immersed in a healthy environment where they learned to work out interpersonal conflicts productively and participated in activities and games that taught them valuable lessons about life, responsibility, and cooperation (Parent Ex. K at p. 2). In "[p]sychology" students learned the fundamental principles of psychology by experiencing real-life situations that demanded integrity, honesty and responsibility (*id.*). In addition, students learned about how their behaviors affected others, how to engage in honest communication, and how to function healthier within their family (*id.*). By confronting their own beliefs and feelings students could "evaluate the effectiveness of patterns and choose more effective strategies" (Parent Ex. K at p. 2). In "[p]hysical [e]ducation" the students participated in almost daily exercise, were responsible for learning about safety as it related to being in the elements, and responsible for developing improved physical conditioning (*id.*). The students also learned the fundamentals of first aid in "[f]irst [a]id" class (*id.*). In "[p]ersonal [d]evelopment" students learned new and healthier ways of behaving by holding themselves accountable for their choices and how to "evaluate and take responsibility for past behaviors" (Parent Ex. K at p. 2). In "[s]ocial [s]ciences" students learned "problem solving, group dynamics, and effective communication" by "living closely with a small, tight-knit community" (Parent Ex. K at p. 2). The students were exposed to anthropological studies by practicing primitive survival skills and learned cultural and historical information regarding the Cherokee people (*id.*). In "[h]ome [e]conomics" students learned basic cooking techniques, repair/sewing, basic craft skills, and knife safety (*id.*). In addition, the report card indicated that in "English" students were responsible for a basic curriculum that included using correct grammar, sentence structure, and punctuation (*id.*). The students were expected to participate in group discussions as well as present an oral book report to peers and instructors (Parent Ex. K at p. 2). Lastly, in "[o]utdoor [l]eadership" students learned map, compass, navigation, and orienteering skills (*id.*). In effect, the student's "report card" could have been written for any student but for the number of hours that SUWS attributed to each course description (Parent Ex. K). The report card corroborates the district's argument that SUWS offered little instruction to the student that fit within academic areas and this is consistent with the clinical director's testified that the school does not have teachers and does not view student's through an academic lens. However, there is very limited evidence that a social worker works with the student on at least two sessions per week of unknown duration, which

although not directly academic, could fall into the category of a related service, and counseling is clearly relevant to the student's social emotional needs.

3. Progress

In the request for review the district argues that the SUWS report card was "devoid of any progress" and lacked specificity regarding how the student's progress was measured (Req. for Rev. at p. 8). 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"]). As described below, the progress reported by SUWS was subjective in nature, and there was no process used for measurement of progress described in the hearing record.

The SUWS discharge summary described the student's progress in the wilderness program relative to his mental health diagnoses (see Parent Ex. L). With respect to major depressive disorder, the discharge summary noted that staff had observed improvement in the student's mood and sense of well-being and the student reported an increase in mood confidence, and self-worth (Parent Ex. L at p. 1). The discharge summary indicated that while attending the SUWS program the student did not self-harm or express suicidal ideation (id.). The student demonstrated increased participation and engagement in program activities and schedules (id.). With respect to the student's diagnosis of oppositional defiant disorder, the discharge summary indicated that the student exhibited a reduction of aggressive and nonaggressive misbehavior and an increase in prosocial behavior (id.). The student was able to replace maladaptive behavior with prosocial skills and develop "increased relationship[s]" with staff and peers (id.). In addition, the student was better able to follow directions and was more respectful of others (id.). With respect to the student's diagnosis of generalized anxiety disorder, the discharge summary indicated that the student was able to reduce restlessness and symptoms associated with an anxiety disorder (id.). In addition, the student was able to increase his awareness surrounding coping and grounding skills to help cope with stress and anxiety (id.).

According to the SUWS clinical director, the student made progress with his ability to use coping skills and emotionally regulate himself, clearly state his thoughts and feelings and "work with people towards solutions rather than against" the system (Tr. p. 85). The student reportedly became more able to consider others' perspectives and manage his anxiety, exhibited improvement in his mood and self-esteem, and exhibited reduced aggressive and defiant behavior (Tr. p. 85). Contrary to the clinical director's testimony the district argues that the student was not able to communicate his thoughts and feelings clearly, because according to the report card the student's self-reported preferences were "A life," his abilities were "IDK", his strengths were "video games" and "pabling atentdon", and his needs were "sleep" and "better food" (Parent Ex. L at p. 2).

The discharge summary stated that the student would be discharged on October 12, 2020 and would transition to Wediko therapeutic boarding school (Parent Ex. L at p. 2). The prognosis indicated that the student would likely struggle with the transition to a therapeutic boarding school and identified the student's obstacles to transitioning as resistance to the new placement and

increased anxiety (Parent Ex. L at p. 2). However, SUWS staff determined the student was ready for the transition and would succeed once he had established a structured routine (Parent Ex. L at p. 2).

