



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-133

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the City of New York.**

### **Appearances:**

Law Offices of Neal H. Rosenberg, attorneys for petitioner, Gloria Bruzzano, Esq., of counsel

Ingerman Smith, LLP, attorneys for respondent, Kerrin A. Bowers, Esq. and Christopher Venator, Esq., of counsel

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request to be reimbursed for the costs of the student's tuition at Sandhill Child Development Center (Sandhill) for the 2012-13 school year. The appeal must be dismissed.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

Given the limited scope of this appeal, only a brief recitation of the student's educational history is warranted. On May 2 and June 11, 2012, subcommittees of the CSE convened to conduct the student's annual review and to develop an IEP for the 2012-13 school year (fifth grade) (see Dist. Exs. 7 at p. 1; 8 at pp. 1-3; 9 at pp. 1-3; 11 at pp. 1-2). Finding that the student remained eligible for special education and related services as a student with an other health impairment, the CSE subcommittees recommended resource room services; counseling as a related service; the services of a full-time, 1:1 aide for behavior management support; and individual behavior intervention services for the student (see Dist. Ex. 11 at pp. 1-2, 8-9).<sup>1</sup> In

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<sup>1</sup> The student's eligibility for special education programs and related services as a student with an other health impairment is not in dispute (see 34 CFR 200.8[c][9]; 8 NYCRR 200.1[zz][10]).

addition, the CSE subcommittees developed annual goals targeting the student's study skills, writing skills, and social/emotional and behavioral needs (id. at pp. 7-8).

On June 21, 2012, the student was admitted into an out-of-State wilderness program (see Dist. Ex. 19 at p. 1). Shortly thereafter on or about June 28, 2012, the student was admitted into an out-of-State hospital (see Parent Exs. B at p. 1; C at p. 1). On or about July 18, 2012, the student was admitted to Sandhill, and on the same date, the parent executed an enrollment agreement with Sandhill (see Parent Exs. H at p. 1; K at pp. 1-3).<sup>2</sup> In a letter dated August 15, 2012, the parent provided the district with a 10-day notice of his intention to place the student at Sandhill based upon the district's failure to offer the student an appropriate placement and the student's "current behavior and recent hospitalization and his multiple suspensions" during the 2011-12 school year (Dist. Ex. 15). In addition, the parent indicated that based upon recent testing in spring 2012, the student required a "much more intensive level of behavior therapy" (id.). By letter dated August 20, 2012, the parent notified the district of his intention to seek reimbursement for the costs of the student's tuition at Sandhill for the 2012-13 school year (see Dist. Ex. 16).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated December 6, 2012, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Dist. Ex. 21 at pp. 1-7). As relief, the parent requested a determination that Sandhill constituted an appropriate unilateral placement for the student, and an order directing the district to reimburse the parent for the costs of the student's tuition at Sandhill for the 2012-13 school year (id. at pp. 7-8).

### **B. Impartial Hearing Officer Decision**

On April 15, 2013, the parties proceeded to an impartial hearing, which concluded on May 21, 2013, after five days of proceedings (see Tr. pp. 1-762). In a decision dated June 17, 2013, the IHO determined that the district did not offer the student a FAPE for the 2012-13 school year, but that the parent was not entitled to an award of tuition reimbursement (see IHO Decision at pp. 31-40). More specifically, although the IHO determined that Sandhill provided the student with "individual and milieu therapy with the goals of improving [the student's] ability to express his anger and reduce his temper tantrums, and improving his relationship with caretakers," the IHO found the parent failed to establish that Sandhill provided the student with "educational instruction specially designed to meet his unique needs" (id. at p. 37). The IHO noted that the July 2012 neuropsychological evaluation recommended a "reading enrichment program with intensive immersion in phonics" for the student, in addition to a "comprehensive approach to improve paragraph writing, and an individualized behavioral plan with rewards dispensed multiple times each day" (id. at pp. 37-38). Likewise, the IHO indicated that the June 2012 IEP recommended a "behavior plan, the services of a behaviorist," and a 1:1 aide, as well as a "high level of individual instruction" and "extensive accommodations including shortened assignments, and revised test format" (id. at p. 38). However, the IHO found no evidence to

