STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION

Student v. Greenwich Board of Education

Appearing on behalf of the Student:	Phillip Cohn, Esq. Jamie Mattice, Esq. Goldman, Gruder & Woods, LLC 200 Connecticut Avenue Norwalk, CT 06854
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.

ISSUES:

1. Whether the District failed to offer FAPE to the Student for the relevant portion of the 2018-2019 school year (commencing January 1, 2019), and extended school year period?

2. Whether CALO was an appropriate placement from January 1 to January 22, 2019, where the student could have accessed an education and made educational process?

3. Whether the District should provide the Student with placement at a State approved residential program, or, in the alternative, reimbursement and/or placement at Daybreak Canyon, or at another appropriate residential school program, for the relevant portion of the 2018-2019 school year, including the extended school year period, and for the 2019-2020 school year, including related expenses?

4. Whether the parent is entitled to reimbursement for the evaluation performed by Dr. Cornelia Gallo?

PROCEDURAL HISTORY:

The Due Process Complaint was filed on January 3, 2019 and amended on March 7, 2019. A prehearing conference was held on January 9, 2019. The mailing date was set and extended to accommodate hearings and for the parties to submit written briefs at the conclusion of the hearing. The Hearing Officer was appointed on January 4, 2019. The hearing commenced on February 4, 2019, on the issue of the Student's Stay Put placement. Subsequently, the due process hearings took place over the course of eight (8) days on the following dates: March 7, March 8, April 1, April 3, April 5, April 9, April 24, and April 30, 2019.

On March 5, 2019, the Hearing Officer issued an order pursuant to 34 CFR § 300.518(a) and Conn. Regs State Agencies § 10-76h-17, that the Board pay the costs associated with the educational component of the Student's residential program during the pendency of this proceeding. Upon request from the Board, on March 19, 2019, the Stay Put order was clarified and ordered the Board was responsible for the costs, other than room and board, for the Student's Stay Put placement.

Testimony from witnesses began on March 7, 2019. The original Due Process Request and Amended Request of March 7, 2019 were entered as HO-1 and HO-2. Parent exhibits P1-P8 and P10-P31, P33 (p. 2 only) were admitted in full. Parent's exhibits P9, P32, P33 (p. 1 only) were admitted for identification purposes only. Board exhibits B1-B9, B12-B17, B21-B41, B42 (except pp. 3-8), B43, B44, B46-B47, B48 (pp. 179-180, 229, 231-232, 235-236, 256, 263, 264, 289-290, 297, 301, 311, 334-336, 377-344), B48, B49, B52-B55 were admitted as full exhibits. Board exhibits B10-B11 and B19-B20 were withdrawn. Board exhibits B28a and B41 were admitted for background purposes only. Board exhibits B44, B45, B-18, B-48 (the remainder) were marked as identification only.

The following witnesses were called by the Parent: Parent; Cornelia Gallo, M.D., Psychiatrist; Linda Sepa-Newell, the Student's therapist from Daybreak Canyon. The Board called the following witnesses: Karen Vitti, Pupil Personnel Services (PPS) Administrator; Christina Dawson, PPS Administrator; Andrea Wragg, Fifth Grade Teacher; Joanna Savino, Assistant Principal; and Timothy Drummond, School Psychologist.[1]

On April 23, 2019, the Board filed a motion to dismiss the due process complaint on the basis that the Student was not a resident of Connecticut; rather, the Student was a resident of Idaho where he attends his unilateral placement. The Hearing Officer deferred the ruling on this motion until the Final Decision issued. The Parent addressed the issue in her post-hearing brief.

The Parent requested in her brief that the Hearing Officer order the following relief: (1) amendment/ and or modification of the Stay Put order to reflect that the Stay Put placement is Daybreak Canyon, through December 2019; (2) reimbursement for Parental travel expenses to and from CALO and Daybreak; (3) reimbursement for Dr. Gallo's December 2018 evaluation; (4) granting of the Parent's IEE request for a psychoeducational evaluation; (5) reimbursement for tuition, counseling, room and board or any other expenses for CALO from January 1, 2019, through January 22, 2019; (6) reimbursement for tuition, counseling, room and board or any other expenses for Daybreak Canyon and/ or placement at Daybreak Canyon; and reimbursement or compensatory relief as a result of the district's non-compliance with the stay-put order.

