



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-295

Application of a STUDENT WITH A DISABILITY, by the 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 Offices of Neal Rosenberg, attorneys for petitioners, by Elissa Stern, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their child's tuition at Three Points Center (Three Points) for the 2022-23 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 student identifies as non-binary with preferred pronouns they/them and he/him (Parent Ex. B at p. 6).¹ The student attended a competitive public high school for high achieving students (district public high school) since ninth grade and was a "straight A" honors student (id.).

¹ The hearing record includes references to the student using different pronouns (see Tr. pp. 241-42, 368; Parent Exs. N at pp. 1, 5, 6, 7, 11, 14-16, 18-24; P at ¶ 18[a][i]; Q at ¶ 31; IHO Decision at pp. 8, 10-11, 16, 24-26). According to the testimony of the Three Points clinical director, the student's preferred pronouns were they/them (Tr. p. 242). The student's father testified that, although Three Points was an all-girls school, during the student's prior hospitalizations, the student was not comfortable with "alpha males" and the parents believed Three Points

The student had no prior medical or psychiatric history until fall 2021, when the parents found out that the student was engaging in self-harm in the form of "cutting" (Parent Exs. B at p. 6; P at ¶ 4). The student began seeing a therapist and after five months the parents believed the student had stopped cutting and was working on their coping skills (Parent Ex. B at p. 6). The student reportedly seemed happy and engaged in school and in their social life (id. at pp. 6-7).

The student attempted suicide on July 5, 2022, and was admitted to the hospital (Parent Exs. B at p. 7; P at ¶ 6). The student was discharged from the hospital on July 26, 2022 and enrolled in a public school partial hospitalization program (Parent Ex. P at ¶ 7). Later that day the student was admitted to the pediatric psychiatric unit at the hospital after telling a psychiatrist that they still had suicidal ideation and would follow through if given the opportunity (id.). The hospital recommended placement of the student in a facility providing a higher level of care (id. at ¶ 8).

On August 30, 2022, the student was admitted to ViewPoint Center (ViewPoint), an out-of-State psychiatric assessment center and treatment facility for adolescents, where they remained for six weeks (Parent Exs. B at p. 17; P at ¶ 8). Over the course of the student's stay at ViewPoint, a multidisciplinary report was developed, which included information about the student's treatment team, an August 31, 2022 initial psychiatric evaluation, a therapeutic course of treatment with program recommendations completed on October 20, 2022, a neuropsychological evaluation conducted on August 31, 2022 through October 10, 2022, an August 31, 2022 medical history and physical examination, a psychiatric discharge summary dated October 20, 2022, transition planning following discharge, and an "[u]nedited [a]utobiography" completed by the student (Parent Ex. B at pp. 3, 4, 6, 11, 16-42, 44-45, 47, 52-54, 56-59).² The student was reportedly enrolled in full programming including milieu activities, dialectical behavior therapy (DBT) and process groups, music therapy, meditation group, nursing activities, recreational therapy, academics, off campus outings, weekly nursing assessments, psychiatric medication management sessions, as well as individual and family therapies (id. at pp. 11-13; 49). While admitted to ViewPoint, the student was also evaluated by a neuropsychologist and psychiatrist, and received preliminary diagnoses of generalized anxiety disorder, social anxiety disorder, unspecified depressive disorder, gender dysphoria in adolescence, suicidal behavior, personal history of non-suicidal self-harm, and parent-child relational problems (id. at pp. 33, 47, 49). The student was discharged from ViewPoint on October 20, 2022 (id. at p. 2).

According to the student's father, following consultations with the student's team at ViewPoint, the parents decided to reenroll the student at their public high school with a lighter

would "cater better to [the student]'s emotional distress at the time" (Tr. p. 344). To the extent possible, the student will be referred to by their preferred pronouns in this decision or as "the student" when grammatically necessary.

² The ViewPoint multidisciplinary report was admitted into evidence with a date of August 31, 2022 in accordance with the parents' exhibit list. However, August 31, 2022 was the date the student was admitted to ViewPoint, and nearly all of the evaluative data contained therein was obtained between the student's admission and discharge on October 20, 2022 (see generally Parent Ex. B). The ViewPoint multidisciplinary report included eight sections, some of which were individually dated and others which were not. The document will be cited by the specific reports with their respective dates to the extent possible, otherwise undated individual reports will be cited by the completion date of the entire document, which was October 20, 2022.

course load that was prearranged with the district and have the student attend a rigorous outpatient therapy program (Parent Ex. P at ¶ 9). The student returned to their district public high school on October 24, 2022 (Tr. p. 55; Parent Ex. P at ¶ 10). On October 26, 2022, the student expressed thoughts of suicide to their therapist, and was admitted to the hospital (Parent Ex. P at ¶ 10).