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<sup>2</sup> The Commissioner of Education has not approved Sandhill as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

show that Sandhill's principal—who was responsible for overseeing the student's academic program—reviewed the July 2012 neuropsychological evaluation or "any other evaluative material regarding [the student]" (id.; see IHO Decision at pp. 23-29). Furthermore, although the IHO noted that Sandhill's principal had access to the student's IEP, the hearing record contained little, if any, evidence that Sandhill provided the student with the "type of supports (individual instruction; one-to-one aide)" previously provided to the student by the district so he could make educational progress (IHO Decision at p. 38). Next, the IHO noted that the student's class contained 11 students with a "wide range of needs and ability levels," and in order for Sandhill to address this "wide range of grade levels within his class," Sandhill provided the student with a "non-special education, online program" so he could access grade-level curriculum (id.). The IHO further found that despite the student's "requests for more support," Sandhill did not provide the student with an individual aide until late March 2013 (id.). Moreover, the IHO found no evidence to establish that Sandhill provided the student with "appropriate remediation for his difficulty with phonics or writing," nor did the hearing record indicate that Sandhill modified the student's curriculum to provide for "shortened assignments or revised test formats" (id.). The IHO also concluded that there was no evidence to show that Sandhill implemented a behavioral system to provide the student with rewards throughout the day to improve behaviors or complete assignments, as recommended in both the July 2012 neuropsychological report and the June 2012 IEP (id.).

With respect to whether the student made progress at Sandhill during the 2012-13 school year, the IHO found that the student "responded poorly to the educational program" at Sandhill and received failing grades in all of his classes, except art (IHO Decision at p. 39). The IHO further noted that the parent did not offer the student's first semester report card or progress reports as evidence, which "might have explained" the student's lack of progress (id.). Notwithstanding testimony from Sandhill's assistant clinical director (assistant director) and the parent about the student's "improved behavior and his development of empathy," the IHO also found that for the majority of the 2012-13 school year the student "avoided doing school work" (id.). Similarly, the IHO afforded little weight to an undated report prepared during the course of the impartial hearing, which reflected that the student "was now passing his classes with grades of 'D' to 'C+,'" and he could complete the "fifth grade curriculum during the summer" (id.). The IHO also did not attach much weight to the testimony of the parent's witness or the student's resource room instructor (id.). Specifically, while the IHO found that the parent's witness believed that Sandhill implemented a "structured behavioral program (point system)" for the student to achieve his academic and behavioral goals, the IHO found no evidence that "any such program existed" at Sandhill (id.). Likewise, the student's resource room teacher testified that the "program was appropriate" for the student because it met the student's "intensive emotional needs" (id.). Notwithstanding this testimony, however, the IHO concluded that the hearing record did not contain sufficient evidence to establish that Sandhill was reasonably calculated to enable the student to receive educational benefits, and thus, the IHO denied the parent's request for reimbursement of the costs of the student's tuition at Sandhill for the 2012-13 school year (id. at pp. 39-40).<sup>3</sup>

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<sup>3</sup> In addition, while the parent alleged that the student's classification category should have been emotionally disturbed" as opposed to "other health impairment," the IHO found that both categories described the student's disability, and therefore, the IHO denied the parent's request to direct the CSE to reconvene and to reconsider the student's classification category (see IHO Decision at pp. 39-40).