The Board argued in its brief that it provided FAPE by offering a placement at Eastern Middle School and offering a therapeutic day school or residential school for nonacademic reasons, with the Parent to pay for a portion of the residential school. The Board argued that the Student had not had significant behavior problems during Fifth grade, before he was unilaterally placed.

[1] The testimony of the witnesses will be cited as follows: Parent ("Parent"); Cornelia Gallo, M.D. ("Psych"); Linda Sepa-Newell ("Therapist"); Timothy Drummond ("School Psych"); Karen Vitti ("PPS 1); Krystina Dawson ("PPS 2"); Andrea Wagg ("5th Grade"); and Joanna Savino ("Asst. Prin.").

After the last day of hearings, the Parent brought to the Hearing Officer's attention, via email, that the Board had not reimbursed the Parent for the educational costs of the Student's Stay Put placement, as previously ordered. The Board confirmed the non-payment. This decision addresses that issue as well.

STATEMENT OF JURISDICTION:

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

1. The Student is 12 years old. The Student is in 6th grade. (P23).

2. The Student was adopted as a newborn from California. (Parent).

3. The Student's parents divorced when the Student was two and a half years old. The Student's father, who had moved overseas at the time of the divorce, passed away in 2016. (*Id.*).

4. The Student's Parent (adoptive) has two biological sons, one older and one younger than the Student. (*Id.*).

5. The Student has a significant mental health history including threatening to stab himself with a kitchen knife at age 6. (*Id.*).

6. The Parent sought a psychological evaluation from the Child Guidance Center in 2014. (*Id.*) (P11). He presented with anxiety and depressive symptoms. (P11).

7. The Parent unilaterally placed the Student at Change Academy Lake Ozark ("CALO") in Lake Osage, Missouri, in January 2018. CALO is a residential therapeutic school. (*Id.*).

8. Until his placement in CALO, the Student lived with his Parent (mother), brothers and maternal grandparents in Greenwich, Connecticut. All the IEPs identify the Student as a resident of Greenwich. (*Id.*) (B5, B6, P23). He is a resident of Greenwich.

9. The events which precipitated the Parent's placement of the Student in a residential facility occurred in the Fall/ Winter of 2017. The Student had not yet been identified as eligible under the IDEA. The Parent obtained an evaluation from the Southfield Center opined that the Student's behavior was consistent with Reactive Attachment Disorder and unspecified Depressive Disorder, and Attention Deficit-Hyperactivity Disorder (ADHD), combined presentation. (P12)

10. In the Fall of 2017, the Student was referred to Kids in Crisis by the Parent, after an incident where the Student threatened the Parent in the home that he was going to "kill her in her sleep" and "skin her alive." Mental health professionals at Kids in Crisis reported to the Parent that the Student exhibited behavior consistent with several psychiatric disorders, including Reactive Attachment Disorder ("RAD") (P7).

11. During that time, the Student engaged in concerning behavior while in school. He sexually harassed a peer during music class, for which he received a suspension. He also told a teacher to "go to hell." (B36, B38) (P21).

12. The Student was discharged from Kids in Crisis on November 14, 2017. Kids in Crisis recommended exploration of therapeutic learning programs (P7). The Student punched the Parent that night when he returned home. (Parent).

13. On November 21, 2017, the Student was admitted to Four Winds Hospital. (Parent).

14. Four Winds' Discharge/Referral Summary indicated that the Reason for Hospitalization was "report of increased impulsivity and aggression in the home." The treating psychiatrist diagnosed him with bipolar disorder, oppositional defiant disorder and attention-deficit/hyperactivity disorder, combined type. The Summary stated that the Discharge Plan was "return to North Mianus School" in terms of educational plans. (B-31). However, the plan urged that residential treatment options be explored.