On November 2, 2022, the parents signed an enrollment contract with Three Points, a therapeutic boarding school in North Carolina (Parent Ex. E).³ The student was placed at Three Points from November 4, 2022 through June 5, 2023 (Parent Exs. H; P at ¶¶ 10-11).

In a series of communications dated between November 7, 2022 through November 22, 2022, the parents, the district, and Three Points collaborated to ensure that the student would have the required coursework in order to receive a high school diploma from their public high school at the end of the 2022-23 school year (Parent Exs. J; K; P at ¶ 11).

In an email to the district dated November 28, 2022, the parents requested "an IEP meeting" for the student and stated that the email should be considered "informed consent" for the purpose of a special education evaluation (Parent Ex. C at pp. 3-4).

A CSE convened on January 11, 2023 and determined that the student was eligible for special education as a student with an emotional disability (IHO Ex. III).⁴ The January 2023 CSE recommended that the student attend a 12:1+1 special class in a nonpublic residential school, with the related services of one 30-minute session per week of individual counseling services and one 30-minute session per week of group counseling services (*id.* at pp. 9-10).⁵ The January 2023 CSE deferred the student's case to the district's central based support team (CBST) to identify an appropriate State-approved nonpublic residential school (Parent Exs. D at p. 1; P at ¶ 13).

In a January 29, 2023 letter, the parents notified the district that an appropriate residential nonpublic school had not yet been found for the student and that, until the district offered an appropriate IEP and placement, the student would continue at Three Points and they would seek reimbursement for tuition and room and board for the 2022-23 school year (Parent Ex. D at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated November 20, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (see generally Parent Ex. A). Specifically, the parents claimed that the district should have referred the student to the CSE prior to November 28, 2022 and that the district violated its child find

³ Three Points has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁴ The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

⁵ The January 2023 IEP reflects recommendations for both a residential placement and a special class in a specialized school (IHO Ex. III at pp. 9-10). However, the hearing record demonstrates that the January 2023 CSE recommended a residential placement for the student (Parent Ex. A at p. 1; D at p. 1; P at pp. 2-3; IHO Ex. III at pp. 3, 14, 16, 17).

obligations (*id.* at pp. 1, 2). Further, the parents asserted that the January 2023 CSE and resultant IEP were procedurally and substantively inadequate (*id.* at pp. 1-2). The parents alleged that the January 2023 CSE was improperly composed and that the January 2023 IEP failed to describe the student's complex needs and further failed to address the student's social/emotional and academic needs (*id.* at p. 2). The parents also asserted that the January 2023 IEP included goals and objectives that did not appropriately address this student's special education needs and were "extremely vague" (*id.*). The parents also alleged that, as of that date, the district had not identified a residential nonpublic school for the student (*id.* at pp. 1-2). The parents argued that they had no choice but to seek their own placement to address the student's special education needs, which included a small, structured class in a small, therapeutic residential school where the student's specific needs were addressed past the traditional school day (*id.* at p. 2). Thus, the parents contended that Three Points was an appropriate unilateral placement and, as relief, requested tuition reimbursement and/or prospective funding, including room and board, provision of transportation, and related services (*id.*).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on February 1, 2024 and concluded on March 29, 2024, after three nonconsecutive days of proceedings (Tr. pp. 21-461).⁶ In a decision dated May 31, 2024, the IHO found that the district did not offer the student a FAPE for the 2022-23 school year but that the parents did not demonstrate that Three Points was an appropriate unilateral placement (IHO Decision at pp. 21-22, 27). As a result, the IHO denied all of the parents' requested relief (*id.* at p. 28).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the district did not recommend a residential placement in the January 2023 IEP and erred in finding that Three Points was not an appropriate unilateral placement. The parents further assert that the IHO erred in failing to address their child find claims.