#### **IV. Appeal for State-Level Review**

The parent appeals and asserts that the IHO erred in finding that Sandhill was not an appropriate unilateral placement for the student. The parent asserts that to address the student's social/emotional and behavioral needs, Sandhill provided the student with a "highly structured environment," a "heavily therapeutic program," and "specially trained faculty." In addition, Sandhill used a neurosequential model of therapeutics (NMT) to address the student's difficulty regulating his emotions and to target the student's neurodevelopment. The parent also argues that Sandhill provided the student with both individual and family therapy, and worked with the student on an "as needed" basis within the residential setting to address the student's interactions with others. Next, the parent asserts that the student made "significant" progress with respect to his social/emotional and behavioral needs, and the students' special education teacher modified the curriculum and pace of instruction to respond to the student's strengths and weaknesses. In addition, the parent contends that Sandhill provided the student with a 1:1 aide to further address his executive functioning and distractibility, as well as to provide structure for the student. The parent—as further proof of the student's progress—submits additional documentary evidence for review on appeal. Finally, regarding equitable considerations, the parent contends that he acted in good faith and cooperated fully with the CSE process. As relief, the parent requests an order directing the district to reimburse him for the costs of the student's tuition at Sandhill for the 2012-13 school year, in addition to an order directing the CSE to reconvene to review the student's classification category.

In an answer, the district responds to the parent's allegations, and argues to uphold the IHO's finding that Sandhill was not an appropriate unilateral placement for the student.<sup>4, 5</sup>

#### **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

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<sup>4</sup> The district did not cross-appeal the IHO's adverse determination that it failed to offer the student a FAPE for the 2012-13 school year; as such, the IHO's determination is final and binding on both parties and it will not be further addressed in this decision (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see also M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]; IHO Decision at p. 36).

<sup>5</sup> The parent attached additional documentary evidence to the petition for consideration on appeal, and the district objects to its consideration (Pet. Ex. AA at pp. 1-2; Answer ¶ 18). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of the Dep't of Educ., Appeal No. 12-103; Application of a Student with a Disability, Appeal No. 11-041; Application of a Student with a Disability, 10-047; Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this instance, the parent's proffered evidence is an undated document, which precludes a determination regarding whether it was available at the time of the impartial hearing (see Pet. Ex. AA at pp. 1-2). Regardless, even if the document was not available, it is not now necessary to consider in order to render a decision in this matter; therefore, in my discretion, the parent's request must be denied.

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is

"reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"])). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at \*9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

### **A. Unilateral Placement**

In this case, the district does not appeal the IHO's determination that it failed to offer the student a FAPE for the 2012-13 school year; therefore, the next issue to determine is whether the parent's unilateral placement of the student at Sandhill during the 2012-13 school year was appropriate. As explained more fully below, a review of the evidence in the hearing record

supports the IHO's finding that Sandhill was not appropriate, and thus, there is no reason to disturb the IHO's decision.

### **1. The Student's Needs**

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the remaining disputed issue; namely, whether the student's unilateral placement at Sandhill was appropriate.

Generally, the evidence in the hearing record reveals that although the student demonstrated an overall intellectual functioning within the superior range, he engaged in acting-out and disruptive behaviors that, at times, escalated into physical behavior or aggression both in school and at home (see Dist. Exs. 1 at pp. 3-6; 14 at pp. 1-7, 10-12). Notwithstanding his overall intellectual functioning, however, a July 2012 neuropsychological evaluation of the student revealed reading skills within the average to low average range, which represented a decline from previous testing results (compare Dist. Ex. 2 at pp. 1-3, with Dist. Ex. 14 at pp. 6, 16). The student's written expression skills fell within the low average range with some scatter of subordinate skills that ranged between the average to low average range (see Dist. Ex. 14 at pp. 6, 16). The evaluator suggested that the student's low average facility with spelling was consistent with similar estimates of the student's decoding skills; however, in contrast, the student's testing results in sentence composition and essay composition fell within the average range (id. at pp. 6-7). The student's overall performance on measures of his mathematics skills fell within the average range (id. at p. 7). In addition, the evaluator reported that the student presented with a "highly complex constellation of issues and concerns," which included "pervasive and developmentally excessive manifestations of inattention and hyperactivity that negatively impacted his functioning" consistent with an attention deficit hyperactivity disorder (ADHD); a "temperamental volatility" indicative of the "presence of comorbid oppositional defiant disorder (ODD);" and "anxiety (most compatible with an [a]nxiety [d]isorder), [n]ot [o]therwise [s]pecified" (id. at p. 12).

