STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Greenwich Board of Education

Appearing on behalf of the Student:	Naomi Nova, Esq. Meredith C. Braxton, Esq. Meredith C. Braxton, Esq., LLC 280 Railroad Avenue, Suite 205 Greenwich, CT 06830
Appearing on behalf of the Board:	Abby Wadler, Esq. Town of Greenwich Law Department 101 Field Point Road Greenwich, CT 06830
Appearing before:	Melinda A. Powell, Esq. Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. What is the Student's Stay Put placement? [1]
2. Are the Parents entitled to an independent educational evaluation (IEE) at public expense in the area of neuropsychology including academics?
3. Did the September 14, 2022[2] IEP offer a free appropriate public education (FAPE)?
4. Did the Board provide FAPE during the 2021-2022 school year?
5. Did the Board provide FAPE during the Student's inpatient hospitalization of September –December 2020?
6. Did the Board provide FAPE to the Student during the remainder of the 2020-2021 school year?

[1]Two of the issues in this matter were heard on a bifurcated basis. The IEE issue was adjudicated on an expedited basis at Parent's request because the Hearing Officer determined the circumstances warranted an expedited ruling, including the fact that the Parent alleged that the Student had not been evaluated since late 2018, an evaluator had immediate openings, and evidence on an IEE case can be completed quickly. Furthermore, the usual timeframe is 45 days when a Board files for Due Process to defend its evaluation. The parties requested a one-day extension to issue the decision, due to the lack of receipt of the Transcript until December 22, 2022. The IEE issue was decided by Order on December 23, 2022, and is incorporated herein. The Hearing Officer also issued an Order regarding the Stay Put placement on January 16, 2023, and an Order on the Board's Motion for Clarification on February 10, 2023. Those orders are not incorporated in this final decision. The Stay Put order is now moot because a final decision has been rendered.

[2] The Parties referred to this IEP as the September 14, 2022 IEP. September 14, 2022 is actually the date of the PPT meeting where the IEP was developed. The date on the IEP is September 28, 2022. (P-7A) Issue #3 was the crux and focus of the evidence in this case.

7. Did the Board comply with procedural requirements of the IDEA from November 7, 2020 to present?
8. If not, did any procedural violations rise to the level of a denial of FAPE?
9. Did the Board comply with the LRE (least restrictive environment) requirements of the IDEA? [3]
10. Does the Hearing Officer have jurisdiction over the Section 504 claim?
11. If so, did the Board violate Section 504 of the Rehabilitation Act by failing to provide regular or special education and related aids and services that were designed to meet the Student's educational needs on an equal basis as non-disabled students?
12. Is the Student entitled to compensatory education as a remedy?
13. If so, what is the remedy that should be awarded?
14. If the Hearing Officer finds that the Board did not offer FAPE in the September 2022 IEP, should the Hearing Officer order placement at a residential therapeutic program at a school that specializes in treating RAD in adolescents as a remedy? [4]
15. If the Hearing Officer finds that the Board did not offer FAPE in the September 2022 IEP, should the Hearing Officer order placement Three Points as a remedy?
16. Did the Board offer FAPE during the 2022-2023 school year?
17. If not, are the Parents entitled to reimbursement for their unilateral placement at Three Points Center?
18. Should the Student be placed at Three Points Center?

PROCEDURAL HISTORY:

The Student initiated this special education due process matter on November 7, 2022, and the initial mailing date was January 21, 2023. Evidence on Stay Put and the IEE issues was heard on November 30, 2022, December 2, December 12, December 14, December 16, December 20, 2022, and January 3, 2023. The morning session of the December 12th hearing transcript was entirely lost and not recoverable due to a computer crash on the court monitor's computer. After discussion with the Hearing Officer, the Parties agreed to submit a stipulation regarding the testimony which occurred on that day by former Winrose alternative high school Principal and Greenwich out of district program administrator, ("Admin. 1"), and the Director of Hope Academy ("Hope"). That stipulation was submitted via email to the Hearing Officer on December 16, 2022. Hearings on the issues related to FAPE and the request for reimbursement/ unilateral placement were held on January 12, January 19, February 1, 6, 24, March 1 and 21, 2023. A thirty-day extension for additional hearing dates was granted until February 20, 2023. On January 23, 2023, the Hearing Officer issued her Memorandum of Decision and Order Re: Stay Put. The Hearing Officer concluded that "that the student's stay put placement is a Board funded educational program, with a therapeutic component, such as would be available to the Student at a Connecticut licensed, approved, therapeutic day school. If there is a residential, unilateral placement by the Parent, the Board's funding obligation must cover the cost of academic instruction, individual counseling and group counseling, per the Board's program in the 4/11/22 IEP."[5] The Board filed a Motion for Clarification, and the Hearing Officer

[3] Issues 9, 10-11 were not briefed and therefore, deemed abandoned. As to Issues 4, 5 and 6, Parent's Brief does not clearly address whether the program at the therapeutic day school (at Spire) was an appropriate placement at the time the PPT met to develop the IEPs for 2020-2021 or 2021-2022 school years.

[4] Issues 14-18 arose as a result of the Parent's second due process complaint filing dated February 14, 2023, designated as Case No. 23-0345 and then consolidated. A prehearing conference was held on March 1, 2023, and the issues were added at that time.

[5] That Stay Put order was an interim order which governed the Student's placement during the due process

issued an Order on that motion on February 10, 2023. The Parent requested to amend the complaint on February 9, 2023, and the Board objected. The Parent then filed an identical Due Process complaint with the SDE on February 15, 2023, which was assigned to Hearing Officer Jerman. Due to the subsequent filing, the Hearing Officer denied the request to amend as moot. Thereafter, on February 28, 2023, Hearing Officer Jerman transferred 23-0345 to this Hearing Officer for consolidation, and additional issues were joined in the hearing. The new complaint and consolidation resulted in a reset of the mailing date until April 30, 2023. The Parents filed a motion to cancel a PPT scheduled for January 31, 2023, and then withdrew the motion after the PPT occurred, filing a State Complaint instead. After the amendment to the due process complaint, an extension was granted so that the parties could submit their briefs and provide time for the Hearing Officer to consider the briefs and prepare a decision, until May 5, 2023. This date was further extended for seven days (to May 12, 2023) to complete the decision.

Parent Exhibits P1 through P-7A, and P-8 through P-11, were entered as full exhibits. However, the audio tape of the PPT meeting (P-7B) was admitted only for the Parent's use as impeachment evidence, if needed. The exhibit was not used during testimony, so it was not considered by the Hearing Officer. P-7C was excluded by the Hearing Officer, as an unauthenticated transcript of that audio recording, that was proffered to be used by Parent's counsel as a reference tool, to locate timestamps in the audio recording for impeachment, if needed. P-12 was excluded but the Hearing Officer took administrative notice of the document, which was an OSERS Letter to Baus dated 2/23/15. P-13 was admitted for a limited purpose. P-14 through P-63 were admitted as full exhibits. B-1 through B-111 were admitted as full exhibits. The first Due Process Request was entered as a Hearing Officer exhibit HO-1, and the Second Due Process Request was entered as HO-2.

The following witnesses testified: former Winrose alternative high school Principal and Greenwich out of district program administrator, ("Admin 1"), the current out of district program administrator ("Admin 2"), out of district program Administrator (2020-2021) ("Admin 3"), Student's private therapist ("Therapist"); the Student's former counselor at Spire school (Counselor), a private placement counselor hired by the Parents ("Placement Counselor"), the Director of Three Points Center in Utah ("Director"), the Special Education Director at Three Points ("Sped. Dir."), a psychiatrist who completed an evaluation of the Student at Board request ("Psychiatrist")[6] , the Executive Director of Links Academy ("Links"), a psychologist hired by the Parent to complete an evaluation in January 2023 ("Psych."), Special Education Director of Hope Academy ("Hope"), the Student's mother ("Parent") and the Board's homebound tutor ("Tutor"). Other witnesses included the Board's BCBA and the Director of Cooperative Educational services, but their testimony did not assist the Hearing Officer for the issues presented.