In an answer, the district responds to the parents' claims with denials of the material allegations and argues that the IHO's decision should be affirmed in all respects. The district initially asserts that it does not cross-appeal the IHO's determination that it failed to offer the student a FAPE for the 2022-23 school year and that, therefore, the parents' appeal of the IHO's failure to address their child find claims should not be addressed. The district further alleges that the IHO correctly determined that Three Points did not address the student's individual special education needs for the 2022-23 school year. With regard to equitable considerations, the district contends that the student was reenrolled in a district public school on October 24, 2022 and that the parents failed to timely provide 10-day written notice to the district of their intention to unilaterally enroll the student at Three Points for the remainder of the 2022-23 school year. The district further argues that the parents did not refer the student to the CSE until after the student had been removed from public school and enrolled at Three Points. With regard to the IHO's alleged factual errors and incorrect findings, the district alleges that they are of no consequence as

⁶ A prehearing conference was held on December 21, 2023 (Tr. pp. 1-20; IHO Ex. II).

the district has not cross-appealed the IHO's determination that it failed to offer the student a FAPE for the 2022-23 school year.

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. 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).

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).

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—Unilateral Placement

As noted above, contrary to the IHO's factual finding, the parties agree that the January 2023 CSE recommended a State-approved nonpublic residential school for the student for the remainder of the 2022-23 school year (IHO Ex. III at pp. 3, 9, 14, 16). Notwithstanding the IHO's error, the district does not appeal from the IHO's determination that it failed to offer a FAPE to the student for the 2022-23 school year (IHO Decision at pp. 21-22). Accordingly, this determination has become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]). Thus, it is unnecessary to address the parents' claims related to the district's denial of a FAPE for the 2022-23 school year and the crux of the dispute between the parties relates to the appropriateness of the parents' unilateral placement of the student at Three Points for the 2022-23 school year.

The IHO determined that the parents failed to meet their burden to establish that Three Points was an appropriate unilateral placement 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 Three Points 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). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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 (id. 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., 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). 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).

A. The Student's Needs

According to the August 31, 2022 initial psychiatric evaluation included in the Viewpoint multidisciplinary report, the student was self critical, rigid in thinking, critical of others, and strove for perfection (Parent Ex. B at p. 7). When they began the program, the student was angry and despondent and engaged in inappropriate behaviors to manage emotional dysregulation (id. at p. 11). The student had difficulty integrating socially and was isolated from others, using avoidance as a means to achieve distance from social situations (id. at pp. 11-12). The student's self-harm and inappropriate behaviors began to decrease after about two weeks, and they began to participate more in activities (id. at p. 12). The student was frustrated by situations that failed to adhere to expectations and by the unpredictability of human behavior (id.).

The October 2022 neuropsychological evaluation report indicated that the student's then-current presentation had adversely affected all areas of functioning, including home, social and academic settings (Parent Ex. B at p. 30). The report indicated that the student's general intelligence was well developed and their intellectual functioning was "sufficient enough to require treatment planning that include[d] them having opportunities to think abstractly and being presented with constant mental stimulation" (id. at pp. 30-31). The report further stated that academically, the student demonstrated advanced achievement, with their skills in reading, mathematics, and spelling "measured to be better-developed than the majority of same-aged peers" (id. at 32). The report also indicated that "[a]lthough scores suggest[ed] they should perform adequately, they may still have functional difficulty in large and more complex tasks given personal process speed limitations," noting that "[t]his [wa]s likely related more to emotional and

self-image concerns" (id.). The evaluation report stated that the student might struggle with schoolwork due to behavioral or emotional dysregulation rather than weaknesses related to achievement or cognitive abilities (id.). The evaluation report further noted that an emphasis on social/emotional needs, rather than academics "at this time, w[ould] open the potential to pursue education and a career of their choice" (id.). The report indicated that, given the student's "unique academic needs" they "should be offered opportunities to grow" and that "[c]urriculum should be based on development and ability more than age" (id.). The evaluation report recommended that, to the extent that it was clinically appropriate, the student should "attend classes with others who [we]re at the same developmental level" and that, "[g]iven the[student's] advanced achievement capacities, . . . they be challenged beyond that of their peers, if clinically appropriate" (id.). The evaluation report noted that central to the student's struggles was their "lack of a clear sense of self" (id. at p. 33). The concluding recommendations in the neuropsychological evaluation report stated that the student "require[d] a level of services that [wa]s more comprehensive than c[ould] be provided in an outpatient program, or day treatment program" and that the student "require[d] a multidisciplinary level of services addressing their difficulties" through "educational, residential, and community services" (id. at p. 33). The student reportedly did not possess the coping skills and resilience to function without this kind of significant structure and therapeutic assistance (id.). The evaluation report recommended that services be aimed at developing a strong sense of internal self-esteem, identity development, and social/emotional growth (id.). The report stated that the student "require[d] a well-structured residential treatment facility that w[ould] aid in teaching, modeling, and reinforcing adaptive living and coping skills until they can be more resilient" (id. at p. 36).