15. The Parent placed the Student at CALO in January 2018. The reason for admission to CALO included: Parent reports of defiance and suicidal thoughts; outbursts, throwing things when angry, mood swings, poor sleep habits, difficulty controlling emotions, lack of self-esteem, anxiety and depression. CALO testing found a more pressing concern for the Student in regulating emotion, ongoing pattern of outbursts, expressing significant sadness and low self-esteem. Student had symptoms consistent with Unspecified Depressive Disorder, and met the diagnostic criteria for ADHD. Student experienced a series of disrupted attachments. Student's affect was often flat, but had outbursts that are typically directed toward Parent. Student's profile suggested that outbursts are coming from a place of fear rather than sheer defiance. This was consistent with Reactive Attachment Disorder. (P4).

16. The Student started to refuse academics at CALO by midyear. (Parent).

17. CALO was unable to administer medication for the Student as directed. The Student would refuse to take his medication or he "fooled them." (Parent). While at CALO, he assaulted other students and teachers and was bullied. He was assigned to the most restrictive setting at CALO, which required constant adult supervision and monitoring. (Parent, P17).

18. The Parent did not know whether the Student was receiving special education at CALO. No evidence was presented regarding the particulars of the academic instruction provided to the Student; at some point within a few months into his stay, the Student just gave up and refused to attend classes or participate in school. (Parent). He was also physically violent with staff and other students. (*Id.*) Staff reported that the academic program was likely too easy and inappropriate for him. (School Psych.).

19. The Student earned 0.5 credits (four F's and one D) for the 2018-19 school year at CALO. The Parent presented no testimony or any other evidence regarding the second half of the prior, 2017-18 school year at CALO. (P33).

20. The Parent filed for Due Process in 2018, and the parties executed a Settlement Agreement in September 2018. The Agreement identifies the Student as a resident of Greenwich. (P6).

21. As part of the Agreement, the Board was to conduct a psychiatric evaluation of the Student. Pursuant to the 2018 settlement agreement, "the parent agreed to allow the Board to contact the Local Education Agency responsible for Child Find at the CALO School to obtain a psychiatric evaluation, to complete behavior rating scales and to conduct any achievement evaluations required by the Board staff to determine eligibility and if eligible, to develop an IEP." (P6 and Parent).

22. The Board contacted the Missouri Department of Education as referenced in the Agreement. (B49). Missouri told the Board that the Parent would need to contact them to make a referral. The Board emailed the Parent and told the Parent to contact Missouri. The Board made no further attempts to procure a psychiatric or other evaluation. (PPS1) The local school district where CALO is located completed an evaluation on November 27, 2018. (B2).

23. The Settlement Agreement was effective through December 31, 2018. In late January 2019, the Parent unilaterally placed the Student at Daybreak Canyon, a therapeutic residential school, which is located in Kellogg, Idaho (Parent). The Parent did not give the Board written notice of this placement. The Board became aware of the placement around January 31, 2019. (P28) The Board held a PPT meeting on February 4, 2019, to discuss the unilateral placement. (P23). The Parent did not attend that PPT meeting on that day, which was held the morning of the hearing on Stay Put. (Parent).

24. The Student is eligible for special education services under the category of Emotional Disturbance. (B5). The Student was found eligible by the State of Missouri on November 27, 2018, and by the Greenwich Board of Education on December 13, 2018. (P13).

25. In November 2018, the Parent engaged Dr. Gallo to complete a psychiatric re-evaluation of the Student. Dr. Gallo had previously completed an evaluation in 2017. Dr. Gallo interviewed the Student via teleconference. She issued her report on December 14, 2018 and recommended that the Student continue in a 24-hour therapeutic residential placement. (Psych).

