



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-126

**Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**

Liz Vladeck, General Counsel, attorneys for petitioner, by Fiona M. Dutta, Esq.

The Law Office of Deborah A. Ezbitski, attorney for respondent, by Deborah A. Ezbitski, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondent (the parent) for the costs of the student's tuition at Greenbrier Academy for Girls (Greenbrier) for a portion of the 2020-21 school year. The appeal must be sustained in part.

#### 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[a]). 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, a full recitation of the student's educational history is unnecessary. Briefly, the parent unilaterally placed the student at Greenbrier—an out-of-State, "four-year, college-preparatory, therapeutic boarding school"—for the 2019-20 school year beginning on or about September 12, 2019 (see Parent Exs. E at p. 1; F at p. 3). The evidence reflects that, on September 12, 2019, the parent executed an enrollment contract with Greenbrier for the student's attendance during the 2019-20 school year, which noted an anticipated enrollment date of September 12, 2019 and an anticipated completion date of June 10, 2020 (see Parent Ex. F at p. 2). According to the evidence in the hearing record, Greenbrier operated as a "year-round school that beg[an] in the first week of June and end[ed] the third week of May each year" (Parent Exs. E at p. 3; G).

On or about November 13, 2019, the parent filed a due process complaint notice, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. J at p. 2). As relief in that administrative proceeding, the parent sought, in part, reimbursement of the costs of the student's tuition at Greenbrier for the 2019-20 school year (id.).

In the midst of the impartial hearing for the 2019-20 school year, a CSE convened in December 2019 to conduct an initial review of the student's eligibility for special education when she was in 11th grade and, at that time, had earned approximately 26.75 credits towards graduating high school; the December 2019 CSE found the student eligible for special education as a student with an emotional disability and recommended 12-month programming for the student in a 6:1+1 special class placement in a State-approved nonpublic school, together with counseling services (see Parent Ex. K at pp. 1-2, 8-9, 11).<sup>1</sup> The December 2019 IEP reflected a projected implementation date of January 2, 2020 and a projected annual review date of December 19, 2020 (id. at p. 1).

Subsequent to the December 2019 CSE meeting, the student continued to attend Greenbrier (see Parent Ex. G).

In a letter dated June 15, 2020, the parent informed the district of his intention to continue the student's unilateral placement at Greenbrier for the 2020-21 school year because the district failed to develop an IEP for the student for the 2020-21 school year and the Central Based Support Team (CBST) had not contacted him regarding an "appropriate placement at a NY State approved residential school" (Parent Ex. B). The parent also advised the district of his intention to seek public funding for the costs of the student's tuition at Greenbrier (id.).

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

By due process complaint notice dated September 16, 2020, the parent alleged that the district failed to offer the student a FAPE for the 2020-21 school year because the district failed to develop an IEP for the student and no "placement" had been offered for the 2020-21 school year (see Parent Ex. A at pp. 1-3). As relief, the parent requested an order directing the district to reimburse him for the costs of the student's tuition at Greenbrier for the 2020-21 school year (id. at p. 3). The parent indicated that any funds awarded should be paid to his educational advocate's escrow account, which would then reimburse the parent or pay Greenbrier directly (id.).

### **B. Events Post-Dating the Due Process Complaint Notice**

The evidence in the hearing record reflects that, on or about October 9, 2020, the student graduated from Greenbrier and, thereafter, no longer attended Greenbrier (see Tr. pp. 69, 198; Parent Exs. F at p. 3; G).

In a decision, dated November 15, 2020, arising from the administrative proceeding the parent brought concerning the 2019-20 school year, an IHO concluded that the district failed to

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<sup>1</sup> The December 2019 IEP also reflected a recommendation for an interim placement in a 15:1 special class from January 2020 through March 2020 (see Parent Ex. K at p. 8).

offer the student a FAPE for the 2019-20 school year, that Greenbrier was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's requested relief (see Parent Ex. J at pp. 5-6). The evidence reflects that the district "took no position as to whether or not it offered the [s]tudent a FAPE" for the 2019-20 school year at the impartial hearing, and the parent presented Greenbrier's academic dean (dean) and an assistant clinical director (director) as witnesses, as well as the parent himself (via affidavit in lieu of direct testimony), and offered documentary evidence in support of his case (*id.* at pp. 2-3, 5-6). The IHO in that matter ordered the district to reimburse the parent for the costs of the student's tuition at Greenbrier for the 2019-20 school year (*id.* at p. 7).