STATEMENT OF JURISDICTION:

This matter was heard as a contested case pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 United States Code ("U.S.C.") Sections 1400 et seq. and related regulations, Connecticut General Statutes ("C.G.S.") Section 10-76h and related regulations, and in accordance with the Connecticut Uniform Administrative Procedure Act ("U.A.P.A."), C.G.S. Sections 4-176e to 4-178 inclusive, Section 4-181a and Section 4-186.

FINDINGS OF FACT:

After considering all the evidence submitted by the parties, including documentary evidence and the testimony of witnesses, I find the following facts:

proceedings. Once a final decision is rendered, the Student's stay put placement may change.

[6] The Hearing Officer overruled the Parent's objection to the admission of the psychiatric report and testimony of the psychiatrist. The Hearing Officer did not permit the psychiatrist to testify until the Parents had been provided a copy of the report that met timelines in state regulations.

1. The Student is eligible for special education and related services under the IDEA, under the category Emotional Disturbance. The Student is sixteen years old. (Id.) (P-5)

FAPE

2. Student has formal diagnoses of reactive attachment disorder ("RAD"), oppositional defiant disorder, mood disorder, and a history of complex trauma. (B-48 and B-49). His diagnosis of RAD stems from his early childhood adoption and foster care history. (Parent 2/1/23, p. 59; Ex. B-92, p. 7; Psychiatrist, 12/16/22, pp. 14-15) All of his IEPs since January 23, 2020, reflect a therapeutic educational placement. (B-37, pp. 13; B-24, p. 15; B-19, p. 16; B-7. P. 16; B-5, p.15; B-2, p.15; and P-7, p. 16)

3. He is very fragile and intensely anxious, depressed, and overly focused on and sensitive to issues of attachment/adoption/family. There is a complex history of trauma. Student has some deep-rooted issues with his self-worth and identity, frequently experiences (although then minimizes and avoids) sad and anxious thoughts, and easily feels less than, worried, and then marginalized, and isolates. Over the past few years, Student has suffered from a severe and debilitating withdrawal from school and has made limited progress in the multiple treatment programs and school programs he has attended. Student is also sweet and smart and has the potential to be academically and socially successful. (B-48, B-49, B-92)

4. Student's current symptoms appear to meet the criteria for a co-diagnosis of Traits of Reactive Attachment Disorder and related Post Traumatic Stress Disorder; Generalized Anxiety Disorder; and Major Depressive Disorder, recurrent, moderate. Student is unable to regulate his thinking and behavior at school, at home, and with peers. When stressed, he feels reactively internally overwhelmed and disorganized and externally avoidant and overflows and becomes hopeless and physically aggressive toward himself or verbally aggressive toward his family. Student's distress causes him to misperceive reality and further contributes to his inability to consistently attend and engage in classes, with peers, and in extracurricular activities. (B-92)

5. The Student had been placed at the Spire School ("Spire"), a therapeutic day school in Connecticut, by the PPT at a meeting held on November 26, 2019 (B-41, pp. 3-4)

6. The Student's private therapist in 2019, had recommended a therapeutic day program, but one different than the Student ultimately attended. (B-48, p. 2)

7. In mid-2020, Admin 3 took over as the case manager. (Admin 3 1/19/23, p.31). For out-placed students, the Board would monitor progress by checkpoints listed on the IEP. The Board would also hold check-in meetings about a student's lack of attendance, but largely the Board relied on the school, Spire, to reach out. (Id., p. 35)

8. The Student was hospitalized due to his disabilities at Newport Academy in the fall of 2020. The Student left Newport in December 2020 due to insurance issues (Parent, 2/6/23, p. 63) (Admin 3, 1/19/23, p. 68)

9. The December 22, 2020 IEP[7] explains that his goals and objectives were suspended during the hospitalization and due to his return, the goals would be worked on. Toward this end, new goals were added to help him with skills to get his work completed and to provide a 1:1 counseling goal instead of only having group counseling. (B-24)

10. The meeting notice for the December 22, 2020 PPT omitted the fact that the PPT intended to discuss ESY. The minutes reflect a discussion about ESY eligibility to be addressed at a subsequent meeting.

[7] This is the first IEP which falls within the two-year statute of limitations.

(B-24, p. 5)

11. The Discharge Summary from Newport recommended a return to Spire. (B-24, p. 5, B-103)

12. The Student attended an IOP (intensive outpatient program) upon his return to Spire (B-24, p. 5). This occurred after school. (Admin 3, 1/19/23 pp. 52-56) He was not making meaningful progress at that time. (Id. pp. 56-57) He was not completing work and had insufficient grades. (Id., p. 61). In April 2021, all his classes on his progress report were listed as incomplete. (B-18)

13. The Student participated in a full-day PHP (partial hospitalization program) starting on March 18, 2021 (B-19, p. 6) The minutes and discussion indicate lack of work completion and some non-attendance, but also note that the Student was socializing instead of completing work. (Id.)

14. The Board initiated the process to obtain updated triennial testing. (B-19) Even though the Student had been in and out of school, language skills are generally maintained even if a Student is not attending. Updated testing in that area was not required. (Admin 3, 1/19/23 p. 64) However, math required consistency, so absences could affect whether a student is performing on grade level or not. (Id.) Consent was provided by the Parent for updated math and social emotional assessments on May 3, 2021. (B-17)

15. The April 6, 2021 IEP was updated from the prior IEP and described the Student's functioning at that time. His therapist from the PHP attended and provided input. He was completing some work in the PHP. He was attending some of his counseling sessions, mostly virtually. He tended to avoid in-person sessions. The team noticed a downward change in his behavior after the February 2021 school break. He was recommended for ESY. (B-19) However, he did not return to school for the remainder of the year. (B-19)

16. By September 2021, the Spire team members were concerned that Spire was not an appropriate placement. (Counselor, 2/1/23, p. 21) Moreover, Student's disrespectful behavior was impacting other students in their program. (P-24, p. 10)

17. On October 15, 2021, Counselor advised that the school administration would need to meet with Parent due to Student's lack of progress and ongoing attendance issues. (P-24 at p. 26) Based upon weekly contact with Spire, the Board was on notice of the Student's continued lack of progress and severity of his needs. No PPTs were initiated by the Board. (Admin 1, 1/12/23, p. 29)

18. Triennial testing was due by February 2022 but not conducted due to the Student being "emotionally unavailable" for testing. (B-7).

19. The annual review meeting was held on February 28, 2022.[8] The Board would generally rely on the school to collect data on the Student's progress, and consistent access to the services can affect performance on the goals and objectives. If a student's emotional disability limits his ability to engage, then a PPT could reconvene and discuss placement. (Admin 1, 1/12/23, pp. 30-31) However, the Board did not look back at prior progress or lack thereof in a previous year to determine if there was a trend of progress. (Id. pp. 36-37; 50-51) Additionally, in the weeks leading up to that PPT, Student had not spent a full day at The Spire School since February 9, 2022—a fact which Admin 1 admitted was concerning. (Admin 1, 1/12/23, p. 40) Moreover, Student had still not earned enough credits to be considered a 10th grader. (B-7 at p. 5) Placement was not discussed until April 11, 2022.

[8] The transcript of 1/12/23 misidentifies the 2/28/22 PPT as having occurred in 2020. There was no PPT on 2/28/20 in the Record. Pages 43-44 also misidentify the witness as Stacey Heilig[e]nthaler, instead of the correct witness, Admin 1. Dr. Heilig[e]nthaler did not testify in this hearing.