26. The Student was not being compliant with his medication and this affected his behavior. (Psych).

27. The Student was made eligible for Special Education under the category of Emotional Disturbance by the Board on December 13, 2018. The PPT did not make a placement decision at that time to give the Board a change to review Dr. Gallo's reevaluation. (Asst Prin) The IEPs identify Greenwich as the Local Educational Agency responsible for providing FAPE to the Student. The Student's address on the IEP is in Greenwich. (B5)

28. Two IEPs do not accurately reflect who was present at the meeting. (B5) (P23). Through testimony, it was undisputed that the December 13, 2018, meeting was attended by the school team, including Asst. Prin., School Psych and Patricia Morahan (Special Education teacher), the Parent, Psych (by phone), CALO's Clinical Director, Cathy Abeln (by phone) and Virginia Ayers (Southfield Center), and counsel. (B5).

29. The Parent requested an IEE for rating scales which had not been done by the school district in Missouri, which was denied. (B5). Rating Scales were supposed to be completed under the terms of the Settlement Agreement, but were not. (P6)(Parent). A psychiatric evaluation was supposed to be completed as well but was not. Id. The lack of a psychiatric evaluation was the reason the Parent obtained an updated evaluation from Dr. Gallo. (Parent).

30. The Parent requested placement at CALO, which was denied by the Board. The Parent did not indicate at that time that the Student might by leaving CALO. The Parent testified that she was contemplating moving the Student out of CALO at that time but did not share that with the PPT. (Parent)(B5).

31. The Board reconvened a PPT on December 21, 2018 to complete the programming and placement decision. (Asst Prin) The December 21, 2018 IEP is substantively the same IEP as the December 13, 2018 IEP. (B5, B6).

32. The PPT had extensive evidence of the Student's need for a residential placement. (P4, P7, P13, P14, P15, P16, P17, P18, P19). This evidence included two psychiatric evaluations by Dr. Gallo, written recommendations from Dr. Ortiz-Schwartz and Virginia Ayers from the Southfield Center, and recommendations from CALO. Furthermore, representatives from CALO, Cornelia Gallo, M.D., and Virginia Ayers, LPC, LADC, SCPD all recommended a residential school placement during the PPT meeting on December 13, 2018. (B5).

33. The December IEPs did not accurately document the Student's then-present levels of performance. The eligibility evaluation completed by the School of the Osage district documents multiple serious needs that require intervention. (B2, B6). Serious behavioral issues include inappropriate comments to peers, threats to adults, inappropriate response to friendly teasing, does not change behavior from one situation to another, does not follow directions from authority figures, engages in sexually related behaviors, is not motivated by rewards, deliberately hurts self or damages property, among others. (B2).

34. The District based its recommendations on a file review and how Student performed when he was a Student at North Mianus Elementary School, which was a year prior to the December 2018 PPT meetings. The Board called the Student's Fifth grade teacher as a witness to present testimony on the Student's functioning before he went to CALO. She did not believe that the Student exhibited any unusual behavior as compared to same aged peers. (5th Grade).

35. The IEP offered 3.75 hours of total special education services per week, and 1.5 hours of individual counseling per week; no group counseling was provided. Behavioral

interventions and supports were all listed as accommodations and not incorporated into the IEP as specially designed instruction in the form of goals, objectives, and related services. Only three vaguely worded goals in behavior were included. (B6). The EMS placement is not specifically described in the IEP, other than in the delivery service page which identifies the classrooms or location where the Student will receive services. The recommendations page offers a therapeutic day school, but it is unclear and the Board did not explain how the services offered in the IEP would translate to a separate school, i.e. whether the outplacement would simply follow the IEP as written, or some other plan was contemplated. Furthermore, the offer in the recommendations section of a residential placement "for nonacademic" reasons confused not only the Parent, but also Board witnesses, who had a different understanding than what apparently Board "policy" was. (Parent, School Psych, Asst. Prin., Board Brief of March 11, 2019).

36. The PPT discussed potential therapeutic day placements or residential placements for "nonacademic reasons." More specifically, Grove School in Madison, CT and Green Chimneys in New York were mentioned, and emails were sent to those schools on December 13, 2018. (B52). The Student was rejected from both those schools. (PPS 1)(P2, P3). The schools explained that the Student's needs could not be met in their day programs. (Id) Even by the conclusion of the hearing, no day or residential school in Connecticut or nearby has accepted the Student in any program, because of his severe needs. In a letter, dated January 11, 2019, Grove School informed the Parent that the Admissions team determined that Student "needs a higher level of care than we offer. Unfortunately, he is not an appropriate match for our residential program or our day program." (P3) On January 23, 2019, Green Chimneys contacted the Parent via email and reported that it had rejected Student' "application to the Therapeutic Day Program as the Admissions Committee feels that his needs would be better served in a higher level of care, such as a Residential Treatment Center." These schools would have had an unbiased incentive to enroll the Student had he been an appropriate candidate.

37. The Board sent out a referral to Devereux Glenholme, but Student was not accepted into its therapeutic day or therapeutic residential programs. The Board then reached out to the Andrus School; however, the response was that Student was not a good fit. (PPS 2).

38. The Board participated in the interview with Student at Green Chimneys and learned from the admissions committee at Green Chimneys that Student required a residential program. Although the Board knew he was being rejected from every therapeutic day and residential school, no further PPT meetings were called to reassess placement options. Furthermore, the searching for appropriate programs ceased once litigation started. (PPS 2). Even though the December 21, 2018 IEP documents that the school team recommended "explor[ing] CES, High Roads and Spire as day school options," the Board did not send out referrals to these schools. (Id.).

39. Despite multiple expert opinions supporting the Student's needs for a residential placement, and the opinions of the professionals from the day placements whom the Board recommended, the Board maintained that EMS would provide the student FAPE, *in the interim*, until an outplacement could be secured. (School Psych.) The Board's intransigence to a residential placement was based on the misguided opinion that a school

district is not responsible for a student's "medical" needs. (Asst. Prin.). The Assistant Principal testified, "Based on what we had considered at — at the meeting and based on the information given to us, it seemed like, [the Student] would have been able to meet the academic demands at Eastern, that we could give him access to an education. But, a lot of the reasons for needing a residential were outside of educational needs, more medical." (Asst. Prin).

40. Board witnesses were genuinely concerned and alarmed at the Student's experience at CALO and also based their recommendations on a theory that CALO caused the Student's behavioral dysregulation, and if he were to return to Greenwich, the new setting would ameliorate his challenges. (Asst Prin, School Psych) Board witnesses were also moved by the Student's desires to return home. (Asst Prin.) The Student told Dr. Gallo that he wanted to go home, and she included this fact in her report. (P17).

41. Daybreak Canyon (Daybreak) is licensed by the State of Idaho Department of Health and Welfare as a Children's Residential Care facility and approved to provide care and services to a maximum of twenty-four (24) male children aged eleven (11) to seventeen (17) years. (P5). It is licensed as a therapeutic and behavioral facility with an online school option for children that are diagnosed with oppositional defiant disorder, reactive attachment disorder or traditional psychiatric issues such as depression, anxiety and obsessive-compulsive disorder. (Therapist). Daybreak has partnered with Idaho Connects Online (ICON) to provide educational services for its students. ICON is a fully accredited Idaho Public Online School and offers a wide variety of educational offerings from basic and early education through college preparatory classes. The program is provided by the State of Idaho Department of Education as an approved online school. (Therapist). By participating in this program, the Department of Education requires that the Students participate in their educational program for 35 hours per week. There are certified teachers in the online school for each subject, who are available to each student for assistance with any questions or additional support.