In consideration of the testing results, the evaluator recommended the following educational and neuropsychological supports for the student: an "academic environment" assuring the student's "success" and with opportunities to receive "scholastic supports and assistance;" a "therapeutic school environment with a small student-teacher ratio, highly structured approach to learning (i.e., clearly defined rules and expectations) and opportunities for individualized instruction;" the completion of a functional behavioral assessment (FBA) and the development of an "individualized behavioral plan;" assignments presented in a "multimodal manner;" test questions and instructions read aloud; extended time and a separate location for testing; participation in a "reading enrichment program" to provide the student with an "intensive immersion in phonics along with the benefit of continuity and repetition;" encouraging the student to read aloud; the use of particular software programs to provide the student with an "intensive immersion in phonics;" enlarged printed materials; providing the student with opportunities to select high interest literary materials to engage him in focused discussions; a comprehensive approach to improve paragraph writing; assisting the student to "organize verbal output more effectively;" breaking up writing assignments into smaller tasks and writing in "stages;" setting goals to accomplish during a given work period; implementing "manageable study sessions;" providing frequent breaks to sustain his attention; and sequencing homework

assignments to maintain the student's engagement and minimize his frustration (Dist. Ex. 14 at pp. 12-15). In addition, the evaluator made the following recommendations related to the student's social/emotional needs: "continued pharmacological treatment" to address the student's "inattention, oppositionality, affective lability, and anxiety;" teaching the student "self-regulatory skills in non-stressful situations;" individual psychotherapy to address anxiety and "instill adaptive coping strategies;" and encouraging the student's participation in extracurricular activities for exposure to positive role models and opportunities for constructive problem-solving (id. at p. 15).

In addition, an FBA of the student conducted in June 2012 described the following as target behavior to reduce: non-compliance (i.e., refusing to complete tasks or activities), aggression (i.e., hitting, slapping, punching, kicking toward another individual), inappropriate sounds (i.e., out-of-context audible sounds), elopement (i.e., attempting to leave or run from an area or adult), and inappropriate social interactions (i.e., interrupting conversations, talking back, speaking in an unfriendly manner) (see Dist. Ex. 9 at pp. 1-3). Finally, evidence in the hearing record documents that the student received the following diagnoses: disruptive behavior disorder, not otherwise specified (NOS); an ADHD, combined type; and an ODD (see Dist. Exs. 1 at p. 1; 12 at p. 6; 14 at pp. 3, 12).<sup>6</sup>

## **2. Sandhill and Specially Designed Instruction**

The parent argues that contrary to the IHO's determination, Sandhill met the student's social/emotional, behavioral, and academic needs through its highly structured environment, heavily therapeutic program, and specially trained faculty. In addition, the parent asserts that Sandhill also addressed the student's difficulty regulating his emotions, provided the student with both individual and family therapy, and as a result, the student made significant progress with respect to his social/emotional and behavioral needs. A review of the evidence in the hearing record does not support the parent's contentions, and thus, the IHO's conclusion that Sandhill did not provide the student with specially designed instruction tailored to meet his unique needs, should not be disturbed on appeal.

According to the evidence in the hearing record, the Sandhill program followed a neurosequential model of therapeutics—or "brain development"—that considered the "different parts of the brain," its organization, and how the brain "developed in a hierarchal and sequential system," as well as a "relational model" that focused on helping students learn to self-regulate arousal states (Tr. pp. 236-40). The Sandhill assistant director explained that as students moved up the continuum of arousal states to "alarm, fear, [or] terror," they lost "functional IQ points" and could not learn (Tr. pp. 239-40). As a result, Sandhill worked with students to "regulate their brain consistently to get them to a place where they [were] learning-ready and they [could] take in information" (Tr. p. 240). For this student in particular, the Sandhill assistant director testified that he exhibited "poor and maladaptive" coping skills when "escalated and