In the request for review, the district argues that hygiene was a struggle for the student, that the student regressed in the area of hygiene while attending SUWS, and that the IHO did not consider how SUWS's program negatively affected progress regarding the student's hygiene issues (Req. for Rev. at p. 8). The school guidance counselor at Wediko testified that she did not think that the wilderness program had affected the student's hygiene because according to the parents hygiene had "always" been a struggle for the student (Tr. p. 171,). The student's mother reported that hygiene had "always been a thing" for the student because he had " a lot of sensory "stuff" and did not like to shower but was a "bath person" (Tr. p. 219). The district argues that the record shows that the student used the wilderness experience as an excuse not to shower, and the student got out of the habit of showering, indicating regression in this area of need (Tr. p. 170, Parent Ex. R at p. 3). The SUWS clinical director testified that at SUWS, the students would come to base camp "at least" once every two weeks to shower (Tr. 68, 89). In between, when the students were in the field, they would shower using a bucket of water (Tr. pp. 89-90). However, the clinical director also stated that the expectation was for the students to shower "several" times a week, but that showering was not a daily requirement (Tr. p. 90). Little of the information in the hearing record is specific to this student's hygiene in particular other than that personal hygiene was an area of concern.

The clinical director reported that the student left SUWS because his treatment goals and objectives had been achieved and a new boarding school had been found (Tr. p. 86).

The totality of the circumstances in this case most strongly supports the conclusion that SUWS does not even view itself as an alternative schooling environment and the evidence shows that it did not provide an opportunity for the student to receive any educational instruction from teachers. Instead focused almost entirely on treating the student from a mental health perspective. There is evidence of therapy provided by a social worker two times per week, but the duration of the sessions is unknown and there are no notes or other objective documentation that might have been offered to support how the student benefited from that related service. The remaining evidence of "milieu therapy" is general and while it may be designed to foster healthy living, it is not a substitute for a program that assesses a student's learning, awards or tracks credit or support the development of educational skills other than perhaps some physical education and outdoor survival skills. The parents' statements that the institution is "state-approved" does not bear out in the record, at least in terms of a state educational authority. The parent's argument that the district failed to offer rebuttal evidence overlooks the fact that the burden of production and persuasion was placed on the parents with respect their unilateral placement of the student at SUWS without the district's consent and thus the district did not have a per se obligation to offer rebuttal evidence. It is beyond cavil in this case that the parents viewed SUWS as a form of residential placement for the student, and circuit courts addressing the question of residential placements have offered several varying and at times conflicting tests for whether a school district must pay for medical or mental health services in residential settings under IDEA (see Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1122 [2d Cir. 1997]; Kruelle v. New Castle Cnty. Sch. Dist., 642 F.2d 687, 694 [3d Cir. 1983] [applying an "inextricably intertwined" test noting that a 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]; Richardson Indep. Sch. Dist. v. Michael Z, 580 F.3d 286, 299 [5th Cir. 2009] [applying a primarily orientated test]; Clovis Unified Sch. Dist. v. California Off. of Admin. Hearings, 903 F.2d 635, 643 [9th Cir. 1990] [applying a "necessary for educational purposes" test]). All of the tests however have a clear relationship between the noneducational, medical or mental health services being provided and the educational opportunities such services were designed to support. Here the educational opportunities for this student at SUWS were insufficiently clear from the record, especially when the clinical personnel providing mental health services essentially conceded that SUWS does not attempt to view the student through an academic lens. There is no evidence of cooperation with a local district of location or other educational institution, or contact with the student's district of residence to ascertain educational objectives for the student, albeit objectives that could be reasonably attempted in a wilderness setting. Although I am sympathetic to the parent's plight in their efforts to obtain mental health services to support their son, I do not believe, under the circumstances of this case, that the student's placement at SUWS was appropriately designed to further him educationally and instead was putting that endeavor off for another institution to address at a later time. Accordingly, I am constrained to find that reimbursement for SUWS does not lie under the IDEA and that the IHO's decision in that respect must be reversed.

VII. Conclusion

Having determined that the evidence in the hearing record is insufficient to establish that the parent's unilateral placement of the student at SUWS for the 2020-21 school was appropriate, the necessary inquiry is at an end. The parents are not entitled to the requested reimbursement for the student's tuition and associated transportation costs related to his attendance at SUWS for the time period at issue.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 23, 2021, is modified, by reversing that portion which ordered the district to reimburse or directly pay the costs of SUWS from July 2020 through October 2020.

Dated: **Albany, New York**
 August 5, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER