



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-200

Application of a STUDENT WITH A DISABILITY, by his parents, 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:

The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tuneria R. Taylor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Seven Stars Residential Treatment Center (Seven Stars) and Oxbow Academy for the 2020-21 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The student has received diagnoses of attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder (ASD), and has a history of presenting with "emotional and behavioral dysregulation" (Parent Ex. D at p. 10). According to the parents, the student was found eligible for special education as a student with an emotional disability beginning in kindergarten (id. at pp. 2-3).¹

¹ The parent testified that since age three the student received physical therapy (PT), occupational therapy (OT), and speech-language therapy from both school and private therapists (Tr. p. 146).

During elementary school, the student's parents and teachers reported concerns about the student's "immature" and "acting out" behaviors, social functioning, and attention difficulties (*id.* at p. 3). Beginning in fourth grade and continuing through the seventh grade (2019-20 school year), the student attended a specialized nonpublic school for students with emotional and behavioral difficulties (*id.*).²

According to the parents, a CSE convened in April 2020, and, in a letter dated July 17, 2020, the parents expressed to the district their concern about the recommended program and assigned school location and asked the CSE to consider a private neuropsychological and educational evaluation report (Parent Exs. C at p. 1; I). According to the parents, the CSE reconvened in August 2020 to develop the student's IEP for the 2020-21 school year, at which time the CSE recommended an 8:1+1 special class placement (Parent Ex. C).

On September 6, 2020, the parents entered into an enrollment agreement with Seven Stars for the student's attendance beginning on September 23, 2020 (Parent Ex. N). In a letter dated September 9, 2020, the parents informed the district that they disagreed with the recommendations contained in the August 2020 IEP, and that they had not received notice of the particular public school site to which the district assigned the student to attend for the 2020-21 school year (Parent Ex. C). As a result, the parents notified the district of their intent to unilaterally place the student at Seven Stars in Utah and seek funding from the district for that placement (*id.*).³ In particular, the parents claimed that the August 2020 CSE's recommendation for an 8:1+1 special class in a district specialized school would not have met the student's "significant social/emotional and behavioral needs" (*id.* at p. 1). The student attended Seven Stars from September 23, 2020 until May 18, 2021 (Parent Exs. N; P at p. 1). Thereafter in May 2021, the parents entered into an enrollment agreement with Oxbow Academy in Utah for the student's attendance beginning on May 18, 2021 (*see* Parent Ex. R).⁴

In an amended due process complaint notice, dated May 20, 2021, 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).⁵ Specifically, the parents alleged that the August 2020 CSE failed to have sufficient evaluative information in all areas of the student's suspected disability and consider the recommendation for a residential placement in a June 2020 neuropsychological evaluation, and failed to have a qualified district representative and participation of the student's teachers/providers at the meeting (*id.* at pp. 3-4). Regarding the August 2020 IEP, among other claims, the parents

² The parent testified that some of the behaviors the student exhibited included verbal aggression at home and school, elopement at school, stealing, lying, physical aggression at home, and property damage at home and at school (Tr. p. 149).

³ Seven Stars is an out-of-State nonpublic residential school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

⁴ Oxbow Academy is an out-of-State nonpublic residential school which has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1[d], 200.7).

⁵ The parents initially filed a due process complaint notice dated January 14, 2021 (Parent Ex. A).

alleged that the present levels of performance were "insufficient" because they failed to contain a "baseline," the annual goals were vague and unmeasurable, the IEP failed to appropriately address the student's "severe social/emotional and behavioral needs" or provide a behavioral intervention plan (BIP), the recommended 8:1+1 special class failed to provide the student with individualized instruction, and the CSE failed to recommend a residential placement (id. at p. 4). As relief, the parents requested a finding that the district denied the student a FAPE for the 2020-21 school year, and tuition reimbursement for the unilateral placements of the student at both Seven Stars and Oxbow Academy (id. at pp. 4-5).

The parties participated in a status conference on June 29, 2022, and attempted to proceed with the hearing on January 27, 2023 and March 20, 2023 (Tr. pp. 1-23). The evidentiary phase of the proceeding convened on April 4, 2023 and concluded on May 12, 2023 after two days of hearings (Tr. pp. 24-203). In a decision dated August 14, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, noting that the district failed to present a defense to the parents' claims or provide any testimony or explanation for how the recommended educational program would enable the student to make progress (IHO Decision at pp. 7-8). Next, the IHO found that neither Seven Stars nor Oxbow Academy were appropriate unilateral placements for the student (IHO Decision at pp. 8-13). With regard to Seven Stars, the IHO found that the psychologist, founder, and executive director (director) had difficulty remembering what he reviewed to determine if the student was a fit for Seven Stars (id. at p. 9). The IHO described the individual cognitive behavioral therapy and group therapy that the director was involved in as the student's primary therapist, but when it came to educational aspects of the programming, the IHO noted that the director had difficulty remembering the identity of the student's instructors and academic subjects that the student took, and that paper-pencil packets were provided to the student, but there was no evidence showing that the educational aspects of the program were individually designed for the student (id. at pp. 10-11). The IHO also found that documentation showed that Seven Stars screens out and does not work with students who have needs like the student in this case, and that the director testified that the student's needs were beyond what Seven Stars had expected at the time of admission (id. at p. 11). After reviewing further testimony from a psychiatric nurse practitioner and the parent, the IHO found that the parents "failed to show with the curriculum offered to [the s]tudent; the methodologies used in the classroom; how the teacher adapted his instruction to meet [the s]tudent's unique needs; how the student was accommodated during instruction; the assessment strategies; or the educational services offered" (id. at p. 12). With regard to Oxbow Academy, the IHO determined that the executive director's testimony and the schedule entered into the hearing record failed to "show that [the s]tudent received any education instruction that was specifically designed to meet his unique needs" (id.). Accordingly, the IHO denied the parents' request for tuition reimbursement for Seven Stars and Oxbow Academy for the 2020-21 school year (id. at p. 13).

IV. Appeal for State-Level Review

The parents appeal. The essence of the parents' appeal is that the IHO incorrectly denied tuition reimbursement for Seven Stars and Oxbow Academy. The parents contend that the IHO incorrectly found that Seven Stars did not offer "specially designed educational instruction" to the student. They contend that the IHO "improperly discredit[ed] the extensive therapeutic supports Seven Stars provided [the student] throughout the day, which in part, was the education instruction specifically designed for [him]." The parents claim that the IHO called into question the credibility

of the Seven Stars director because he was unable to recall certain details during his testimony. In addition, the parents contend that since the Seven Stars director was no longer employed by Seven Stars, he was not an interested witness in the outcome of the proceeding. The parents assert that the student required a residential placement because his social/emotional needs "extended beyond the classroom," and needed to be addressed and stabilized before he could "benefit from academic instruction" and move to a "longer-term program."

Next, the parents argue that the IHO's finding that the student did not receive specially designed instruction at Oxbow Academy was not supported by the evidence in the hearing record. They contend that the student received and benefitted from "therapeutic and academic supports," which included individual and group therapy and "individualized" educational support at Oxbow Academy.

The parents also claim that the IHO erred in failing to consider equitable considerations. They claim that they provided the CSE with the private neuropsychological evaluation report, informed the CSE of their concerns pertaining to the recommended program, and timely informed the district of the student's enrollment in a residential school. As relief, the parents seek tuition reimbursement/direct funding for the tuition at both Seven Stars and Oxbow Academy for the 2020-21 school year.

In its answer, the district generally denies the material allegations contained in the request for review. The district claims that the IHO correctly found that the parents failed to establish that Seven Stars and Oxbow Academy were appropriate unilateral placements for the student.⁶ The district argues that although Seven Stars "may have provided some therapeutic benefit" to the student, the parents failed to offer any evidence of the curriculum, instruction, accommodations, assessments, or how the instruction met the student's needs. Next, the district asserts that the IHO correctly held that Oxbow Academy was not an appropriate unilateral placement because the student did not complete a lot of the academic credits during his time there. The district also argues that the parents did not demonstrate the actual special education services delivered to the student at Oxbow Academy. The district seeks to affirm the decision of the IHO.

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]).

⁶ The district does not cross-appeal from the IHO's finding that it denied the student a FAPE for the 2020-21 school year, and accordingly, that finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 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]).

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).⁷

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

Among the primary issues for resolution in this appeal is whether the IHO erred in determining that the parents failed to meet their burden to establish that Seven Stars and Oxbow Academy were appropriate unilateral placements to meet the student's unique needs. A careful and independent review of the evidence in the hearing record supports the IHO's conclusion that the parents did not show that the programming provided at Seven Stars and Oxbow Academy was reasonably calculated to enable the student to receive educational benefits.