20. Counselor has a master's degree in counseling with a concentration in school counseling. She worked at a social services agency for many years, providing intensive in-home adolescent psychiatric services. She was the Director for three programs for parents in Danbury, worked as a counselor at New Milford High School and worked in a residential therapeutic boarding school in Bethlehem, CT and at Spire, for three years. (Counselor, 2/1/23)

21. At Spire she has weekly sessions with the students on her case load, runs therapeutic groups four days a week and provides as-needed support as a life coach. She was promoted to lead life coach and serves as part of the leadership team. She became aware of Student in August 2020, but he was at Newport Academy; she emailed school work for him. He returned in December 2020. She was aware of his diagnosis. She is very familiar with Reactive Attachment Disorder although candidly admitted she was not an expert. She explained that: (1) Student's disability impacts his ability to attend to and engage with students at Spire; (2) he had an inability to form connections with the staff, teachers, life coaches; (3) he showed depressed moods, avoidance, irritability and anger, which were barriers for him; (4) he had resistance to form and initiate relationships with teachers. Occasionally he would, but on the whole, he was not successful; (5) no significant changes were made to his program while at Spire. For a time, she employed a strategy to motivate the Student (time with friends) but then he stopped buying into it. Overall, the Student engaged for a couple of weeks in the winter, but he did not engage otherwise. She and the Parent were hoping that the day program would be effective but ultimately it was not. (Counselor, 2/1/23, pp. 15-21)

22. Counselor opined that the Student was not thriving, even with all the supports that were given; a higher level of care was needed. She also described Spire's involvement in a placement decision: that they would not recommend a specific school but would provide opinions about what was working or not. (Id, pp. 22-23)

23. At the April 11, 2022 PPT meeting, the Parent requested a residential placement. (B-5). The Spire team reported at the PPT: a consistent decline in academic progress; that he did not go to class and would not meet with Counselor. (Counselor, 2/1/23, p. 26) Parent reported that the Student did not care about school. In this timeframe, Spire was unable to meet his needs; he was not performing academically and not earning any credits; the Counselor tried to engage the Student and he would not engage. He would not be successful in another day program. Admin 1 refused the request, because "educational performance supported the refusal"; no evaluator had provided a report that opined a residential placement was needed; and the Student was not attending his classes but "coming into the building." Admin 1 offered to pay for the educational portion of a residential placement, but not the therapeutic portion, and suggested looking for other therapeutic day schools. Admin 1 requested permission from the Parent for a psychiatric consult, but the Parent did not sign consent at that time. (B-5, p.5, B-4)

24. The Parent unilaterally placed the student at a residential therapeutic school in Missouri, CALO, in April 2022. (B-5)(Admin 1) The Parents had to remove the Student from CALO after serious incident(s) occurred involving staff and the Student. An investigation occurred by the State of Missouri child welfare department which substantiated allegations against a staff member for physical maltreatment of the Student. (Parent, 1/3/23, p. 14).

25. A PPT was held on June 21, 2022 after the Student's return (Parent, 1/3/23, p. 15) The PPT minutes indicate Greenwich High School as his placement, but that was just a placeholder or interim placement used by Admin 1 until another school could be identified. The Board recommended a program at Aspire which was not in operation yet, but was anticipated by October 2022. The minutes state the team would reconvene for further discussion. (Admin 1, 1/12/23, pp. 69-73).

26. Parent visited the Aspire-Stamford location, which at that time mainly served students with Autism.

(Parent, 1/3/23, pp. 72-73). She met with the program director. (Id.) No PPTs were scheduled over the summer, even though the Parent began inquiring in early August about the necessity for one. In trying to answer the question why no PPT was scheduled before school started, Admin 1 stated "people don't work in August so maybe that's why. I don't know." (Id., p. 82) No reasoning otherwise was provided by the Board (Admin 1, 1/12/23)

27. The Student was unsuccessful in his ESY program that summer. The Board acknowledged that he was not accessing his Links tutoring services (Admin 1, 1/12/23, p. 81), nor was he able to access the Board's special education teacher or counselor that summer. (Stipulation of Facts, Admin 1, ¶ 4).

28. On September 1, 2022, the Parent requested a therapeutic residential school placement in Waterford, Connecticut, which was a state approved special education school, via email. (B-101, p. 8)

29. A PPT was held on September 14, 2022 (after the public school calendar had started), and an IEP was drafted. (P-7A). Another request for the psychiatric consult was made to the Parent, and she signed consent on September 28, 2022. (P-7A, pp.1-2, 16)

30. There are errors in the PPT minutes from that meeting concerning who was in attendance and their titles. (Admin 1, 1/12/23, p. 84) The Student's school was misidentified as Spire, and the following school year as "Aspire." Admin 2 was invited to attend but had not yet started his employment. The minutes can be misconstrued to state that CES and High Roads were recommended, but that was a prior conversation from the Spring. CES and High Roads were not recommended. The Student would not have had access to extracurricular clubs and activities, although that opportunity is stated on the LRE checklist. (P-16, Admin 1, 1/12/23 pp. 87, 91-92.)

31. The Links representative told the PPT the Student needed more support than they could give; he had left tutoring without permission. And then two weeks later he again eloped. (Admin 1, 1/12/23, pp. 91-95)

32. Counselor attended the September 2022 PPT and told the team the Student would not be successful in a day school environment. During testimony she explained her reasoning. In a residential school, it is more difficult for a student to use avoidance since the program is 24/7. The 24/7 supervision provides the structure needed, and the student cannot avoid therapeutic engagement like in a therapeutic day school just by leaving school.

33. At the time of the September 2022 PPT, Counselor had worked with the Student for a lengthy amount of time (that he was not hospitalized). She worked with him from January 2021 through April 2022. She had observed his behavior in the school environment.

34. In this IEP, there were no progress reports that had showed meaningful or even limited progress. (P-7A). A grade report from Spire School at the end of the 21-22 school year confirms that the Student has only received 3.25 credits toward high school graduation, even though he was enrolled as a Student there for two school years. (B-96, p. 42.) The PPT minutes, nor the testimony at the hearing show whether the Student was being promoted to the next grade. The Board had him listed as an 11th grader on the IEP, but Spire still had him as a 9th grader. (B-96, p. 42). He has not completed enough high school credits to be an 11th grader.

35. There were no updated present levels of performance in the goal areas. (P-7A). There are no details or additions to this IEP to allow the reader of it to understand the current functioning of this Student. The IEP states he is enrolled in classes that he was not enrolled in. It states that the student attends English class "consistently", participation has "decreased in the last month" (p. 17) Admin 1 could not recall what she communicated to Admin 2 about any concerns or priorities regarding the Student

when he took over her position. (Admin 1, 1/12/23, p. 100)

36. Admin 1 stated that Counselor did not have knowledge of the Student, except from the prior spring, (but admitted that he did not have any significant progress since then). (Admin 1, 1/12/23, p. 96).

37. No witnesses from Aspire testified in the hearing, and no detailed information regarding the program was presented by the Board.

38. No other placement PPTs have been held since then.

39. The Parent has been cooperative with the Board, and visited the programs it referred her to, even though she believed that the Student needs a residential placement. (Admin 2, 12/12/22, p. 13, 23) (Parent, 1/3/23, p.19, 20, 21, 9) (P-20, p. 8) (Statement of Facts, Hope, ¶¶ 22-24). She was able to get the Student to attend virtual meetings with Aspire on three separate occasions between November 7 and November 17– none of which went forward due to calendaring confusion (Admin 2, 12/12/22, pp. 23-27). The Student also participated in an interview with the Board's consulting psychiatrist. (B-92). As of January 19, 2023, even with the support of the school psychologist, BCBA, home tutor, and parents, Student was still not ready to participate in an interview for therapeutic day schools, although it was something the Board offered to worked toward. (Admin 2, 1/19/23, pp. 15-16)

40. During the hearing process, the Parents retained a psychologist to attempt a psycho-educational evaluation of the Student, or alternatively, complete a program review. Psych. has a doctorate in psychology and is licensed as a professional counselor. (P-59) He has a decade of experience working in a school setting as a teacher, school counselor, and school administrator. (Psych., 2/24/23, p. 8) Psych. has performed over a thousand evaluations throughout his career, and hundreds of those evaluations involved students with RAD. (Psych., 2/24/23 p. 8). He recommended: (1) enrollment in a nurturing residential program specializing in adoption trauma; (2) a small school environment that can provide one-to-one assistance and emotional regulation breaks as needed; (3) the ability to monitor for suicide and self-harm; (4) individual therapy, combined with a structured approach, that targets Student's developmental trauma, mood dysregulation, relationship issues, and self-esteem; (5) group therapy, done through a relational group approach, that builds on Student's individual therapy; (6) family therapy; (7) the ability to manage medications; (8) experiential therapies, such as animal therapy, EMDR, neurofeedback, and yoga; (9) a biophysical diet and exercise; and (10) a cognitive educational/psychoeducational evaluation performed with Student's participation. (P-61, pp. 23-25)

41. The Parent cooperated sufficiently with the Board's requests to look at different schools. (Parent, Admin 2, P-22). Despite her efforts, the Student refused any in-person visits to complete the intake process. (Parent)