### **C. Impartial Hearing Officer Decision**

On September 20, 2021, an IHO was appointed to the instant matter, and the parties appeared before the IHO on 16 dates between October 4, 2021 and April 26, 2023 (see IHO Decision at p. 3; Tr. pp. 1-222). For almost a year and a half while the matter was pending before the IHO, the parties appeared before the IHO on several occasions and discussed the parent's attempts to gather documents from his financial institution and the student's residential school to facilitate the settlement process, the status of the parties' negotiations, the status of pendency payments in the matter, and, eventually, the plan for going forward with the substantive portion of the impartial hearing, including the deadlines for disclosures and the anticipated evidence (see Tr. pp. 9, 24-25, 30-31, 42-43, 48, 57, 63, 69-70, 78-82, 84-86, 95-99, 104, 106-09, 111-15, 122, 124-25, 127, 135-39, 141-47).<sup>2, 3</sup>

At the appearance before the IHO on January 26, 2023, the parent's attorney indicated that the "evidence [she] had prepared to introduce [wa]s the [hearing] record from that [previous impartial] hearing" including the parent's affidavit dated August 28, 2020, as well as the transcript testimony of two witnesses who appeared on July 20, 2020—the dean and the director at Greenbrier, as well as "the findings of fact and decision from that [impartial] hearing" (Tr. pp. 105, 111-14). In addition, the parent's attorney noted that she would produce witnesses or additional affidavits, if necessary, and "endeavor to make [those witnesses] available for cross-examination on the 13th" but otherwise, the parent's attorney was "ready to go forward with what [she] ha[d] on the record" (Tr. pp. 105-06, 113).

After the district representative confirmed that the parent's attorney intended to present evidence pertaining to the previous school year—i.e., the 2019-20 school year—he further confirmed that the evidence was not related to the "school year at hand" (Tr. p. 106). The parent's attorney indicated that the student had attended a residential placement for a "year-and-a-half" (Tr.

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<sup>2</sup> On November 22, 2021, a district representative executed a pendency form—already executed by the parent's attorney on August 26, 2021—which indicated that the following constituted the student's pendency services: "Parent Reimbursement" of the costs of the student's tuition at Greenbrier (10-month school year program), "effective as of 11/15/2020 issue date" of the IHO's decision in the previous administrative proceeding (IHO Ex. VII at pp. 1-2).

<sup>3</sup> On May 3, 2022, neither party appeared due to what the IHO believed to be a mix-up with dates (see Tr. pp. 37-38). On August 29, 2022, neither the parent nor the parent's attorney appeared (see Tr. p. 55). On December 20, 2022, no one appeared on the district's behalf (see Tr. pp. 93-95).

pp. 106-07). And in defense of just recently providing the district with certain information, the parent's attorney stated that it was difficult to get information from the residential placement because the student had graduated in 2020 and had not, therefore, been attending the school for "some period of time" (Tr. pp. 108-09). According to the parent's attorney, she offered the parent's affidavit as "sworn testimony" and explained it was "relevant because it [wa]s testimony at exactly the same time that this student was enrolled in the program" (Tr. p. 114). The parent's attorney also indicated that if she brought in the two school witnesses for direct testimony, "it [wa]s reasonable to suggest that two and a half years later their memories [we]re not going to be as good as they were when they testified on the 20th of July in 2020 when the student was still attending the program" (Tr. p. 114). The IHO suggested that, perhaps, the parent's attorney should have the two school witnesses "adopt the statements they made in 2020," for the purpose of providing a "cleaner record"; the parent's attorney agreed to do that (Tr. p. 115).

On February 13, 2023, the parent's attorney explained that she had made attempts to locate the two school witnesses who had previously provided testimonial evidence in the prior impartial hearing for the 2019-20 school year, but she could not locate either witness as neither worked for Greenbrier any longer and Greenbrier was not comfortable releasing any contact information at that time (see Tr. p. 124). However, the parent's attorney stated that she would continue her attempts to locate the witnesses to "either testify or provide affidavits, swearing to the accuracy of their testimony from 2020" (Tr. pp. 124-25, 127).

On March 20, 2023, it was confirmed that the district would not extend an offer to settle the case and the parent's attorney indicated that the parent was "ready to proceed with the [impartial] hearing" (Tr. p. 135). The district representative stated that the district was not presenting a case (Tr. p. 137).

The district representative stated that the district was going to object to the parent's evidence, especially given previous discussions concerning the need for the parent's attorney to update the testimony she intended to present as evidence, as well as the need to have those witnesses available for cross-examination (see Tr. p. 139). Specifically, the district representative objected to entering parent exhibits "E" (the student's class schedule from the 2019-20 school year) and "I" (transcript testimony of two school witnesses—the dean and the director—elicited at the previous impartial hearing) into evidence (Tr. pp. 141-44).