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).

⁷ 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., 580 U.S. at 402).

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).

With respect to residential placements, the Second Circuit has stated that "[w]hile some children's disabilities may indeed be so acute as to require that they be educated in residential facilities, it is appropriate to proceed cautiously whenever considering such highly restrictive placements. . . . The norm in American public education is for children to be educated in day

programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). A residential placement is not appropriate unless it is required for a student to benefit from his or her educational program (M.H. v. Monroe-Woodbury Cent. Sch. Dist., 296 Fed. App'x 126, 128 [2d Cir. Oct. 7, 2008]; Walczak, 142 F.3d at 122; Mrs. B., 103 F.3d at 1121-22; see Educ. Law § 4402[2][b][2]; 34 CFR 300.104; 8 NYCRR 200.6[j][1][iii][d]). In general, the Second Circuit has required objective evidence that a student cannot obtain educational benefit in a less restrictive setting before finding that a residential placement is required by the IDEA (M.H., 296 Fed. App'x at 128; Walczak, 142 F.3d at 131-32; see MN v. Katonah Lewisboro Sch. Dist., 2020 WL 7496435, at *9 [S.D.N.Y. Dec. 21, 2020]). Additionally, State law requires that in order to properly recommend a residential placement, a district must make the determination that there is no appropriate non-residential school available consistent with the needs of the student (Educ. Law § 4402[2][b][2]).

Although regulations provide that a residential placement must be at no cost to the parent when it is necessary to provide special education and related services to a student with a disability, those regulations apply to the district's obligation to provide a FAPE rather than to a parent's unilateral placement (34 CFR 300.104; see Educ. Law §4402 [2.b][2]). Additionally, to the extent that the restrictiveness of a parental placement may be considered as a factor in determining whether the parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L., 744 F.3d at 830, 836-37; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). Additionally, while some Circuit Courts of Appeal have adopted separate tests to determine whether a unilateral residential placement is reimbursable under the IDEA, in determining the appropriateness of any unilateral placement, including a residential one, the Second Circuit has employed the analysis considering the "totality of the circumstances," with LRE being one factor (see D.D-S., 506 Fed. App'x at 82 [holding tuition reimbursement was not warranted for a residential placement because the parent did not present evidence that the placement was appropriate to address the student's educational needs]; Mrs. B., 103 F.3d at 1120-22; see also Jefferson County Sch. Dist. R-1 v. Elizabeth E., 702 F.3d 1227, 1238-39 [10th Cir. 2012], cert. denied 133 S. Ct. 2857 [2013] [holding that the essential question is whether the residential placement provides specially designed instruction and related services to meet the student's unique needs]).⁸

⁸ The Circuit Courts for the Third, Fifth, and Seventh circuits have adopted various tests for determining the appropriateness of a residential unilateral placement (Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 297-300, 298 n.8 [5th Cir. 2009] [holding that a residential placement must be essential for the student to receive meaningful educational benefits and primarily oriented toward enabling the student to receive an education]; Mary T. v. Sch. Dist., 575 F.3d 235, 242-44 [3d Cir. 2009] [holding that a residential placement must be necessary for educational purposes as opposed to being a response to medical or social/emotional problems segregable from the learning process]; Dale M. v. Bd. of Educ., 237 F.3d 813, 817 [7th Cir. 2001] [holding that the services provided by the residential placement must be primarily oriented toward enabling the student to obtain an education, rather than noneducational activities]).

A. Student's Needs

Prior to enrolling in either unilateral placement, in June 2020, the student underwent a private neuropsychological and educational evaluation (see Parent Ex. D). Although not in dispute on appeal, review of the student's needs as described therein provides background to assess the appropriateness of Seven Stars and Oxbow Academy.

The student presented for the neuropsychological evaluation due to a "complex neurodevelopmental and psychiatric history" that included a "history of social concerns, highly restricted and fixated areas of interest, and repetitive behaviors" (Parent Ex. D at p. 1). During the evaluation, the neuropsychologist observed the student as quiet and reserved, and reported that he did not appear to be interested in engaging socially with the evaluator (*id.* at p. 4). The neuropsychologist reported that the student exhibited "low frustration tolerance," difficulty persisting on tasks that were difficult, and impulsivity (*id.* at p. 5).