42. The Board maintained that its placement recommendation was Aspire, notwithstanding its inquiries to facilitate other options. (P-21). After the Student continued to be at home, the Parent told the Board she would accept the Aspire placement and the Student would need transportation. She had no other choice. However, placement had not been initiated though, due to the Parent's communication over the summer that it was inappropriate. The Board then reached out again to Aspire around October 14, 2022. (P-21)

43. During the hearing process, home tutoring was then scheduled, but not put in place until December 2022. However, the family was ill on the first day of tutoring, December 5, 2022, and cancelled the session (B-96 at 151; Parent) The following week, the tutor had a scheduling complication (Admin 2, 12/12/22, p. 15). Tutoring began on December 19, 2022. The Student was not responsive and was uncooperative for the first few sessions (Tutor, 1/19/23, p. 101). Eventually he came out of his room, and filled out a preference form (Tutor, 1/19/23, p. 111). The Tutor attempted to engage the Student

by setting a three-minute timer with the expectation that the Student could disengage after that amount of time. (Tutor, 1/19/23, p. 112) During a session, the Student threatened to pour boiling water on her, via text, to his mother. (Tutor, 1/19/23, pp. 104-5). No actual tutoring sessions, i.e., delivery of educational content, occurred. Likewise, the Student did not engage in offered counseling sessions. (Admin 2, 12/12/22, pp. 15-16)

44. In the Fall of 2022, the Board retained a psychiatrist. He holds Board Certifications in Pediatrics, Psychiatry and Neurology as well as Child and Adolescent Psychiatry (B-98, p. 3). He interviewed the Student as part of a Psychiatric Consult in October 2022 (B-92, p. 1). In addition to interviewing the Student, Psychiatrist spoke with Parent, the Western Middle School, Spire, and reviewed a part of the Student's file (B-92, p. 1, Psychiatrist, 12/16/22, p. 12). The report has inaccurate information concerning the Student's attendance and experience at CALO. The report recommends more partial hospital support *or* intensive outpatient therapy and in-home therapies (to be completed outside of the school day) in combination with a small therapeutic day school.

45. Before the psychiatric consult in the fall of 2022, the Student was evaluated by Dr. Barbara Kapenatanakes on January 21, 2020. That evaluation was not able to be completed due to the Student's refusal to attend more than one session. Dr. Kapenatanakes remarked that Student's emotional instability was immediately apparent. She stated, "It was painful to watch, as Student was clearly in so much pain so much of the time, and his anxiety over the session was overwhelming."; he cried uncontrollably. While she did not offer an opinion on diagnosis, she corroborated other records and information that Student had attachment difficulty, depression, and oppositional behavior, related to his adoption. (B-40)

46. Around the time that they were filing for Due Process, Parents hired an education consultant, to identify an appropriate educational placement for Student. (Placement Counselor, 2/6/23, p. 16) He is qualified to provide placement recommendations: he has a master's degree in social work, has worked as a therapist in outpatient and residential settings, has twenty-five years of experience as a program designer and facilitator for therapeutic schools, and founded an educational consultant company that focuses on therapeutic programs and services. (Placement Counselor, 2/6/23, p. 6) As a clinician, Placement Counselor worked in male adolescent programs, including wilderness, residential, step-down, and state-level program (Placement Counselor, 2/6/23, p. 8). The Student's disabilities affect the ability to engage and perform in an educational setting.

47. Placement Counselor considers a range of therapeutic services in the community to intensive residential placements. (Placement Counselor, 2/6/23, p. 11) With respect to identifying a program specific to a student with adoption trauma and RAD, like the Student, behaviors these students exhibit may be perceived as primarily oppositional. Without knowledge in adoption/ trauma a program may respond in a punitive type of way, which further exacerbates the problem for a student like this." (Placement Counselor, 2/6/23, p. 13)

48. There are only a few places in the country that can meet the needs of a student with adoption trauma who is presenting with the issues that the Student exhibits. (Placement Counselor, 2/6/23, p. 23)

49. Despite his inquiry of a potential appropriate program in Connecticut, the program reported it could not accept Student because of the degree to which he was self-harming, and the severity of Student's self-harming behaviors and anxiety are considered contraindications to admission by many programs (Placement Counselor, 2/6/23, p. 32). Placement Counselor investigated three potential placements for Student, and recommended a program at Three Points Center ("Three Points") in Hurricane, UT. The other two potential placements became non-viable because one was at capacity, and the other incorporated a behavioral model. (Placement Counselor, 2/6/23, p. 24)

50. The prior history of failures at Spire and Newport Academy supported stepping up to a residential setting. (Placement Counselor, 2/6/23, p. 25)

51. Student was formally accepted into Three Points in December 2022 (during the Stay-Put portion of the bifurcated Due Process hearing), and Director, the CEO and Founder of Three Points Center, testified regarding the scope of their program on December 12, 2022. (Director, 12/12/22, pp. 76, 83). Three Points is licensed as both a therapeutic boarding school and as a residential treatment center by the State of Utah. (Director, 12/12/22, p. 93) It is a year-round school, and most of their students reach their grade level within 14 months. (Director, 12/12/22, p. 101) An interview is not required; most of their students are clinically unavailable to participate in an interview prior to enrollment and forcing them to interview could exacerbate their RAD symptoms (Director, 12/12/22, pp. 89-90) Instead, they heavily rely on prior academic and clinical records, and detailed information from the parents regarding behaviors and risks. (Director, 12/12/22, p. 88)

52. Three Points uses a relational model grounded in Dyadic Developmental Psychotherapy (DDP). (Director, 12/12/22, p. 79) DDP focuses on creating a safe atmosphere, through establishing relationships that are non-challenging and non-confrontative, addressing reflexive defensiveness, and promoting empathy. (Director, 12/12/22, pp. 80-81) This is something that all staff at Three Points are trained in.[9] This type of program and model is evidence based and a standard practice for treating RAD. (Therapist)

53. On February 2, 2023, Student began attending Three Points. The Student was accepting of the news that he was going to Three Points. There were no overreactions or tantrums. He has told his mom he knows how bad his depression is; he has pulled out all his hair, but he showed a glimmer of understanding that he may need to go to the residential placement as a last resort. (Parent, 2/6/23, p. 87)

54. As of February 24, 2023, the Student was able to complete academic assessments in reading, language usage, and science. (Spec. Ed. Dir. 2/24/23, pp. 91-92) Three Points had scheduled him to undergo the math assessment during the week of 2/27/23. (Sped. Dir., 2/24/23, p. 121) The assessments that were administered were part of the NWEA Map Growth measure, which is based on common core standards and used by states across the country. (Sped. Dir., 2/24/23, pp. 121, 123).

55. Student is enrolled in eight classes, all of which are being taught in-person: English, algebra, biology, world history/geography, reading lab, math applications, careers, and personal finance. (Sped. Dir., 2/24/23, pp. 94, 106) He has been present in every class since enrollment. (Sped. Dir., 2/24/23, p. 99). Teachers are expected to assign a minimum of one assignment per week, and Student has been turning in his assignments. (Sped. Dir., 2/24/23, p. 127) His teachers report that he is completing course work, behaving in a respectful manner, and starting to get comfortable with the daily routine. (Sped. Dir., 2/24/23, p. 100) Each class period is 75 minutes long and is staffed with a minimum of one teacher and two group living staff who are there to provide support as needed. (Sped. Dir., 2/24/23, p. 95) Some classes also have a paraprofessional, and other classes are co-taught with a special education teacher. Three Points considers the rigor of the subject matter, specific learning disabilities of any students, and class size in determining whether to assign a paraprofessional or make a class co-taught. (Sped. Dir., 2/24/23, pp. 95-96) So far, the notes from therapists and group living staff and teachers, indicate the Student is a good fit. Id.

[9] This testimony was grammatically mis-transcribed by the Court Reporter as, "Our teachers are trained in this modality as well. Even though they're not clinicians, we train our therapists…" This is a punctuation error by the Court Reporter. It should also be noted that there are other errors in the transcript which state "Aspire" rather than "Spire." The context in the question/ answer provides clarification, since the Student attended Spire, but never was enrolled in Aspire.