In conclusion, the October 2022 neuropsychological evaluation report indicated that the student's "education c[ould] not proceed successfully without taking into consideration the implication and impact of these disorders on their schooling" (Parent Ex. B at p. 36). The evaluator stated that the student's program should be "therapeutic in nature" and further expressed "concern that their presentation will continue to interfere with their achievement" and that the student would likely struggle "with their behavioral and emotional functioning in a peer classroom" (id.). According to the evaluation report, the student required "[f]lexibility in their academic environment" and the report recommended that the student "be officially identified as [a] student with special needs and receive an Individualized Education Program based on the local definition" (id.).

According to the ViewPoint psychiatric discharge summary, on October 10, 2022, the interdisciplinary treatment team completed an "end of assessment Multi-Disciplinary Review conference call with both parents" and their educational consultant "to review therapeutic and neuropsychological testing results, course of psychiatric treatment, medication management, and interdisciplinary diagnostic findings along with . . . recommendations for ongoing care" (Parent Ex. B at p. 49). The summary further stated that the treatment team addressed questions and concerns and discussed the disposition and transition plan (id.). The ViewPoint clinical team recommended "continued treatment in [a] residential setting to address [the student]'s psychiatric, therapeutic, and educational needs" noting that "[a]n ideal program would offer strong social emersion, be academically sophisticated (if clinically appropriate) as well as mentally stimulating (school, music, etc)" (id. at pp. 49-50). The student was discharged from ViewPoint on October 20, 2022 (id.).

B. Three Points

On November 4, 2022, the student was transported by a private crisis intervention team from a hospital in New York to Three Points in North Carolina (Parent Ex. M at pp. 1-2). Upon admission to Three Points, the student presented with suicidal ideations and attempted suicide, depressed and anxious mood, "near crippling social anxiety," and communication issues with their parents (Parent Ex. N at p. 1). The student was described as creative, intelligent, musically talented, and able to complete schoolwork easily (*id.*). The student exhibited a desire to connect with others, although they preferred one to one, rather than group interactions (*id.*).

On November 7, 2022, the parents, the then-current academic director (academic director 1) at Three Points, the assistant principal at the district public high school, and the school counselor at the district public high school began communicating via email about the "goal of [the student] receiving their diploma from [the district public high school]" (Parent Ex. J at p. 9).

On November 9, 2022, the school counselor at the district public high school forwarded his October 3, 2022 email to the parents—which had described the New York State high school graduation requirements—to academic director 1 at Three Points (Parent Ex. J at p. 5). The school counselor requested that academic director 1 send him a list of the classes the student was currently taking and to state whether the course was provided by Edgenuity or by Three Points (*id.*). The Three Points academic director 1 responded with the student's current course load and with changes that were to be made in light of the school counselor's email (*id.* at p. 4). All of the student's core academic courses were provided by Edgenuity, with "[e]quine" and physical education provided by Three Points staff (*id.*). On November 10, 2022, the school counselor replied to provide further clarification relative to required courses and credit values (*id.* at p. 3). The academic director 1 replied that the proposed new schedule would meet the student's graduation requirements "while keeping a good balance of high level AP coursework and some classes that w[ould] allow for a bit of an academic respite while [they] focus[] on the other aspects of our program" (*id.* at p. 2). On November 14, 2022, academic director 1 advised the school counselor that, after speaking with Three Points' accrediting body, the public high school needed to provide a letter on its letterhead describing that the credits earned from Three Points would be transferred to the public high school upon completion of the Three Points program (*id.* at pp. 1-2). Academic director 1 further explained that the student would have obtained sufficient credits to receive a diploma as of May 2022 and the accrediting body would "expect a diploma to be conferred," which would result in the student being unenrolled in May (*id.*). To prevent unenrollment, the accrediting body required an explanation from the district public high school (*id.*). On November 22, 2022, the public high school provided the requested letter (*id.* at p. 1; see Parent Ex. K).

A November 14, 2022 entry in the Three Points master treatment plan reflected that the student's "[m]aster [p]roblem" was a "[m]ajor depressive disorder, [s]ingle episode, [s]evere" (Parent Ex. N at p. 2). A long term goal in response to the student's "problem" was that the student would "report significant improvement in mood and sense of well-being" (*id.*). A November 2022 summary of progress indicated that the student arrived at Three Points on November 4, 2022, and was settling into the program fairly well (*id.* at p. 5). The progress note further stated that the student continued with self-harm behaviors without known suicidal ideations, engaged in conversation with the clinical therapist, and participated in group with minimal prompts (*id.*). With

regard to education, the summary reflected that the student "[wa]s brand new [to Three Points]" and "ha[d] started into online coursework and ha[d] no issues completing work, remaining on task, and progressing in the online courses" (id. at pp. 6, 8, 11).