In connection with the student's intellectual functioning, the neuropsychologist administered the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V) to the student, which yielded a full-scale intelligence quotient (FSIQ) that fell in the low average range but with "significant and clinically meaningful discrepancies among indices" (Parent Ex. D at pp. 5-6, 10, 14-15).⁹ According to the neuropsychologist, the student's visual memory skills were "below age typical levels, and appeared to be negatively impacted by inattention and executive functioning weaknesses" (*id.*). Measures of the student's executive functioning, and fine and visual motor skills indicated to the neuropsychologist that the student demonstrated "[w]eaknesses in attention and executive functioning (task persistence, organization and planning, cognitive flexibility and shifting) and fine motor speed and dexterity" (*id.* at pp. 7, 8, 10, 16). Further, she noted that the student "displayed significant difficulties on more demanding tasks measuring executive functions, which are considered higher order thinking skills including organization, planning, mental flexibility, inhibition, and reasoning" (*id.* at p. 7).

An assessment of the student's academic functioning using the Kaufman Test of Educational Achievement-Third Edition (KTEA-3) indicated that the student's sight word reading and decoding, and spelling in isolation skills fell in the low average range, his reading comprehension skills were in the borderline range, and his math calculation skills fell within the "extremely low range" (Parent Ex. D at pp. 8, 17). The student's ability to learn, store, and recall auditory information was assessed with the California Verbal Learning Test, Children's Version (CVLT-C), yielding results in the extremely low range (*id.* at p. 6). With regard to the student's speech-language development, the evaluation report indicated that the student's receptive language skills appeared to be "intact" (*id.*). The student's expressive language was "notable for weak pragmatic skills; he did not spontaneously initiate social conversations" and he demonstrated repetitive or "stereotyped/scripted" language at times during the evaluation (*id.* at pp. 6, 15).

⁹ For example, the student's "verbal comprehension fell within the low average range, nonverbal reasoning fell within the average range, and visually based fluid reasoning fell within the borderline range" while "[w]orking memory and processing speed abilities fell within the low average and average range, respectively" (Parent Ex. D at p. 10).

Measures of the student's social, emotional, and behavioral functioning completed by the parents indicated that the student had "significant difficulties with externalizing problems, including hyperactivity and aggressive behaviors" (Parent Ex. D at p. 8). The parents also reported that the student exhibited "elevated symptoms of inattention, atypicality (e.g., has strange ideas, is suspicious of others, and seems unaware of others)," withdrawn behaviors, and elevated levels of depression (*id.* at pp. 8, 17-18). The parents described the student as having a "longstanding history of social difficulties, including difficulties developing and maintaining appropriate peer relationships, difficulties with reciprocal conversation, and delays in nonverbal means of communication," and a "history of restricted and repetitive behaviors, including intense and highly fixated interests, rigid thinking, sensory seeking behaviors, and unusual sensory interests" (*id.* at p. 9). The student's teachers revealed to the neuropsychologist that the student had difficulty "connecting with peers and adults at school," "rigid thinking," and had "highly restricted areas of interest" (*id.*). As reported by the parents, the student's adaptive skills were delayed, including social skills in the extremely low range; communication, functional academic, and self-direction abilities in the below average range; and practical skills in the low average range (*id.* at pp. 8-9, 18).

Based on the information obtained through the neuropsychological evaluation, the neuropsychologist determined that the student met the criteria for diagnoses of ASD and ADHD, combined presentation (Parent Ex. D at p. 10). The neuropsychologist opined that the student's behavioral and emotional concerns of "rigid thinking, social difficulties, highly restricted interests" and poor self-regulation impacted his "overall functioning" (*id.*).

B. Seven Stars

Turning to the parties' dispute over the IHO's finding regarding Seven Stars, the evidence in the hearing record described Seven Stars as a coeducational, short-to-mid-length stay (two to nine months), residential treatment center with a small, highly structured program for teens (Tr. pp. 173-74; Parent Ex. L). According to an undated document in a question and answer format that provided a description of the program specifics, Seven Stars specialized in treating teens with ADHD and autism "who [we]re struggling with the emotional, social, behavioral, learning, processing and executive function deficits associated with neurodevelopmental disorders" (Tr. p. 174; Parent Ex. L at pp. 1, 3; *see* Tr. p. 96; Parent Ex. F at p. 1). The document indicated there was a "stabilization and assessment" component together with "residential treatment, classroom academics, outdoor adventure and experiential therapy, social skills development, life skill building, community activities, academic development and behavioral shaping" (Parent Ex. L at p. 1).