56. A PPT meeting was scheduled for January 31, 2023. Prior to that time, Admin 2 had emailed Parent to advise that the psychiatric report would be reviewed. However, the PPT notices did not include the evaluators as attendees, and Admin 2 did not tell Parent the doctors would be there. The Parent challenged the propriety of the meeting as not providing proper notice, but the Board held the meeting. (B-109, p. 1) Parent and the Parent's attorney noted their objection and turned their cameras off at the beginning of the meeting (Admin 2, 3/21/23, p. 10 at 5-9).

IEE

57. On April 6, 2021, the PPT discussed planning for a triennial re-evaluation and agreed to evaluate the Student in the areas of math and social –emotional learning. (P-5). The Board provided the written consent form to the Parent to conduct reevaluations in the areas of math and social–emotional learning. (P-8) The academic portion was to be completed by a special education teacher, and the social emotional learning piece was to be completed by the school psychologist. (P-8). The intent was for a teacher at the Spire school to complete the math evaluation. (Admin 1)

58. Parental consent for the reevaluations was given on May 3, 2021. (P-8)

59. The Student was admitted to Newport Academy on March 18, 2021. The Student attended that residential program for three months, and then continued with a partial hospitalization, intensive out patient program for six months at Newport Academy. (Parent)(P-5)

60. A PPT meeting was held on February 28, 2022, to conduct a triennial review and determine continued eligibility. (B-7)(Admin 1). Eligibility was continued. (Id.)

61. It was agreed that when the Student is emotionally available, the testing would be completed. (Id.)

62. Around the time of the February 28, 2022 PPT, the Student was having some difficulties. (B- 7). The Student refused to participate in the math evaluation. (Admin 1)

63. Another PPT meeting was held on April 11, 2022, at Parental request. (B-5). The Parent provided notice of a unilateral placement at CALO, in Missouri. (Id., Admin. 1)

64. The Student attended from April to June 2022. (Admin 1)

65. Another PPT meeting was held in June 2022 after the Student returned, and ESY was discussed. (Admin 1)

66. The social/emotional evaluation was not completed due to administrative error. (Admin. 1)

67. On October 27, 2022, the Parent sent an email to the Board, stating the following, "I am writing to formally disagree with the results of the triennial review, which was held on February 22, 2022, because the district failed to have [Student] re-evaluated. Because the District was unable to re-evaluate [Student], I am now requesting an IEE at the District's expense in the area of neuropsychology with an educational portion." (P-10)

68. On October 31, 2022, an email/ letter was sent to the Parent which explained that the IEE request was denied because the Board had not yet completed its evaluation. (P-10). The letter also inquired as to whether the Parent wanted the Board to move forward with the educational evaluation in mathematics, because the Parent's request for an IEE indicated that the Parent may feel the Student is emotionally available for further testing. (Id.)

69. The Board also provided its guidelines and procedures regarding parental IEE requests. This document explains that the right to an IEE is triggered after the Board completes an evaluation. (B-1)

70. The Board did not file for due process and did not grant the IEE. (Admin. 2)

71. The Parent testified that the Student's functioning was variable, and she expected the Board to make more effort to get the Student to participate in the triennial evaluation. (Parent)

72. Other than stating that a neuropsychological evaluation was being requested as an IEE in the email, the Parent did not request that the Board perform this type of evaluation at any PPT meeting. (Parent)

CONCLUSIONS OF LAW:

FAPE

The overriding goal of the Individuals with Disabilities Education Act, 20 U.S.C. Sections 1400 et. seq (IDEA) is to open the door of public education to students with disabilities by requiring school systems to offer them a free appropriate public education (FAPE). Board of Education v. Rowley, 458 U.S. 176, 192 (1982) (Rowley).

IDEA and Connecticut law provide that parents of students with disabilities may request a due process hearing before an impartial hearing officer to challenge a school district's proposal or refusal to initiate or change the identification, evaluation or educational placement or the provision of a free appropriate public education for their children. 20 U.S.C. Section 1415(f)(1)(A); C.G.S. Section 10-76h(a)(1).

Under the IDEA, the "stay put" provision serves as an automatic preliminary injunction, creating "an absolute rule in favor of the status quo." *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982). Furthermore, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered to the student by the [IEP team] (*Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist*., 386 F.3d 158, 160-61 (2d Cir. 2004); *Zvi D. v. Ambach*, 694 F.2d 904, 906 (2d Cir. 1982); *Bd. of Educ. of Poughkeepsie City Sch. Dist. v. Student*, 353 F. Supp. 2d 449, 459 (S.D.N.Y. 2005)) (noting that "pendency placement and appropriate placement are separate and distinct concepts").

In *Rowley*, the United States Supreme Court held that FAPE "consists of educational instruction specially designed to meet the unique needs of the . . . child, supported by such services as are necessary to permit the child 'to benefit' from instruction." *Rowley* at 188-89. See also *Endrew F. v. Douglas City School District*, 580 U.S. 386, 404 (2017)("The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created".); *Oberti v Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

The IEP itself is the cornerstone of the child's program. However, the "Second Circuit has rejected the "rigid 'four corners' rule prohibiting testimony that goes beyond the face of the IEP." *D.C. ex rel. E.B. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 513 (S.D.N.Y. March 26, 2013). Although, the Hearing Officer may not rely on "testimony that materially alters the written plan" she may consider testimony "that explains or justifies the services listed in the IEP." *R.E.*, 694 F.3d at 185-86; see also, *F.L. ex rel. F.L. v. New York City Dep't of Educ*., 553 F. App'x 2, 5 (2d Cir. 2014). This rule recognizes the critical nature of the IEP as the centerpiece of the system, ensures that parents will have sufficient information on which to base a decision about unilateral placement, and puts school districts on notice that they must include all of the services they intend to provide in the written plan. If a school district makes a good faith error and omits a necessary provision, they have thirty days after the parents' complaint to remedy the error without penalty.

Further, the Second Circuit has stated forcefully that Parents of disabled children have a "considerable

reliance interest[]" in an IEP being created prior to the start of the school year because "[a]t the time the parents must choose whether to accept the school district recommendation or place the child elsewhere, they have only the IEP to rely on." *R.E.*, 694 F.3d at 186. *Mr. A. v. Greenwich Board of Education*, Docket No. 3:15-cv-00203 (CSH), 2016 U.S. Dist. LEXIS 94431, at *37 (D. Conn. July 21, 2016).

In order to determine whether parents of a disabled child are entitled to reimbursement of expenses incurred at a private school in an IDEA challenge to a proposed IEP, the three-step Burlington/Carter test is applied: "(1) the [Board] must establish that the student's IEP actually provided a FAPE; should the [Board] fail to meet that burden, the parents are entitled to reimbursement if (2) they establish that their unilateral placement was appropriate and (3) the equities favor them." *M.W. ex rel. S.W. v. N.Y.C. Dep't of Educ., 725 F.3d 131, 135 (2d Cir. 2013)*; see also *Florence Cty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993); *Sch. Comm. of Town of Burlington v. Dep't of Educ*., 471 U.S. 359 (1985).

"Where the IEP is substantively deficient, parents may unilaterally reject it in favor of sending their child to private school and seek tuition reimbursement from the State." *T.K. v. N.Y.C. Dep't of Educ.*, 810 F.3d 869, 875 (2nd Cir. 2016). A school district will be required to reimburse parents for expenditures made for a private school placement, if the services offered the student by the school district are inadequate or inappropriate. See, *Florence Cty. Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 13-16 (1993); *Sch. Comm. Of the Town of Burlington, Mass. v. Dep't of Educ. Of Mass*., 471 U.S. 359, 369-70 (1995).

In *Rowley*, the United States Supreme Court set out a two-part test for determining whether a local board of education has offered FAPE in compliance with IDEA. The first part of the test is whether there has been compliance with the procedural requirements of IDEA, and the second part is whether the student's IEP is reasonably calculated to enable the student to receive educational benefit. 458 U.S. at 206-207. See also, *Fry v. Napoleon Community Schools*, 580 U.S. __ (2017). The second part, the substantive component, is measured by whether the school offers an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F. ex rel. Joseph F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2019). The Second Circuit explained, "the substantive adequacy of an IEP is focused on whether an IEP was reasonably calculated to enable the child to receive educational benefits and likely to produce progress, not regression." *Mr. P. v. West Hartford Board of Education*, 885 F. 3d 735, 757 (2018); *Mr. and Mrs. G v. Canton Board of Education*, 74 IDELR 8, 119 LRP 9264 (D. Conn. March 11, 2019).