The December 2022 Three Points master treatment plan progress report noted that the student was introverted, had difficulty expressing their emotions, and preferred one to one interaction rather than group interaction, and therefore became easily overwhelmed and used self-harming behaviors to cope (Parent Ex. N at p. 14). The student avoided sharing in group therapy and, instead of interacting, often put their head down on the table, aggressively snapped rubber bands on their skin, and engaged in self-harm by digging into their skin or picking at scabs until they bled (id.). The student had trouble communicating their thoughts and became frustrated easily, had difficulty seeing how their behaviors affected others, seemed to lack empathy, and minimized their mental health issues (id.). The master treatment plan included five short-term objectives that were created on December 20, 2022, which related to the student's "problem" (id. at p. 3). The goals targeted the student's ability to identify factors that contributed to their depressed mood, make a feeling statement during group therapy, make feeling statements in individual therapy, identify thinking errors that led to feelings of worthlessness, and report a gradual decrease in irritable mood (id.).

The January 2023 Three Points master treatment plan progress report noted that the student had made improvements over the review period as they engaged less in minimizing their behaviors and in self-harm behaviors, exhibited less social anxiety, and participated more in group therapy (Parent Ex. N at p. 11). The student engaged in less self-harm, practiced self-advocacy more, and their interactions with peers had increased (id.). The summary of progress with regard to education was carried over verbatim from the November 14, 2022 entry, which had been written 10 days after the student's admission to Three Points (id.).

The February 2023 Three Points master treatment plan progress report noted that the student continued to make "slow and steady progress with her treatment goals," and exhibited "fewer episodes of dysregulated behaviors" (Parent Ex. N at p. 14). The February 2023 progress note did not include any information about the student's educational programming (id.).

The March 2023 Three Points master treatment plan progress report noted that the student was exhibiting more effort to communicate and interact with others (Parent Ex. N at p. 14). The student appeared more "at ease" in social situations, and was better able to express their feelings, wants, and needs (id.). However, the student continued to engage in self-harm behaviors, struggled with significant cognitive distortions, and misinterpreted what others said (id.). The student reported little motivation to do their online schoolwork and had expressed an inability to talk with peers about topics the student found interesting due to differences in intelligence levels (id.). The summary of progress note related to education reflected in a March 21, 2023 entry that the student had been consistently working on their online programming and exhibiting less frustration about the "monotony" of the courses (id. at p. 15). The student continued to be an "extremely strong scholar," "driven," and was working "diligently" toward their academic goals (id.). The student achieved grades ranging from 91 to 97 in their courses comprising AP Government, AP English Literature, AP Economics, AP Expository Reading and Writing, and AP Personal Finance (id.). At the time of the final quarter, the student's report card reflected consistent grades from 88 to 97 in all core classes (Parent Ex. O at p. 3).

At the time of the impartial hearing, Three Points had a different academic director (academic director 2) who began in that role in late November 2022 (Tr. pp. 111-12; Parent Ex. Q at ¶ 3). Academic director 2 provided written direct testimony by affidavit, wherein she averred that she first became familiar with the student during the school's admissions process when she reviewed the ViewPoint multidisciplinary report, enrollment application, and spoke to the student's parents (*id.* at ¶20). Academic director 2 further testified on cross-examination that, based on review of the student's profile and report, the admissions team determined that the student would be appropriate for the program, however, academic director 2 then conceded that she was not part of the student's admission process (Tr. pp. 109-15). Academic director 2 testified that, when the student began attending Three Points, they frequently self-harmed, became easily dysregulated, and was "extremely disengaged" from both their therapy and academics (Parent Ex. Q at ¶¶ 22-23). However, the student was described as "extremely motivated," needing to be challenged academically to stay engaged (*id.* at ¶ 24).

According to academic director 2, the student received academic instruction provided by an online platform called Edgenuity, taking their courses in a computer lab with no more than eight other students and one teacher to monitor and support the students during online learning (Tr. pp. 95-96; Parent Ex. Q at ¶ 14). Academic director 2 stated that she was personally familiar with the classes the student took and the progress they made during their time at Three Points (*id.* at ¶ 19). Academic director 2 further testified that the online courses were provided by licensed content area instructors and supported by face-to-face teaching at Three Points (*id.* at ¶ 15). However, during cross-examination, academic director 2 admitted that she could not identify the names, licenses, or credentials of any of the online teachers providing online instruction to the student (Tr. pp. 90-91, 95). In addition, the online classes consisted of instruction using recorded video and therefore, there was no real time interaction with the student's primary instructor or any other students (Tr. p. 97).

Academic director 2 testified that when the student began attending Three Points, they needed one to one instruction due to their "severe emotional state," and the student's "disorders" directly impacted their learning and ability to function in school and as a result the student required a therapeutic setting and "flexibility in their academic environment" (Parent Ex. Q at ¶¶ 23-24). In addition, it was the student's goal to graduate with a diploma from the public high school, and therefore they required a "higher level of academic rigor" than was usual at Three Points (*id.* at ¶25). This was accomplished using instruction from Edgenuity because Three Points did not have teachers qualified to instruct the AP courses that the student required (Tr. pp. 123-24, 139; Parent Ex. Q at ¶¶ 25; 28-31).

Academic director 2 reported that the student had difficulty in large group settings, and that there was "no doubt" that they would become overwhelmed and reluctant to participate in learning in a larger group setting (Parent Ex. Q at ¶ 29). The Edgenuity platform allowed the student to work at their own pace, which was beneficial to the student as they could work ahead, which helped to improve the student's self-confidence (*id.* at ¶ 30). Academic director 2 testified that every four weeks students received progress reports from Edgenuity reflecting their progress in each class (*id.* at ¶ 16).⁸ In addition, academic director 2 stated that she observed and provided

⁸ The hearing record does not include any progress reports from Edgenuity.

support to students, reviewed their work, and communicated with their families "at least once a month" (*id.* at ¶ 17).

Academic director 2 testified that the student had access to the Edgenuity teachers through email, to ask questions or get clarification on lessons or assignments (Tr. p. 97; Parent Ex. Q at ¶ 25). In addition, academic director 2 provided direct testimony that Edgenuity sent weekly reports and that she was in "frequent contact" with Edgenuity staff to discuss the student's progress (Parent Ex. Q at ¶ 26). However, during cross-examination, academic director 2 recanted and admitted that she did not, in fact, ever communicate with the Edgenuity teachers regarding this student (Tr. pp. 121-23, 137-38).

Academic director 2 opined that Three Points met the student's education needs for the 2022-23 school year by supporting the student academically, socially, and emotionally; providing individualized instruction to address their learning needs, and individualized therapeutic support (Parent Ex. Q at ¶ 32). Academic director 2 asserted that, overall, the student made academic progress at Three Points as demonstrated by their high grades, which would not have been possible without the "intensive and individualized therapeutic interventions and academic support" they received at Three Points (*id.* at ¶ 31).

A report card from Three Points for the periods ending December 20, 2022, March 10, 2023, and May 26, 2023 listed the names of Three Points staff as the instructors; however, during cross examination, the Three Points staff member listed therein conceded that she was not the student's instructor and that it was just a policy that someone physically on the Three Points campus must be listed as such (Parent Ex. O at pp. 1-3; *see* Tr. pp. 88-93). Comments entered for the period ending March 10, 2023 for the classes AP English Literature and Expository Reading and Writing were authored by academic director 2 from Three Points, rather than an instructor from Edgenuity (Tr. p. 98; Parent Ex. O at p. 2). Academic director 2 testified that she did not teach the student but reviewed their work (Tr. pp. 97-102). With regard to AP US Government, academic director 2 was listed as the instructor on the report card because she "would have been the person responsible for looking at the Edgenuity course report, transferring that grade from that course report to the report card here on campus" (Tr. p. 117).

The Three Points clinical director, who was a clinical therapist at Three Points during the 2022-23 school year (clinical therapist), provided written testimony in an affidavit and averred that she conducted all individual, group, and family therapy for the student (Parent Ex. R at ¶¶ 3-4, 13). In addition, the clinical therapist stated that she "regularly spoke" with academic director 2 regarding the student's "academic needs" (*id.*). However, during cross-examination the clinical therapist testified that she did not know what the student's academic curriculum was and that she did not speak to academic director 1 about the student's academic needs (Tr. p. 231). The clinical therapist testified that she spoke to academic director 2 about the student's "emotional behavioral issues and about how to best support [the student] in the classroom setting" (Tr. pp. 231, 232).

The clinical therapist testified that, upon entry to Three Points, information regarding the student's needs was gathered from the student's ViewPoint multidisciplinary report and the student's parents (Parent Ex. R at ¶ 14). A master treatment plan was developed which included goals and interventions to address all of the student's social/emotional needs (Tr. p. 202; Parent Ex. R at ¶ 16). The clinical therapist testified that she used dyadic developmental psychotherapy

(DDP) which was a "therapeutic model" which was "based on relationship development rather than compliance," and focused on "developing trusting relationships" (Parent Ex. R at ¶ 17).⁹ The clinical director testified that the student received one 50-minute session per week of individual therapy, one 50-minute session per week of family therapy, one 50-minute session per weekday of group therapy, one 50-minute session per week of equine therapy, and participated in equine assisted activities throughout the week (*id.* at ¶ 18; *see* Tr. p. 252). The clinical therapist further testified that she provided additional support to the student in excess of the scheduled therapy, such as eating lunch with the student, taking walks and providing "ongoing support as needed during unstructured times of the day" (Parent Ex. R at ¶ 18, *see* Tr. pp. 252-53).

According to the clinical therapist's affidavit testimony, the student initially had difficulty participating in group therapy and expressing their emotions (Parent Ex. R at ¶ 20). The student was "easily overwhelmed," exhibited "avoidant behaviors," and would frequently put their head down during therapy, aggressively snap rubber bands on their skin, and engaged in "self-harm by picking scabs" (*id.*). The student reportedly lacked empathy, minimized their mental health issues, and had difficulty seeing how their behaviors affected others (*id.*).

The clinical therapist reported that, in February 2023, the staff observed "marked improvement" when the student exhibited increased willingness to participate in group therapy and began to feel comfortable and safe in the school environment, opening up to the therapeutic approach (Parent Ex. R at ¶ 21). The student exhibited a "significant" decrease in their self-harming behaviors and less social anxiety, as well as increased participation and communication in group therapy (*id.*). The student exhibited increased empathy and the ability to see other perspectives through demonstrating and instructing peers in skills in which the student displayed a specific talent, such as origami (*id.* at ¶ 22).

According to the clinical therapist, the student's therapy sessions focused on improving their mood and overall sense of well-being (Parent Ex. R at ¶ 24). The therapist worked on goals including expressing themselves effectively, regulating their mood, eliminating suicidal behavior, reducing and/or eliminating self-harm behaviors, developing flexible thinking patterns, and decreasing their irritable mood/agitation (*id.*). In addition, the student was working on increasing their self-confidence to complete daily living tasks such as ordering food at a restaurant or calling to make an appointment (*id.*).

The clinical therapist testified that she observed the student "make strong progress in all areas" due to the therapeutic residential environment, structure, routine, and consistent therapy; internalizing and practicing the skills they worked on during therapy (Parent Ex. R at ¶ 24).¹⁰ The

⁹ The recommendations set forth in the ViewPoint neuropsychological evaluation report stated that the student would benefit from counseling emphasizing DBT to help the student understand emotions and promote healthy relationships (Parent Ex. B at p. 35). The evaluator also recommended cognitive behavior therapy (CBT) techniques to help the student develop good coping skills (*id.*).

¹⁰ 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"]).

student was better able to self-advocate and was more willing to participate in activities (id. at ¶ 25).

By the end of the 2022-23 school year, the student was no longer exhibiting clinically significant mental health symptoms, was no longer self-harming, and had learned skills to manage their anxiety and depression, regulate their emotions, self-advocate, and participate socially (Tr. pp. 258-59, 261-62; Parent Ex. R at ¶ 27). In addition, whereas the student had previously been unable to speak before a small group, they now had improved to the point where they spoke at the Three Points high school graduation (Parent Ex. R at ¶ 27).

The clinical therapist asserted that the student had responded well to the Three Points model and milieu, the program had appropriately met the student's needs and provided the tools for the student to be successful, and as a result, the student graduated high school in June 2023 (Parent Ex. R at ¶ 28).

According to the student's June 2023 official high school transcript, the student had achieved straight As in all classes from ninth grade to twelfth grade, including honors level Biology, Chemistry, and Physics; and AP Psychology, French, English Language, English Literature, World History, and US Government; resulting in a GPA of 4.13 (Parent Ex. L). According to the parents, Three Points provided the student with the therapeutic and supportive setting necessary in order to learn and make progress as demonstrated by the student receiving straight As and graduating on time with their public-school diploma (Parent Ex. P at ¶ 22).