The evidence in the hearing record shows that the student began attending Seven Stars on September 23, 2020 and continued until May 18, 2021 (Tr. p. 96; Parent Exs. F at p. 1; N). According to the Seven Stars director, the student had been exhibiting behaviors at home and school and "was very resistant to academics and was not making very much progress" at the time of admission (Tr. p. 175). Through interviews and a review of documentation, Seven Stars staff determined that the student was "likely to be a good fit for the program" (*id.*). The Seven Stars director testified that he was the student's primary therapist at Seven Stars, and he met with the

student twice weekly for individual sessions and once per week for a family therapy session (Tr. pp. 176-77). The Seven Stars director indicated that during the therapy sessions he used a cognitive behavioral therapy (CBT) approach, that focused on the student's distorted and rigid thinking patterns, specifically developing more flexibility, awareness and empathy of others, problem solving, impulse control, social skills, and general relationship skills (Tr. p. 177; see Tr. pp. 123, 141-42).¹⁰ During therapy sessions the student also worked on "family issues," including improving communication with his parents, showing more respect toward them, and following their directions, as the director testified that the student "tended to be very resistant toward his parents" (Tr. p. 178). He also testified that the student participated in group therapy sessions three times per week with other teenagers, which focused on social skills and relationship skills and used a token economy with targeted feedback on behaviors (Tr. pp. 179-80).

Regarding academic instruction, evidence in the hearing record indicated that Seven Stars partnered with another entity, "Dorius Academy," which was described as an accredited private school that developed an individualized academic program for each student (Parent Ex. L at p. 7).¹¹ According to the document, students spent six hours per day, five days per week in "academic activities," including "academic packet work and online testing in specific core courses" (id.). Academic hours included "study hall, health and fitness, art, as well as critical thinking and other elective credit" (id.). The document indicated that therapeutic and professional staff supported students in a "therapeutic classroom" with their individual packet work and provided tutoring as needed (id.). Staff taught academic and classroom study skills and students worked on their areas of difficulty, with a focus on helping students learn social/emotional and behavioral regulation in the classroom (id. at pp. 7, 9; see Tr. p. 116). Seven Stars identified "[t]he primary focus" of the academic program as building students' "coping strategies" to be applied in future academic environments (Parent Ex. L at p. 8).

The Seven Stars psychiatric nurse practitioner (nurse) testified that once students became comfortable with the routine at Seven Stars, they were "tested for aptitude" after which time "school packets" were "assembled to reflect the ability of that child" and included math, science, social studies, and English composition (Tr. pp. 94, 107, 128-31). A special education teacher developed the packets, which he facilitated in the Seven Stars classroom along with paraprofessional staff (Tr. pp. 107-08, 128-29, 182; see Parent Ex. L at p. 7). Additionally, the Seven Stars director stated that when complete, the packets were returned to Northridge Learning Center for the teachers to grade and that the students completed online progress and final assessments (Tr. p. 182). Further, Seven Stars used a computer platform, where staff including the special education teacher, provided progress notes (Tr. pp. 108-09).

The Seven Stars director testified that although he did not recall "exactly" in which subjects the student was participating, "generally, he would have been involved in" language arts, math, and science (Tr. p. 182). The director had observed the student during academic instruction "many

¹⁰ According to the director, the focus of CBT is to correct disordered thoughts and beliefs, and it uses behavioral methods to improve/encourage "wanted behaviors" (Tr. pp. 178-79).

¹¹ The director testified that Seven Stars had an "accredited academic program that was provided by a third party at Northridge Learning Center, which [wa]s an accredited school in Utah" (Tr. pp. 181-82).

times" and he testified that the student was "very resistant to doing academic work" (Tr. pp. 182-83). The director opined that the student was "very intelligent in some ways" but "really struggled with focus, and impulsivity, and academic motivation" (Tr. p. 183). According to the director, "staff usually had to be right there with [the student] to make sure that he was focusing on his work," and that he became "bored or frustrated," at which time he could be "fairly disruptive in the classroom," by "making noises or talking to other students or annoying other students" and he required "a lot of supervision and redirection in the classroom" (id.). The director indicated that while the student presented with "a lot of really difficult attitudes and . . . behaviors," he thought that the student "really benefitted from the supervision and structure" of Seven Stars (Tr. pp. 183-84). The director opined that the student showed "improvement in his ability to communicate about his needs, to advocate for himself appropriately," and the director "saw [the student's] social skills improving, improving his impulse control, . . . his ability to communicate with his family and have better relationships with his parents" (id.).