The Board here had the burden of proving, by a preponderance of the evidence, that the IEPs it offered were both substantively appropriate and in compliance with IDEA's procedural requirements. Regs. Conn. State Agencies § 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998).

The first prong of the *Rowley* inquiry, whether the Board complied with IDEA's procedural mandates, is critical. As the Supreme Court said in *Rowley*, Congress based IDEA on the "conviction that adequate 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." *Rowley* at 206. The procedural requirements of IDEA are designed to guarantee that the education of each student with a disability is individually tailored to meet the student's unique needs and abilities and to safeguard against arbitrary or erroneous decision-making. 20 U.S.C. Sections 1412(1) and 1415(a)-(e); *Daniel R.R. v. State Board of Education*, 874 F.2d 1036, 1039, and 1041 (5th Cir. 1989).

While a student is entitled to both the procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied FAPE. Mere technical violations will not render an IEP invalid. *Amanda J. v. Clark County School District*, 267 F.3d 877, 892 (9th Cir. 2001). In matters alleging a procedural violation a due process hearing officer may find that a student did not receive a FAPE only if the procedural violation did one of the following: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. 34 C.F.R. Section 300.513(a)(2); L.M. v. Capistrano Unified School District, 556 F.3d 900, 909 (9th Cir. 2008). Here, there were several technical

violations that were insignificant. (Findings of Fact #10, 30). However, the notice provided for the January 31, 2023 PPT meeting was a significant violation. (Findings of Fact #56). The Parent's opportunity to effectively prepare and participate in this meeting was denied, since she could not have anticipated that the doctors would be there in person, to ostensibly answer questions or inquiries about their report or opinions. Parents were denied the opportunity to invite other professionals who worked with the Student or had knowledge in the specialized area that the doctors would be discussing.

The failure to complete the triennial evaluation, given the inability of the Student to participate, did not render the IEP inadequate on the basis. The other evidence available to the PPT was sufficient to develop an IEP. See, *Suffield Board of Ed v. L.Y.*, Docket No. 3:12-CV-1026 (JCH), 2014 U.S. Dist. LEXIS 2294, at *23 (D. Conn. Jan. 7, 2014).

Each IEP must include: (a) a statement of the student's present level of performance in each area of disability as determined through periodic assessments; (b) a statement of measurable annual goals, including academic and functional goals, that are designed to meet each of the student's educational needs resulting from the disability; (c) a statement of the special education and related services to be provided in order to enable the student to attain his or her goals and to progress in the general education curriculum; and (d) a statement of the special education and related services and supplementary aids and services, to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals; and to be involved in and make progress in the general education curriculum; and (e) an explanation of the extent, if any, to which the child will not participate with nondisabled children; and (f) a statement of any individual appropriate accommodations necessary to measure academic achievement and functional performance of the student on state and district-wide assessments. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.

Clarity is a critical component of an offer of FAPE. In *Union School Dist. v. Smith* 15 F.3d 1519 (9th Cir. 1994), cert. den., 513 U.S. 965, the Ninth Circuit held that a district is required by the IDEA to make a clear, written IEP offer that parents can understand. Furthermore, a formal, specific offer from a school District will greatly assist parents in "present[ing] complaints with respect to any matter relating to the ... educational placement of the child." 20 U.S.C. § 1415(b)(1)(E); *Union*, 15 F.3d at 1526; see also *J.W. v. Fresno Unified School Dist*. 626 F.3d 431, 459-461 (E.D. Cal. 2009); *Redding Elementary School Dist. v. Goyne*, 2001 WL 34098658, pp. 4-5, No. Civ. S001174 (E.D. Cal., March 6, 2001).

While *Union* involved a district's failure to produce any formal written offer, courts have consistently invalidated IEP's that were unclear or lacked adequate specificity to allow parents to make an intelligent decision as to whether to accept the offer or proceed to a due process hearing. *S.H. v. Mount Diablo Unified School District*, 263 F. Supp. 3d 746, 762 (N.D. Cal. 2017). One district court described the clarity requirement as "a clear, coherent offer which [parent] reasonably could evaluate and decide whether to accept or appeal." *Glendale Unified School Dist. v. Almasi*, 122 F.Supp.2d 1093, 1108 (C.D.Cal. 2000); see, also, *A.K. v. Alexandria City School Bd*. 484 F.3d 672, 681(4th Cir. 2007); *Knable v. Bexley City School Dist*. 238 F.3d 755, 769 (6th Cir. 2001); *Bend LaPine School Dist. v. K.H*, 2005 WL 1587241, p. 10. (D. Ore., June 2, 2005), aff'd sub nom, *Bend-Lapine Sch. Dist. v. K.H*, 234 Fed. Appx. 508 (9th Cir. 2007).

When an IEP is premised on a misunderstanding of important aspects of the Student's disability, it can hardly provide FAPE. A school district's inaccurate description of a student's actual levels of performance in the IEP has been specifically recognized as a material procedural violation of IDEA. 20 U.S.C. Section 1414(d)(1)(A); 34 C.F.R. Section 300.320; *RR v. Wallingford Board of Education*, 101 L.R.P. 196 (D.Conn 2001); *Newtown Public Schools*, 107 L.R.P. 59412 (Ct SEA 2007). The September 14, 2022 IEP was substantively deficient regarding the Student's then present levels of performance. (Finding of Fact # 34). The IEP contained glaring errors which were carried throughout the document. For example, the document does not show Student was not in a school at that time, and lacks sufficient detail of his history of lack of progress at Spire and his inability to attend school during hospitalizations. This insufficient IEP was likely sent to potential Board recommended day placements, presenting an inaccurate picture of the Student to

potential placements.

To determine whether an IEP is substantively adequate, the hearing officer must examine the record for any objective evidence indicating whether the child is likely to make progress or regress under the proposed plan, such as test scores and similar objective criteria. The IEP must state “measurable annual goals.” Furthermore, to be legally adequate, the IEP must identify a student’s behavioral impediments and implement strategies to address that behavior. *A.M. v. N.Y.C. Dept. of Educ.* 845 F. 3d 523 (2nd Cir. 2017); Conn. Regs State Agencies §10-76d-11, 34 C.F.R. §300.320 22.

The sufficiency of an IEP under IDEA is assessed in light of information available at the time the IEP is developed; it is not judged in hindsight. *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). “An IEP is a snapshot, not a retrospective.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1036 (3rd Cir. 1993). It must be viewed in terms of what was objectively reasonable when the IEP was developed. *Id*.

Here, the IEP developed at the September 14, 2022 PPT, did not provide the Student FAPE. Aspire-Stamford, which was the placement carried over from the June 2022 PPT meeting, was not an appropriate placement for this Student, as the weight of the evidence showed that a residential placement is necessary.

The IDEA explicitly provides that in certain cases a state may have to pay for a residential placement for a handicapped child. See 20 U.S.C. § 1401(a)(16) (defining "special education" as including "instruction ... in hospitals and institutions"). Regulations promulgated under the IDEA require, that: [i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child. 34 C.F.R. § 300.302.

In *Rowley*, the Supreme Court determined that only "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction" is the child receiving a "'free appropriate public education' as defined by the Act." 458 U.S. 176, 189 (1982)(emphasis omitted). While the Court rejected a potential-maximizing standard of what is "appropriate" education for a child, the Court noted that "[t]he Act's use of the word 'appropriate' [ ] seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children." *Id*. at 197-98 n. 21, 102 S.Ct. at 3046 n. 21. The Court held that the Act requires "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Id*. at 203, 102 S.Ct. at 3049. Accordingly, the Act clearly contemplates the need for the support services provided by such programs as residential placements in some circumstances.