42. Ms. Sepa-Newell, the Student's treating and licensed therapist at Daybreak, testified that many of the students at Daybreak have experienced trauma and have similar profiles to the Student's, such as Reactive Attachment Disorder. (Therapist) She is highly qualified in this specialized field. (P10). Other students are emotionally delayed or struggle with reactive behaviors including treating adults. Daybreak Canyon is a small, structured environment and currently, ten (10) students attend the program. Students are expected to complete 3% of their coursework in each class each day. If, by 2:00 pm on Friday, students do not have 15% of their coursework completed, they are put on academic probation until they complete their assignments. Thus, the schedule generally requires the Student to complete a class module in about seven weeks. Around the clock supervision is provided and the staff to student ratio is generally 1 to 5; depending upon the activity, it may be 1 on 1. The Student has been also assisted by a special education teacher for a portion of the time he has been at Daybreak.

43. Students receive individual, group, family, and cognitive behavioral therapies at Daybreak. In addition, Daybreak provides experiential therapy, activities such as gardening, community service, and canine therapy. Experiential therapy is real-time therapy which

helps the child understand what the triggers are which cause him to react in a way similar to when the trauma occurred. For example, a student might have an overreaction to a staff member's tone of voice based on abusive incidents in their past. Counseling is offered day and night. Ms. Sepa-Newell testified that she has come in at midnight to work with students in need. Students are responsible for chores and self-care with staff supervision. In the evenings, if the classwork is completed, staff helps students interact with each other. (Therapist)

44. As part of his weekly individual counseling, Student has treatment goals, including emotional regulation, honesty, and trauma work. He is constantly working on skills, like understanding his own emotional process, during individual therapy. If he has difficulties, Student receives additional therapy, as needed. He receives three hours a week of group counseling. Family counseling is provided every other week. Student is benefiting from the 24/7 milieu at Daybreak and he requires this constant level of support to meet his unique educational needs. Daybreak's goal is for the students to be able to return home as soon as practicable and has achieved successful outcomes with other students. (Therapist)

45. Daybreak offers an individualized program to Student, developed through ICON. Daybreak Canyon implements the program through online coursework and a proctor. Students work at their own pace, but are held accountable. (Therapist) If Student becomes dysregulated in the classroom, the proctor/facilitator and staff immediately intercede with supports. Importantly, Student has not become dysregulated in the classroom since his second week at Daybreak. This is a stark difference from the Student's presentation at CALO, where he refused to attend class.

46. The Board did not comply with the Hearing Officer's stay put order.

47. The Board did not file for due process to defend its denial of the Parent's request for an IEE.

48. The Board did not present any evidence on the details of the ESY program in the December 2018 IEP.

CONCLUSIONS OF LAW

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 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. O'Shea, 353 F. Supp. 2d 449, 459 (S.D.N.Y. 2005)) (noting that "pendency placement and appropriate placement are separate and distinct concepts").

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).

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 Distric*t, 580 U.S. ___, 137 S. Ct. 988, 999 (2017); *Oberti v Board of Education*, 995 F.2d 1204 (3d Cir. 1993).

The Local Educational Agency (LEA) is responsible for providing FAPE to students residing within its borders and must provide an individualized educational program (IEP) for each disabled student. *Winkelman v. Parma City School District*, 550 U.S. 516, 524 (2007); *Doe v. East Lyme*, 790 F.3d 440 (2d Cir. 2015). The Student is a resident of Greenwich, Connecticut, and, thus, the Hearing Officer has subject matter jurisdiction. *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) (page 10), citing *Distr. Of Columbia v. Abramson*, 493 F. Supp. 2d 80, 84 (D.D.C. 2007) ("the LEA of residence is charged with the mandate to make FAPE available to every resident child." See 34 C.F.R. §300.101(a).) *See also Doe v. Dept. of Educ.*, CT State, Docket Nos. 14-1261-cv(L), 14-1638-cv (XAP), (2d Cir. June 26, 2015). The Student has been placed in a residential program on a temporary basis with the intent to return to Greenwich. *See Abramson* at 86 ("where the student resides was not relieved of its IDEA obligations by the fact that the LEA where the student attended school "may have child find responsibilities of its own."). (FF

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. Nerv 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.