According to the Seven Stars nurse, she provided evaluative, diagnostic and medication treatment to the student while he was enrolled at Seven Stars once per week and "sometimes more often" to talk with the student regarding his emotions and behaviors (Tr. pp. 95-96, 102). The Seven Stars nurse testified that she observed the student to be bored in the classroom, not engage in academics, rip up packets, antagonize peers, and walk out of the classroom (Tr. pp. 104-05, 111-12). Further, she indicated that the student frequently exhibited behaviors including making inappropriate comments and sounds, using a "myriad of curse words," leaving the classroom to sit in the hallway, and frequently trying "to get out of all programming" (Tr. p. 105). The nurse indicated that her focus when working with the student was to address his impulsivity, negative verbalization, and impulsive verbal aggression (Tr. pp. 106, 120-21). When it came to working on homework, the Seven Stars nurse testified that the student required "significant one-on-one supervision and assistance" from the special education teacher or paraprofessional because without the assistance he did not have the ability to complete the work (Tr. pp. 108, 133-34).

Seven Stars authored an academic update for the student dated April 20, 2021 (Parent Ex. F). The academic update noted that upon presentation to Seven Stars, the student was described as angry and defensive (id. at p. 2). On his first day he tried to elope from the facility and he was aggressive, agitated, and threatening toward staff, which required physical restraints (id.). The update indicated that the student "frequently" made threatening statements, other inappropriate statements, and threats of physical aggression towards staff and students (id.). According to the report, those behaviors were the "primary target" of Seven Stars social and behavioral interventions, and had decreased by approximately 50 percent by the time of the update (id.). Socially, the academic report also indicated that the student preferred solitary activities, often avoided attending group therapy or psychoeducational groups, was "consistently antagonistic and threatening to his peers" and showed a "fair level of joy and excitement when he [was] able to provoke a peer or adult with his inappropriate or provocative behaviors" (id. at pp. 2-3). He was further described as being disruptive during group discussions and would either be asked to leave or left without permission (id. at p. 3). However, the academic update noted that these behaviors reduced by approximately 50 percent while at Seven Stars with interventions (id.). Academically, the student initially showed avoidance or refusal to complete academic tasks but had shown an increase in his ability to sit in a classroom and complete academic assignments (id.). The April 2021 academic update stated that the student had not been able to complete seventh grade level

course work and "functioned best" with fourth or fifth grade level course work (*id.*; see Tr. pp. 109-10, 134).

In the April 2021 academic update, the student self-reported that he struggled with math, avoided participating in the routine of school, and struggled with distractibility and poor focus in the classroom (Parent Ex. F at p. 3). The student explained that "immediate coaching and support from staff" was helpful together with "frequent" breaks (*id.*). Small classrooms of six or fewer students, extra tutoring, and using checklists and rewards were reportedly helpful (*id.*). Although the student stated he did not like rules, structure, and boundaries, those were helpful to him at Seven Stars (*id.*). The student stated he benefitted from 1:1 tutoring and assistance and learned better from lectures and listening to instruction rather than reading the text (*id.*). Overall, the academic update noted that the student was demonstrating "slow progress, in a very highly structured and specialized treatment environment" (Parent Ex. F at p. 4).¹²

Despite what the IHO described as "extensive documentary evidence and witness testimony in support of [the parents'] position that [the s]tudent's placement at Seven Stars was appropriate," the IHO determined that the parents failed to demonstrate "the curriculum offered to [the] [s]tudent; the methodologies used in the classroom; how the teacher adapted his instruction to meet [the] [s]tudent's unique needs; how the student was accommodated during instruction; the assessment strategies; or the educational services offered" (IHO Decision at p. 12). As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided 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). Regulations define 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]; see 34 CFR 300.39[b][3]). Specifically, the hearing record was devoid of evidence such as information from the Northridge Learning Center (or Dorius Academy) and/or the special education teacher who provided instruction to the student as to how the student's academic programming was determined; assessment results, and academic and therapeutic progress reports; information as to how Seven Stars addressed the student's academic deficits or modified instruction, or other information that described the nature of the specially designed instruction the student may have received. Accordingly, there is a sufficient basis in the hearing record to uphold the IHO's decision that the parents failed to meet their burden to show that Seven Stars was an appropriate unilateral placement for the student for the 2020-21 school year.