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<sup>6</sup> A March 2012 psychiatric evaluation of the student included a notation to "[r]ule [o]ut [a]nxiety [d]isorder NOS (with elements of generalized anxiety and compulsive behavior)" (Dist. Ex. 12 at p. 6). The March 2012 psychiatric evaluation report also noted that the student exhibited "[p]sychosocial and environmental problem areas" including "conflict between parents" and "conflict between siblings and parents" (id. at pp. 6-7). A June 2012 psychiatric evaluation report listed the following as "[d]iagnostic [i]mpressions" of the student: mood disorder, NOS (primary); bipolar disorder, NOS (rule out); ADHD, combined type (tertiary); and depressive disorder, NOS (primary) (see Parent Exs. D at p. 3).

overaroused," which manifested in the student being uncooperative and oppositional and which then proceeded into the student "becoming mean, verbally aggressive, [and] belligerent" (Tr. pp. 245-46). Consequently, the student's program focused on helping him "self-regulate and calm his brain down" in a "very highly structured and contained environment" (Tr. p. 246).

The hearing record further described the more theoretical and philosophical nature of the Sandhill program in the student's "[m]aster [t]reatment [p]lan," noting specifically that at the "heart of this philosophy [was] helping children and adolescents regulate fear-terror states" (Parent Ex. H at p. 2). Generally, the program considered "four ways to regulate the brain," including relational regulation, somatosensory regulation, self-regulation, and pharmacological regulation (*id.*). While acknowledging the fundamental role of relational regulation, the master treatment plan indicated that Sandhill also acknowledged the "importance of somatosensory regulation," and therefore, offered students a "sensory diet of exercise, music, yoga, massage and animal assisted activities" (*id.*). According to the student's master treatment plan, Sandhill's treatment philosophy aimed to "deliver treatment that [was] [r]elational, [r]ewarding, [r]elevant (to development needs), [r]epetitive, [r]hythmic, and [r]easonable" (*id.*). In addition, the student's master treatment plan indicated that the neurosequential model of therapeutics specifically helped "match the nature and timing of specific therapeutic techniques to the developmental state and brain region and the neural networks mediating the neuropsychiatric problems" (*id.*). Consistent with providing a safe environment, Sandhill's discipline was "never punitive," but rather, focused on interrupting behaviors and viewing behaviors as "opportunities for relearning" (*id.*). Ultimately, Sandhill's goal was to help students toward "self-regulation, developed in safety" (*id.*).

At the time of the impartial hearing, Sandhill's student body consisted of approximately 30 students in third grade through ninth grade, who ranged in age between 9 and 15 years old, and who enrolled due to difficulties with "self-regulating their emotions" that escalated into "aggression" (Tr. pp. 235-37, 417). Staffing at Sandhill included a psychologist (clinical director), an assistant director, and a psychiatrist who consulted on a monthly basis for medication management (*see* Tr. pp. 295-96; *see* Tr. p. 312). In addition, the assistant director testified that Sandhill offered a "full-time special education component" that employed three special education teachers, and she indicated that Sandhill's principal was a special education teacher (Tr. pp. 240-41, 415-17). During the 2012-13 school year, the student attended a classroom with 11 students, a special education teacher, and two teacher's aides who both had high school diplomas and training in the neurosequential model of therapeutics (*see* Tr. pp. 418-20). Throughout the school day, Sandhill addressed the student's strengths and weaknesses by offering a low student-teacher ratio, and beginning in approximately March 2013, Sandhill provided the student with the services of a one-to-one aide to assist him with academics (*see* Tr. pp. 345, 423-24, 455-56). In April 2013, Sandhill was in the process of "setting up" the student's schedule so he could work on "certain subject at specific times of the day" (Tr. pp. 345, 423-24). In addition, Sandhill provided the student with "exercise, short breaks throughout the day, environmental manipulations," and "bilateral stimulation" (Tr. pp. 423-24).