The standard for when a school district has to place a child in a residential setting was established by our Circuit in *Mrs. B. v. Milford Bd. of Educ.*, 103 F.3d 1114 (2d Cir. 1997), which held that the state has to fund a residential program when it is necessary for the child to make "meaningful educational progress." *Id.* at 1122. Courts have held that "when the medical, social or emotional problems that require [a residential setting] create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement." *Id.* at 1120 (internal quotation marks and citation omitted). As a result, the central inquiry is whether the student's conduct outside of the school building and outside the normal hours of the school day is such that it impedes her ability to derive an academic benefit from a day program.

The Second Circuit has noted 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. IDEA'S preference is for disabled children to be educated in the least restrictive environment capable of meeting their needs." *Walczak*, 142 F.3d at 132. Courts in the Second Circuit are reluctant to find that a residential placement is required in the absence of clear evidence indicating that such a placement is the child's only means of achieving academic progress. As the Second Circuit noted, "in general, the Second Circuit requires that a court point to objective evidence of a child's

regression in a day-program before finding that a residential placement is required by the IDEA." *M.H. v. Monroe-Woodbury Cent. School Dist.*, 296 Fed. Appx. 126, 128 (2d Cir. 2008); *D.B. v. Ithaca City School District*, Docket No. 5:14-CV-01520, 2016 U.S. Dist. LEXIS 123808, at *12-13 (N.D.N.Y. Sep. 13, 2016) "…"[O]bjective evidence," is a review of "test scores, grades, and other similar "objective" criteria. *Walczak*, 142 F.3d at 130; *see also Cerra*, 427 F.3d at 195 (cautioning that to avoid impermissibly meddling in state education methodology, a district court must examine the record for objective evidence indicating whether the student is or is likely to be progressing or regressing in the proposed educational setting). *Walczak*, 142 F.3d at 131-32 (citing examples of Ninth, Third, and First Circuit cases that take the same approach); *M.H. v. Monroe-Woodbury Central School District*, 296 F. App'x 126, 128 (2d Cir. 2008)(finding that Student's progress in a day program indicated residential not required). In *M.H.*, the Student was making progress as shown by grade reports and school psychological reports that she was also progressing in social emotional goals. *Id*. Here, there is no material dispute that the day program had not been successful. By April 2022, a retrospective review of the Student's educational history and emotional decline should have opened the door to a Board sponsored residential placement. (Findings of Fact #19, 23, 40). The Student has been basically confined to his home, rejecting academics, counseling and other efforts to get him an education. He is verbally abusive and harms himself. The disjointed approach suggested by the Board's psychiatrist (and not relied upon by the Board when it proposed its placement) has already failed this Student, and is therefore, inappropriate.

An appropriate IEP for the Student as of September 2022 would have included: (1) enrollment in a nurturing residential program with focus on this Student's disabilities and presentation; (2) a small school environment that can provide one-to-one assistance and emotional regulation breaks as needed; (3) the ability to appropriately manage suicidal symptomology, self-harm, elopement and potentially aggressive behavior; (4) individual therapy tailored to the Student's developmental trauma, mood dysregulation, relationship issues, and self-esteem; (5) group therapy, done through a relational group approach, that builds on Student's individual therapy; (6) family therapy; (7) the ability to manage medications; (8) experiential therapies, (9) exercise/ physical activity; and engagement in community or extracurricular activities. (Findings of Fact # 31, 32, 39, 40, 48, 49).

In September 2022, and relative to other witnesses who testified, Counselor had worked with Student for the most time (that he was not hospitalized). She worked with him from January 2021 through April 2022 before he went to CALO. She had more interaction and personal knowledge about his functioning than the Board's administrators. Her experience in various therapeutic environments including day and residential schools also leads the Hearing Officer to conclude that her testimony and opinions are more credible than the opinion of the Board's LEA. Her explanation of the need for residential program was convincing. The reasoning that the Board used to disregard Counselor's input (she had not seen him since he was placed at CALO) was irrational, especially because the Board has been relying on an even earlier, 2020 evaluation (that also was incomplete because the Student could not complete it) as its foundation for its decision-making.

These opinions were also corroborated by other witnesses. (Findings of Fact # 40, 52) Psych.'s analysis was comprehensive, and analyzed many years' worth of the Student's records and interviewed the persons familiar with the Student's prior and current functioning. His data sources and knowledge of the Student's emotional disabilities, combined with his knowledge of programs which would fit the Student's needs made his testimony and report more thorough and persuasive for the Student's need for a residential placement, than the recommendation made by the Board's consulting psychiatrist. However, there are many aspects of the two opinions that are consistent: the need to try a different approach toward therapy, small classroom and 1:1 assistance, nurturing relationships with staff, experiential learning therapeutic and non-therapeutic social groups which are supervised and facilitated by therapeutic staff, daily individual counseling, medication management, parent training, and engaging in physical activities (e.g., horseback riding, yoga and meditation). (B-92; P-61.) Parent's testimony was also persuasive (even though she is also the parent), given her education and work experience, but especially given her knowledge of the Student and the implementation of behavioral models which have been previously tried, and failed.

Moreover, triennial testing was due by February 2022 but not conducted due to the Student being "emotionally unavailable" for testing. (B-7). This fact was probative of the Student's need for more intensive therapeutic needs. The Student's inability to engage in the therapeutic day school and failure to earn more than *de minimus* credit toward high school graduation, should have signaled to the Board that additional action was required. The seemingly "wait and see" approach ultimately denied the Student FAPE.

In the Hearing Officer's view, a Board has no legal obligation to provide a guarantee that an out of district placement will enroll a student. However, the placement that is offered should be ready, willing and able to meet the student's needs. The Board offered a placement that was *expected* to be operational in October 2022. This is evidence, in and of itself, of a FAPE violation because there could be no IEP in place at the start of the school year for that program. Using Links Academy tutoring as an interim measure was also insufficient because Links was not therapeutic in any way. Offering on-line sessions with the Board school psychologist was an insufficient substitute for what the Student actually required. Given the Student's history, information shared by the Parent, and recommendations from the Counselor, the Student was not likely to make progress under the Board's plan. Even though the Board's continued efforts to try to identify and refer the Student to other day programs evinced a spirit of cooperation, the underlying premise that a day program would meet the Student's needs was an erroneous conclusion.

If the Board has failed to offer an appropriate program, the program provided in the unilateral placement is assessed. Parents are not held to the same standard of appropriateness that apply to a school district's program. Rather, a lesser standard of appropriateness is used.

In order to establish the appropriateness of a unilateral placement, parents only need to show that the placement is reasonably calculated to provide the child educational benefits and be likely to produce progress, not regression. *CL v. Scarsdale*, 744 F.3d 826 at 836; *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 367 (2d Cir. 2006). As noted by the District Court in *Greenwich Board of Education v. G.M.*, 2016 WL 3512120 (D. Conn., 2016), parents meet their burden when they unilaterally placed their child at a school "specially designed for that precise type of student [as their child]….To be reimbursable, the program need not be individually crafted for K.M. herself, but rather, should be … reasonably calculated to enable the child to receive educational benefits." *Greenwich Board of Education v. G.M.*, 2016 WL 3512120 (D. Conn. 2016) at 15. Rather, "[w]hen a public school district, . . . denies a child with a disability a FAPE, a private placement is not inappropriate merely because the environment is more restrictive than the public school alternative. When a child is denied a FAPE, his parents may turn to an appropriate specialized private school designed to meet special needs, even if the school is more restrictive." *CL v. Scarsdale*, 744 F.3d at 830.

Three Points Center is an appropriate placement, and the equities weigh in the Parent's favor. (Findings of Fact #39, 41, 40, 48-55).

Although not perfect, Three Points is reasonably calculated to provide education benefit to the Student. While the education program is delivered very differently from what the Student would receive at the public school, the transition appeared smooth, and he was reportedly a good fit. Parent selected therapeutic programs and placements that provide extensive counseling and training outside of a regular classroom environment have been found in other cases to constitute FAPE, See, *Bd of Ed. Of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. 2006). Hearing Officers and Courts have also ordered tuition reimbursement for nontraditional "wilderness" programs, See Regional School Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M, et al., 3:07-CV-01484 (WWE), U.S. District Court, Connecticut (August 7, 2009). See also *Student v. Greenwich Board of Education*, Final Decision and Order 16-0220, July 28, 2016).