C. Oxbow Academy

Turning next to the challenges to the IHO's decision regarding Oxbow Academy, the hearing record reflects that the student began attending Oxbow Academy on May 18, 2021 (Tr. p. 39; Parent Ex. R at p. 1). According to the executive director, Oxbow Academy was composed of

¹² 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"]).

a clinical team, a residential team, and an academic team; within those teams were a clinical director and certified therapists who were responsible for the clinical aspects of residential care; a residential director with five house coordinators, supervisors and mentors; and an academic director and certified teaches who were responsible for carrying out the academic plans and issuing credits when they were earned (Tr. pp. 35, 37-38). The executive director testified that initially all students went through an evaluation process to determine what "they need[ed] as far as treatment" and if "they would benefit from residential care" (Tr. pp. 40-41). He testified that parents select a "third-party psychologist" to conduct the testing, provide recommendations, and determine "what the client needs" (Tr. pp. 41, 49). The executive director stated that the evaluation process was "approximately 90 days . . . depending on the student's willingness to engage in the process" (Tr. pp. 54-55). Additionally, Oxbow Academy used a tool called the Residential Emotional, Social, and Behavioral Assessment (RESBA) to measure daily the student's behavior, social interactions, "emotional abilities," and "emotional acuity" academically, residentially, and clinically (Tr. pp. 88-91). The executive director testified that this information was used to determine from a behavioral standpoint whether a student was progressing, and their strengths and weaknesses (Tr. p. 91).

A psychological evaluation and risk assessment was completed with respect to the student's 90-day evaluation period at Oxbow Academy (Parent Ex. G). According to the "[r]esidential [r]eview" portion of the report, within the first 30 days at Oxbow Academy the student was "fitting in with his peers" but engaged in "socially awkward behaviors" for attention (*id.* at p. 4). During the second 30 days of the evaluation, the student completed chores, schoolwork, and therapy in a timely manner but "struggled to maintain positive relationships with others" (*id.* at p. 5). The report indicated that the student was becoming critical of his peers, unwilling to accept feedback from peers without becoming argumentative, and easily irritated (*id.*). At the end of the first 60 days, the student's score on a measure of "distress and concern" was at a "high risk level" (*id.*). In the last 30 days of the evaluation, the report indicated that the student had shown "some signs of committing to his treatment" but had a difficult time "avoiding negative interactions" with peers, which the report indicated was "his biggest roadblock at Oxbow" (*id.*). Although the student continued to hide his emotions, he was more engaged in the group and able to acknowledge his mistakes (*id.*).

The executive director testified that during the evaluation phase, the student met with his primary therapist on a weekly basis and also was involved in various types of group therapy (Tr. pp. 56-57). Turning to Oxbow Academy's "[c]linical [r]eview," the student's primary therapist reported that the student had "difficulty with impulse control and engaging in appropriate social interaction" (Parent Ex. G at p. 9). The primary therapist reported on the student's clinical progress during the evaluation period and indicated that initially, the student completed "clinical assignments" and "was meeting milestones," but he would often sleep during group therapy sessions (*id.* at pp. 9-10). In the second month, the student was having difficulty managing his behaviors and maintaining relationships but by the end of the month had improved his behavior (*id.* at p. 9). During the last month, the student was doing well behaviorally, re-engaged in clinical work, earned a visit with his family, and was recommended to attend one of Oxbow's specific clinical programs (*id.* at pp. 9-10). The executive director recalled that the student's level of risk

for certain inappropriate behaviors was "moderate," meaning he would benefit from the residential care and treatment that Oxbow Academy provided (Tr. pp. 49, 52-53).