In the classroom, Sandhill provided instruction through a "nationally recognized" online program that was "individualized to each specific student" (Tr. pp. 424-25). The student's classroom teachers provided oversight on a "daily basis" and helped to "organize" the student's "daily plan" (Tr. pp. 424-25). As described in the hearing record, the student's online program

was "more interactive" as opposed to the online program for high school students, which was delivered through "lecture style lessons" or "links to a video" (Tr. pp. 451-52). However, "interactive" did not mean that the student received live lectures or could ask questions during the online program (Tr. p. 452). The Sandhill assistant director testified that the student spent approximately 40 percent of his time with the online program and the remaining 60 percent of the time he worked "offline" (Tr. pp. 446-47). In addition, the student's progress could be measured through online assessments (see Tr. pp. 447-48). Sandhill issued "semester report cards," which noted the percentage of "academic and emotional support" the student received in the classroom (Tr. pp. 457-58).

In this case, the student's Sandhill master treatment plan identified two problem areas to be addressed: the first focused on the student's "Affect Regulation Issues; Mood disorder and Generalized Anxiety;" and the second targeted his "Oppositional Defiant Disorder" (Parent Ex. H at pp. 1, 3-5). For each identified problem area, the student's master treatment plan included "Long Term/Discharge/Graduation Goals" and "Short-Term Objective[s]," which described interventions used and summarized the student's progress when reviewed in November 2012 and March 2013 (*id.* at pp. 3-5). Each review consisted of brief anecdotal comments provided by Sandhill staff members (see *id.*).

As noted above, the evaluator who conducted the July 2012 neuropsychological evaluation offered an extensive list of recommendations regarding educational and neuropsychological supports for the student, as well as social/emotional supports for the student (see Dist. Ex. 14 at pp. 1, 12-15). In addition to recommendations for a "therapeutic school environment with a small student-teacher ratio" and a "highly structured approach to learning," the evaluator recommended an "individualized behavioral plan" that would be "monitored" and "adjusted by a treatment plan" (*id.* at p. 13). However, the student's master treatment plan provided only a general description of the student's therapeutic services and lacked clearly defined measureable goals; moreover, the master treatment plan offered no criteria to determine goal achievement, methods by which to measure progress, or a schedule to monitor progress (see Parent Ex. H at pp. 3-5). Furthermore, the hearing record contains little, if any, evidence of treatment records (see Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI). In addition, although the parent testified about the student's "progress" in terms of the student demonstrating compassion and expressing remorse, the hearing record contains no evidence of data collection or progress monitoring to support such progress, or to otherwise provide evidence of a structured effort to address the student's behavioral challenges (see Tr. pp. 690-91; see also Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI). In addition, neither the student's master treatment plan nor the evidence presented about the Sandhill program demonstrated how the Sandhill program addressed the effect of the student's social/emotional and behavioral needs on his ability to participate in academics or to benefit from instruction (see Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI ).

In addition, despite the evaluator's recommendation for the student to have opportunities to interact with "positive peer role models" and to engage in "constructive problem solving," the Sandhill principal testified that the student's classmates presented with disparate needs and challenges (compare Dist. Ex. 14 at p. 15, with Tr. pp. 419-21). The Sandhill principal testified that the student's classmates included students who appeared to be on the "autistic spectrum but

[were] high functioning," and others with "severe dyslexia" and "short attention spans and nonspecific learning disabilities" (Tr. pp. 420-21).

Moreover, the evaluator who conducted the July 2012 neuropsychological evaluation stressed the need to provide the student with a "reading enrichment program" to provide the student with an "intensive immersion in phonics," as well as providing the student with a "comprehensive approach to improve paragraph writing" (Dist. Ex. 14 at pp. 13-14). However, the hearing record does not contain evidence that Sandhill's online instruction—or the program overall—addressed these areas of academic concerns noted by the evaluator (see Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI). To the contrary, while the Sandhill principal acknowledged in his testimony that the student's reading and mathematics was "very low" and that it "impact[ed] his emotions and c[ould] lead to emotional dysregulation," the hearing record does not indicate that Sandhill offered the reading or writing instruction as recommended in the July 2012 neuropsychological evaluation report (Tr. pp. 419-23; see Dist. Ex. 14 at pp. 6, 13; see also Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI).