The IHO found that Three Points appeared to be focused on treating the student from a mental health perspective and facilitating a better working relationship and dialogue between the student and the parents (IHO Decision at p. 23). The IHO found that academic director 2 did not provide clarity relative to how the student's academics were affected by their mental and emotional health (id.). The IHO further found contradictions in academic director 2's written and live testimony and that the hearing record did not include notes or other objective documentation that supported how the student benefited from the various counseling services offered by Three Points (id. at p. 24). The IHO also noted that the parents selected Three Points without visiting it and that the parents were not aware that the academic program offered by Three Points for the student would be online instruction (id.; see Tr. p. 431). The IHO further determined that "[t]here was inadequate testimony to show the relationship between noneducational needs and 'the educational opportunities such services were designed to support'" and that the parent must show that the student required the program to receive educational benefit (IHO Decision at p. 24). The IHO also noted that according to the Second Circuit, "[t]he analysis must focus on whether full-time placement may be considered necessary for educational purposes or whether the residential placement is a response to medical, social, or emotional problems that are distinguishable from the learning process" (id.). The IHO then determined that the parents' unilateral enrollment of the student at Three Points was "clearly a response to social or emotional problems, which, by the record, show they are distinct from the learning process," that "[t]he two [we]re not inextricably intertwined" and that "[t]he non-severability of such needs [wa]s the very basis for holding that the services [we]re an essential prerequisite for learning" (id.). The IHO found that the parents failed to meet their burden and that the student excelled academically and had done so from their first days at Three Points (id.; see Parent Ex. N at p. 6).

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]). While I do not agree with all of the IHO's reasoning—including her apparent conclusion that the CSE did not recommend a residential placement for the student—the hearing record supports the IHO's overall determination that the parents did not meet their burden to prove that the student received specially designed instruction at Three Points.

With regard to the IHO's decision, she discussed the evidence at length, assessing the weight and credibility to be afforded to testimony and documents. For example, the IHO did not find academic director 2 to be a credible witness based on the witness's experience, inability to provide information about the student's program, and contradictions in her testimony and with documentary evidence (IHO Decision at pp. 8-11). As to the clinical therapist, the IHO found her testimony "not wholly reliable," noting contradictions between her affidavit and live testimony (id. at pp. 23-24). The IHO also noted that academic director 1 was unable to answer several questions regarding the student's programming, characterized the witness as "evasive," including as related to how Three Points addressed the student's academic challenges, and noted the witness's ownership interest in the private center facility (id. at pp. 14-16). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). Here, there is insufficient basis in the hearing record to disturb the IHO's credibility findings.

Review of the IHO's decision also shows that she applied the correct legal standard to assess the appropriateness of the unilateral placement (see IHO Decision at pp. 22-25). 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., 103 F.3d at 1122; 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, require a clear relationship between the noneducational, medical or mental health services being provided and the educational opportunities such services were designed to support (see S.B. v. New York City Dep't of Educ., 2022 WL 3997016, at *6 [S.D.N.Y. Sept. 1, 2022] [noting that requiring such a relationship between the noneducational supports and the educational

needs is "consistent with Second Circuit law, which focuses on 'whether the child requires the program to receive educational benefit'", quoting see Mrs. B., 103 F.3d at 1122).

Here, the totality of the circumstances shows that Three Points was not an alternative schooling environment and, instead, was primarily focused on treating the student from a mental health perspective, such that, in the parent's words, the student's attendance at Three Points was more of "a medical leave of absence" (Parent Ex. C at p. 1). There was no evidence that Three Points provided instruction to the student, communicated or collaborated with Edgenuity, or that academic director 2 communicated with the clinical staff about the student's educational programming. Nor did the hearing record include information such as how the student's teachers supported the student and the manner in which instruction was provided to the student. Although academic director 1 testified that the teachers at Three Points were "given direct training related to trauma and attachment issues, and other things related to dyadic development psychotherapy" (Tr. p. 268-69), it is undisputed that those teachers did not provide instruction to the student and there was no similar evidence presented about the training provided to Edgenuity instructors or staff that was available while the student was engaging in the video classes presented by Edgenuity. While it was not impermissible for Three Points to provide instruction by a third party such as Edgenuity, there is no evidence in the hearing record to establish any interaction between the instructors at Edgenuity with the academic and clinical staff at Three Points about the student's educational objectives.

Although I am sympathetic to the parents' plight in their efforts to obtain mental health services to support the student, taking into account the totality of the circumstances, there is insufficient basis to disturb the IHO's determination that the parents did not meet their burden to prove that the student's placement at Three Points was appropriately designed to further them educationally. Accordingly, I am constrained to find that reimbursement for Three Points does not lie under the IDEA and that the IHO's decision must be upheld.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parents failed to show that Three Points was an appropriate unilateral placement, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
August 9, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**