Turning to academic instruction, the executive director testified that Oxbow Academy was "a fully accredited high school" and that the student had "a certified teacher in his classroom" in addition to teacher aides, tutors, and residential staff who helped students "stay on task" (Tr. pp. 58-59, 61, 84-85). Upon entrance to Oxbow Academy students took a "MAP" standardized test to determine their academic abilities and class placements, which were repeated quarterly to determine progress (Tr. pp. 59, 87-88).¹³ Oxbow Academy also reviewed former grades and school transcripts to ensure that students started at "the right place" (Tr. p. 59). Students were on individual academic schedules because they were "all at different levels of academic proficiency" (Tr. p. 59; see Parent Ex. S). Oxbow Academy used a curriculum called "Edgenuity," which the executive director described as "electric or databased" that was "widely used and accepted" in Utah and which allowed teachers to put students "in their own place as far as where they're at academically" (Tr. p. 65). The executive director also stated that Oxbow Academy used a database called "BlueStep" to track academic progress including credits earned or assignments completed on a daily basis (Tr. pp. 85-86).

Regarding the student specifically, the executive director testified that the student received instruction from teachers including a special education teacher, and that he received tutoring (Tr. pp. 59-63). The student's academic schedule consisted of math and science on Mondays and Wednesdays; English and history on Tuesdays and Thursdays; and elective courses such as "music, equine, foods, art" on Fridays (Tr. pp. 64-66, 81; Parent Ex. S). The psychological evaluation and risk assessment report included an academic review of the student's first 90 days at Oxbow Academy, which indicated that during the first 30 days the student exhibited difficulty engaging in any academic work (Parent Ex. G at p. 6). The student was reported to have done "very little work, and wanted someone right next to him while doing his work (id.). Next, the student was reported to have completed "very little" work during the second 30-day period at Oxbow Academy, claiming that he could not complete the work and convincing himself that he could not learn (id. at pp. 6-7). Further, the student was reported to be "more aggressive in being sarcastic to his teachers and peers" and was "very degrading and manipulative to those around him" (id. at p. 7). However, the report indicated that the student had made some progress in his live reading course (id. at p. 7). During the last 30 days of the evaluation period, the report indicated that the student made "little to no progress academically," refused to open a book despite having "plenty of work" to complete, and would not do any work in the Edgenuity program (id. at p 7).

When asked if the student benefitted from the academic intervention and support provided at Oxbow Academy during the initial evaluation process, the executive director testified that although it "was a pretty small window" the student "was doing the work" and completed elective credits (Tr. pp. 63-64). The executive director testified that the student had "some learning challenges" but he attended class, and was trying and "engaged and working through the process"

¹³ There was no evidence in the hearing record that defined or specifically described the MAP assessment (see Tr. pp. 1-203; Parent Exs. A-T).

(Tr. p. 64). He testified that the student benefited from the academic intervention and was "successful in the academic environment" (id.).

In this case, review of the hearing record showed that it lacked information from the sources the executive director testified about, including results of the MAP assessment, and data from Edgenuity, BlueStep, and RESBA, all of which were in place to monitor and determine the student's academic and social/emotional performance and progress (see Tr. pp. 1-203; Parent Exs. A-T). The hearing record also lacked evidence such as how the teachers and paraprofessionals supported the student and the manner in which the instruction was provided to the student. Further, there was no information such as student goals or how the student's academic, adaptive, and executive functioning deficits were addressed. Accordingly, the evidence supports the IHO's finding that the parents failed to meet their burden to show that Oxbow Academy provided the student with specially designed instruction to meet his unique educational needs.

In conclusion regarding both Seven Stars and Oxbow Academy the 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 both Seven Stars and Oxbow Academy were insufficiently clear from the hearing record. Although evidence in the hearing record indicated that both residential unilateral placements used outside providers for the student's academic instruction, there was a lack of evidence about the level of involvement by the outside providers and the educational objectives for the student. Although I am sympathetic to the parents' 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 placements at either Seven Stars or Oxbow Academy were appropriately designed to further him educationally and instead was putting that endeavor off for another institution to address. Accordingly, I am constrained to find that reimbursement for Seven Stars and Oxbow Academy does not lie under the IDEA and that the IHO's decision in that respect must be upheld.

Lastly, if it has not done so already, or unless the parties otherwise agree, the CSE should reconvene and consider whether it is necessary to conduct a reevaluation of the student, including a functional behavioral assessment, psychiatric evaluation, or other appropriate evaluations, and in determining an appropriate placement in the least restrictive environment (LRE), consider the full continuum of placements, including placement in a nonpublic school or residential setting, if necessary (see 20 U.S.C. § 1412[a][5][A]; see 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.6[a][1]).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the parents failed to show that Seven Stars and Oxbow Academy were appropriate unilateral placements the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 20, 2023**

**JUSTYN P. BATES
STATE REVIEW OFFICER**