With regard to the student's academic program at Sandhill, the hearing record includes a December 2012 report that included a brief summary of the student's psychiatric and medical history and his adjustment to Sandhill, as well as a brief discussion of the student's "Current Education" that primarily centered on his adjustment challenges and staff interventions (Parent Ex. J at pp. 1-2). According to the December 2012 report, the student experienced anxiety when presented with new instructional material, which led to a state of "dysregulation" (id. at p. 2). In response to the student's acting out behaviors and work refusal, Sandhill staff offered the student increased 1:1 support, and the December 2012 report noted that the student was "beginning to accept the help more readily" (id. at p. 1).

The December 2012 Sandhill report also indicated that the student was "behind in his academic work" and would not complete his coursework in a timely fashion, but the hearing record provides no information regarding what this coursework entailed (Parent Ex. J at p. 2; see Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI). The December 2012 report did, however, list the anticipated dates for the completion of the coursework between June and August 2013 (see Parent Ex. J at p. 2). The Sandhill principal testified the student's first semester report reflected "very poor academic performance," which earned the student a grade of "F" in mathematics, life science, language arts, spelling, and history (Tr. pp. 458-59). The Sandhill principal also testified that for a good portion of the student's first semester at Sandhill, he did not take academics "seriously" (Tr. pp. 462-63).

According to an undated letter updating the student's academic progress at Sandhill, the student had "developed some coping skills" and he improved his ability to "handle daily stresses" and his ability to work independently (Parent Ex. Q at p. 1). At that time, the student's grades improved across all subject areas, and ranged from "D" to "C+" (id. at p. 2). However, the student continued to work on completing curriculum assignments from first semester, and his improved grades reflected the student's efforts to complete that work (see id.).

Based upon the foregoing—and consistent with the IHO's determination—the evidence in the hearing record does not support a finding that Sandhill was an appropriate unilateral placement for the student for the 2012-13 school year. Similar to the IHO's decision, an

independent review of the hearing record indicates that the parent failed to present sufficient evidence to establish that Sandhill provided the student with the types of support previously provided by the district, such as individual instruction and a one-to-one aide, in order to make educational progress. In addition, the hearing record failed to contain evidence that the student received the appropriate remediation for his difficulties in phonics and writing or that any behavioral system was put into place to reward the student for improved behaviors or completion of assignments—as recommended in the July 2012 neuropsychological evaluation report. Consequently, the parent has failed to establish that the student's unilateral placement at Sandhill provided him with specially designed instruction or that Sandhill was reasonably calculated to enable the student to receive educational benefits, and therefore, there is no reason to disturb the IHO's conclusion.

### **3. Progress**

Finally, the parent argues that while not dispositive the hearing record contains evidence to support a finding that the student made progress at Sandhill. With respect to the student's progress at Sandhill, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78, 2013 WL 1277308 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81, 2012 WL 6684585, [2d Cir. Dec. 26, 2012]; L.K. v Northeast School Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at \*3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at \*22-\*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).7 However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27).

While the hearing record suggests the student made some progress in the social/emotional and behavioral domains as indicated above, the hearing record contains little, if any, evidence of progress in the academic domain (see Tr. pp. 1-735; Dist. Exs. 1-26; Parent Exs. A-Q; IHO Exs. I-VI). Collectively, the Sandhill reports provided negligible insight into the student's academic endeavors or his progress therein (see Parent Exs. J at pp. 1-2; Q at pp. 1-2). Although the Sandhill principal testified that online assessments were used to measure mastery of presented concepts, neither the Sandhill reports nor the principal's testimony included reference to the specific skills being assessed or the student's performance on these measures (see Tr. pp. 425-426; Parent Exs. H; J).

## **VII. Conclusion**

Having determined that the parent failed to sustain his burden to establish the appropriateness of the student's unilateral placement at Sandhill for the 2012-13 school year for an award of tuition reimbursement, the necessary inquiry is at an end and I need not reach the issue of whether equitable considerations weighed in favor of the parent's request for relief (M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
September 5, 2014**

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**CAROL H. HAUGE  
STATE REVIEW OFFICER**