Prior to Student's unilateral placement, he was in complete isolation at home with no peers and no instruction, because the Board did not provide a residential placement, but continued to claim a day school

was appropriate. (Findings of Fact, #42, 43). The home program was even a more restrictive setting than a residential program where he has a peer group, teachers, classes to attend, and related services. (Id.).

Parents are entitled to advocate fiercely, even overzealously, on behalf of their disabled children's interests. They are also entitled to disagree with a local education agency's determination as to how those interests would be best served. And, when that agency's process in protecting those interests contravened applicable law, those parents are generally entitled to relief. Parents should not be stripped of that entitlement as long as they operate within the rules and do not hinder the agency in its performance of its statutorily required function. See, *Z.A. v Greenwich Board of Education*, 2016 WL 3951052 *21 (D. Conn. 2016).

In *Z.A. v Greenwich Board of Education*, the parents had unilaterally placed their child at a private special education school (Eagle Hill), and the Board argued that the parents should be denied reimbursement for that placement because they never intended to accept a different placement. The court held, "Parents' intent is not relevant per se. Her actions with respect to Eagle Hill complied with statutory notice obligations and in no way could have hindered or did hinder the Board's ability to create an IEP for Z.A." *Id*. at 20. As in *Z.A.*, Parent was concerned that the Board's proposed placement could not meet her child's needs but was sufficiently cooperative with the placements the Board proposed. (Findings of Fact #39).

IEE

The right to a publicly financed IEE guarantees meaningful participation throughout the development of the IEP. See Honig v. Doe, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("Congress repeatedly emphasized . . . the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness."). Without public financing of an IEE, a class of parents would be unable to afford an IEE and their children would not receive, as the IDEA intended, "a free and appropriate public education" as the result of a cooperative process that protects the rights of parents. There is "nothing in the statute to indicate that when Congress required States to provide adequate instruction to a child 'at no cost to parents,' it intended that only some parents would be able to enforce that mandate." *Phillip C. v. Jefferson County Board of Education*, 701 F.3d 691, 694, (11th Cir. 2012), citing, *Winkelman v. Parma City Sch. Dist*., 550 U.S. 516, 524, 127 S. Ct. 1994, 167 L. Ed. 2d 904 (2007) (internal quotations omitted).

School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.) The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur during a student's education. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006)).

Congress included the right to an IEE at public expense as one of the IDEA's essential procedural safeguards:

> School districts have a natural advantage in information and expertise, but Congress addressed this when it obliged schools to safeguard the procedural rights of parents and to share information with them [Parents] have the right to an independent educational evaluation of the[ir] child. The regulations clarify this entitlement by providing that a parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. IDEA thus ensures parents access to an expert who can evaluate all the materials that the school must make available, and who can give an independent opinion. They are not left to challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.

Schaffer ex. rel. Schaffer v. Weast, 546 U.S. 49, 60-61, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (citations

and quotations omitted).

The IDEA provides for reevaluations to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. 20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b).

The school district must also conduct a reevaluation if it determines that the educational or related service needs of the child, including improved academic achievement and functional performance, warrant a reevaluation. 20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1). A school district must also conduct a reevaluation upon the request of the child's parent or teacher.2 20 U.S.C. § 1414 (a)(2)(A)(ii); 34 C.F.R. § 300.303(a)(2).

An evaluation under 34 C.F.R. § 300.304 refers to the processes and procedures used to "gather relevant functional, developmental, and academic information" about the child, including information provided by the parent, that may assist in determining the content of the child's IEP, which includes the use of "technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors." See also, 20 U.S.C. § 1414 (b).

A parental right to request for an IEE at public expense accrues[10] when an evaluation has been completed by the Board, and the parent disagrees with that evaluation. 34 C.F.R. § 300.502(b)(1); *D.S. v. Trumbull Board of Education*, 975 F.3d 152 (2d Cir. 2020); *Genn v. New Haven Board of Education*, 219 F. Sup. 3d 296, 317 (D. Conn. 2016); OSERS *Letter to Baus*, February 23, 2015 ("a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency."). See also, *Dubois v. Connecticut State Board of Educ.*, 727 F.2d 44, 48 (2d Cir. 1984); *Student v. Wilton*, 119 LRP 33239, SDE Case No. 19-0431 (denying IEE where Parent began private evaluation before Board completed its evaluation); *Student v. Ogden School District*, 75 IDELR 55, 119 LRP 29164 (Utah State Educational Agency 6/5/19)(denying IEE in area not assessed).

Because the only evaluations that trigger a parent's right to an IEE at public expense are the initial evaluation and triennial reevaluations discussed in Section 1414 of the Act, a parent's right to an IEE at public expense ripens each time a new evaluation is conducted. *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 169-70 (2d Cir. 2020).

Under the authority cited, and the facts found by the Hearing Officer, the Parent's right to an IEE for the February 2022 triennial has not yet accrued, because the evaluation was not completed. The Parent's request for an IEE, due to the incompletion of the evaluation, was appropriately denied by the Board.

REMEDIES:

Awards for expert fees are impermissible under the IDEA. *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291, 301 (2006). Therefore, the Parent is not entitled to reimbursement for the costs of the Placement Counselor.

[10] Thus, an IEE request is not the only procedure available for a parent to obtain an evaluation or reevaluation of a student. The procedure requiring a predicate evaluation is similar to the principle of ripeness. Here, a hearing officer cannot determine whether an evaluation was "appropriate" before it is completed. However, a parent may argue that an IEP was not designed to provide FAPE (a free and appropriate education) due to a lack of information about the student, *e.g*. because timely or appropriate evaluations were not completed to inform the PPT members. *D.S. v. Trumbull Board of Education*, 975 F.3d 152, 170 (2d Cir. 2020)(lack of timely evaluations may implicate FAPE). A parent may also argue that the failure to evaluate at least annually or every three years is a procedural violation of the IDEA.

Reimbursement for the services of the Psychologist that the Parent hired is also denied, primarily because an evaluation which included the Student's participation, was not completed.

Compensatory education may be the only means for providing FAPE to children who have been forced to remain in inappropriate placements pending litigation because of their parents' financial inability to pay for private placements. *Letter to Kohn*, 17 IDELR 522 (OSERS 1991). Hearing officers have the authority to order compensatory education as a remedy when it is found that FAPE was denied. *Id*. Funding for or placement in a private school is an appropriate remedy in these instances. *Draper v. Atlanta Indep. Sch. Sys.*, 49 IDELR 211 (11th Cir. 2008). See also *I.S. v. School Town of Munster*, 64 IDELR 40 (N.D. Ind. 2014) (funding for a student's private placement may be an appropriate form of compensatory education). The Student is entitled to prospective relief in the form of Board funding of the program at Three Points for one calendar year, which is the length of the school year at Three Points. The Student has been declining significantly since he returned from the Parent's unilateral placement at CALO and is about two years behind in his education. The equities weigh in favor of providing the Student with a realistic opportunity for progress, which is more likely to be achieved with stability--in the current residential placement.

ORDER:

The Parent's request for an IEE in the area of neuropsychology including academics is denied at this time, as the Parent's right to an IEE has not yet accrued.

The Parent is not entitled to reimbursement for the services of the Placement Counselor or the Psychologist.

To compensate the Student for the denial of FAPE, the Board must prospectively fund the unilateral placement for one calendar year, from the date of this decision, which is the length of the school year at the unilateral placement. Funding should be done prospectively rather than the Parent paying the cost first and presenting a request for payment to the Board. Full funding includes all educational programming, residential costs and all therapies/ related services including those that involve family counseling. To the extent the Parent is able to secure funding from another source for family counseling (such as health insurance), the Board would be excused from funding that portion of the program. This remedy addresses relief the Parent is entitled to for Issues 3, 7, 8, 12, 13, 14-18. This order for funding the unilateral placement is in lieu of an order which would require the Board to place the Student at Three Points/ or a facility for students diagnosed with RAD, or the other variants of this relief requested. (Issues #14, 15, 17, 18).

The Board is not responsible for Parental or Student travel costs and expenses to Three Points. The disallowance of this part of the costs associated with the Student's attendance at Three Points is based on the Parent's initial lack of cooperation and delayed response to the Board's request for permission to obtain consent for the psychiatric consult.

The Parent is not entitled to relief for Issues # 2, 4, 5, 6, 9, 10 and 11.