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 describes the standard, post Endrew, in terms of whether "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 to prove by a preponderance of the evidence that the IEPs it offered were both substantively appropriate and in compliance with IDEA's procedural requirements. Regulations of Connecticut State Agencies ("R.S.C.A.") Section 10-76h-14(a); *Walczak v. Florida Union Free School District*, 142 F.3d 119, 122 (2d Cir 1998). The Board did not meet its burden as to ESY 2019; no evidence was introduced on how the ESY program provided the Student FAPE. Therefore, the IEPs did not provide FAPE for ESY 2019.

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).

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* ((1994) 15 F.3d 1519, cert. den., 513 U.S. 965 (*Union*)), 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* , supra, 15 F.3d at p. 1526; *see also J.W. v. Fresno Unified School Dist.* (E.D. Cal. 2009) 626 F.3d 431, 459-461; *Redding Elementary School Dist. v. Goyne (E.D.Cal.*, March 6, 2001 (No. Civ. S001174)) 2001 WL 34098658, pp. 4-5.) 24.

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*, (N.D. Cal. 2017) 263 F. Supp. 3d 746, 762.) 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*, (C.D.Cal. 2000) 122 F.Supp.2d 1093, 1108; *see, also, A.K. v. Alexandria City School Bd.* (4th Cir. 2007) 484 F.3d 672, 681; *Knable v. Bexley City School Dist.* (6th Cir. 2001) 238 F.3d 755, 769; *Bend LaPine School Dist. v. K.H.* (D. Ore., June 2, 2005,) 2005 WL 1587241, p. 10, aff'd *sub nom Bend-Lapine Sch. Dist. v. K.H.,* (9th Cir. 2007) 234 Fed. Appx. 508.)

Herein, the Board's IEP was deficient because it lacked clarity. The EMS placement is not specifically described in the IEP, other than in the delivery service page which identifies the classrooms or location where the Student will receive services. The recommendations page offers a therapeutic day school, but it is unclear and the Board did not explain how the services offered in the IEP would translate to a separate school, i.e. whether the outplacement would simply follow the IEP as written, or some other plan was contemplated. Furthermore, the offer in the recommendations section of a residential placement "for nonacademic purposes" confused not

only the Parent, but also Board witnesses, who had a different understanding than what apparently Board "policy" was. The Hearing Officer was likewise confused at what actual program was offered, since it appeared that three distinct programs were contained in the IEP.

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 IEPs herein did not accurately reflect the significant and multiple areas of need identified in the School of the Osage evaluation.

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 of December 21, 2018 did not provide the Student FAPE. EMS was not an appropriate placement for this Student, as the weight of the evidence showed that a residential placement is necessary. In addition, there were only three, vaguely worded goals. The Student's behavior was not addressed in detail.

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.

The PPT discussed potential therapeutic day placements at Grove School and Green Chimneys. The Student was rejected from both those schools. The schools explained that the Student's needs could not be met in their day programs. Even by the conclusion of the hearing, no day or residential school in Connecticut or nearby has accepted the Student in any program.

Given these circumstances, the Parent was left without any viable option offered by the Board. Nonetheless, CALO was practically agreed by all to be an inappropriate setting for the Student. The setting and program and the Student's lack of progress made it inappropriate for months before the PPT meetings in December 2018. Therefore, the Board is not liable to the parent on the reimbursement claim for CALO from January 1, 2019 forward. However, this decision must not be construed to obviate the Board's Stay Put obligation, per the March 4 and March 16, 2019, Stay Put orders, which covered the time period beginning January 3, 2019, until

the Student's enrollment at Daybreak on January 22, 2019. The Board must still pay the Parent for all costs for CALO, except room and board, consistent with those prior Orders.

However, Daybreak Canyon was an appropriate placement. Although not perfect, it 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, it has been and is appropriate for him currently. 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).

Furthermore, the balance of the equities favors the Parent in this matter, but full reimbursement for everything the Parent seeks is not warranted. The Board argued that the Parent did not provide Dr. Gallo's report in a timely manner, did not provide a 10-day notice letter for the Daybreak Canyon placement and did not contact the Board to schedule the PPT meeting referenced in the settlement agreement. The Hearing Officer finds that the Parent should have signed the consents for evaluations and a records release in favor of the Board for records from Daybreak. Written notice should have also been given in advance or contemporaneously with the Student's enrollment at Daybreak. However, the Board's failure to comply with the Hearing Officer's stay put order, even partially, was inexcusable[2]. The Board further had ongoing obligations to provide the Student FAPE even while the due process proceedings were pending but stopped its efforts to find a closer outplacement or day program which would accept the Student. There were several schools including High Roads, Spire and CES that the Board did not initiate inquiries of during the hearing process.

Having found that the Board violated the Student's right to FAPE, and that the Parent's unilateral placement at Daybreak was appropriate, the Board must reimburse the Parent for the full costs of Daybreak. However, the Board will not be responsible for Parental or Student travel costs and expenses to Daybreak, or other Parental travel costs for visits. Nor is the Parent awarded payment for educational consultant fees, due to the lack of cooperation outlined above.

By operation of Conn. Regs. State Agencies § 10-76h-17, Daybreak shall also be the Student's Stay Put placement during the pendency of any further appeals. This means that going forward, the Board is responsible for directly paying Daybreak, rather than the Parent funding the placement in the first instance and then seeking reimbursement from the Board.

The Parent is entitled to an IEE for rating scales that were not completed by School of the Osage evaluation. The Board had the responsibility to either grant the request or file for due process. 34 C.F.R. § 300.502 (b). Having done neither, the Board must grant the IEE.

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[2] The Board was partially concerned that the educational component of Daybreak, the ICON coursework, was provided by the State of Idaho free of charge and therefore, the Board should not be responsible for any educational costs. (*See*, Board' Motion to Dismiss). There is no legal authority for the proposition that a reimbursement claim is defined by the actual expenses to the residential treatment center, rather than the costs incurred by the Parent.

The Parent is entitled to reimbursement for Dr. Gallo's December 2018 reevaluation. The Board was to obtain a psychiatric evaluation of the Student, per the Settlement Agreement. The fact that the school district in Missouri did not complete a psychiatric evaluation did not alleviate the Board, per the Agreement and as the LEA, from doing so. The Board used Dr. Gallo's reevaluation in creating some goals for the Student, so the Parent should be reimbursed.

ORDERS:

1. The Board's motion to dismiss is denied. The Board is the LEA responsible for providing FAPE to the Student; he is a resident of Greenwich.

2. The Board shall reimburse the Parent for the costs incurred for the December 14, 2018 evaluation of Dr. Gallo within 30 days of receipt of documentation from the Parent showing the cost to the Parent.

3. The Parent shall execute the consent forms for the Board's evaluations which were requested and identified at the February 4, 2019 PPT, by July 17, 2019. These evaluations by the Board or any evaluator engaged by the Board must be completed by October 31, 2019.

4. The Parent shall obtain and provide the Student's entire record from CALO and Daybreak to the Board by July 23, 2019. The Parent shall also execute a release in favor of the Board to obtain records from Daybreak during the pendency of this matter, including any appeal.

5. The Board shall complete the referrals to High Roads and Spire and resubmit referrals to Devereaux and Green Chimneys for residential and day programs. The Parent shall be copied on all communications between the Board and the outplacements. PPT meetings shall be scheduled prior to the start of the school year by the Board to discuss the referrals and responses from the outplacements.

6. The Board shall comply with its continuing obligations under the IDEA even if there is an appeal of this Final Decision and Order.

7. The Board shall reimburse the Parent from January 22, 2019 to present, for the full monthly tuition costs of Daybreak Canyon, which includes the milieu, the education component and the clinical component, as described in the March 8, 2019 correspondence from Larry MacArthur. The Board shall place the Student at Daybreak Canyon for the remainder of the 2018-2019 school year and ESY2019, and a portion of the 2019-2020 school year through December 21, 2019.

8. The Parent is not entitled to reimbursement for CALO.