The parent's attorney indicated that the proffered testimony took place during the 2020-21 school year "with reference to the student's attendance at the therapeutic residential program during the [20]19[-20] school year" and that "[n]othing had changed in that program from June 30th, 2020, July 1st, 2020, to October 20th, 2020, when the student was discharged from the program" (Tr. pp. 144-45). She further stated that the proffered testimony was "exactly the same testimony that these witnesses would provide today if they were available and if they could recall the circumstances and the progress and the program that the student was attending at that time" and would be "the most accurate testimony" given the proximity in time of the testimony to the student's attendance (Tr. p. 145-46). However, the parent's attorney also noted that the IHO was "free to disregard it and find that the [p]arents ha[d not] sustained their burden"—but that it would be error to not consider it (Tr. p. 146). And although the parent's attorney confirmed that the two school witnesses were not available for cross-examination, she indicated that they had both been

cross-examined at the previous impartial hearing on July 20, 2020, and therefore, the district was not being deprived of the opportunity to cross-examine the witnesses (see Tr. pp. 146-47).<sup>4</sup>

Thereafter, the IHO entered both parent exhibit "E" and exhibit "I" into the hearing record as evidence (Tr. pp. 151-52). The IHO noted the district's objection to the exhibits, and explained that, while both would be entered into the hearing record, it would be up to the IHO whether to accord them any weight (see Tr. pp. 151-53). The district representative additionally reminded the IHO that, with respect to parent exhibit "I," the two school witnesses—while cross-examined at the previous impartial hearing about the "prior school year"—were not cross-examined for "this subject school year" (Tr. p. 155).

In an email dated March 24, 2023, the district representative continued to express disagreement with the IHO's decision to admit parent exhibit "I"—the transcript testimony of two school witnesses—into the hearing record as evidence (IHO Ex. I). The district representative renewed its objection and requested an opportunity to formally respond or brief the issue of the admissibility of the transcript from the prior administrative proceeding concerning the 2019-20 school year (id.). In response, the parent's attorney sent an email dated March 24, 2023, within which she objected to any additional "delay" of the impartial hearing scheduled for April 26, 2023, noting the "financial hardship" the parent experienced due to the protracted settlement negotiations and that any further delay would only exacerbate that hardship and be prejudicial (IHO Ex. II).

The IHO issued an interim order, dated March 31, 2023, which granted the district's request to formally address the admissibility of the transcript from the prior proceeding concerning the 2019-20 school year in the instant proceeding, and set forth a briefing schedule for the parties (see IHO Ex. III at pp. 1-2; see generally IHO Exs. IV-V). In addition, the IHO directed the parties to address whether the pendency agreement should be considered in the final decision on the merits (see IHO Ex. III at p. 2). In a second interim order, dated April 25, 2023, the IHO denied the district's motion to preclude parent exhibit "I"—the transcript testimony from the 2019-20 school year—and noted that the evidence was admissible, but that the "weight to be accorded to the evidence [wa]s committed to the discretion of the fact-finder" (IHO Ex. VI at pp. 2-3).

On the final day of the impartial hearing, April 26, 2023, the parent testified, and the impartial hearing concluded (see Tr. pp. 162, 174-205).

In a decision dated May 24, 2023, the IHO found that the district "did not contest it had not implemented" the student's special education program recommendations for the 2020-21 school year; as a result, the IHO concluded that the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at p. 9).

Turning to the appropriateness of the student's unilateral placement at Greenbrier, the IHO initially found that the testimonial evidence presented in the transcript (parent exhibit "I")—which took place in the "prior due process hearing convened on July 30, 2020"—was "relevant and reliable evidence on the appropriateness" of Greenbrier during the 2020-21 school year (IHO Decision at p. 9). The IHO indicated that the student was "enrolled in a 12-month residential

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<sup>4</sup> In addition, the parent's attorney indicated that she had reached out to both witnesses via "LinkedIn"—the only source providing public contact information for them—but she had not received any responses (Tr. pp. 145-46).

program . . . at the time the witnesses testified" (*id.*). In addition, the IHO noted that several factors conspired to make the two school witnesses unable to be located, including a "global pandemic," a "dispute resolution backlog," a nearly one year delay in appointing an IHO, and the parties' resoluteness to resolve the matter via settlement (*id.* at pp. 9-10). Ultimately, the IHO decided that she would not "penalize [the p]arent for not securing the testimony of witnesses when the [p]arties had attempted to resolve the dispute for an extended periods of time and the witnesses were cross-examined in a prior proceeding" (*id.* at p. 10).

Relying on the prior testimonial evidence, the IHO found that Greenbrier was a "therapeutic boarding school that enroll[ed] approximately 44 students during the school year," and approximately "24 students were enrolled" during "that summer" (IHO Decision at p. 10). Based on the same testimonial evidence, the IHO found that Greenbrier provided "intensive programming in the classroom and a structured living environment on school grounds on a 24-hour basis" and that the student made progress at Greenbrier (*id.*). Based on the parent's testimony, the IHO noted that the student received "substantial benefits from the therapeutic residential program" and was "presently enrolled in college" (*id.*). Given the foregoing evidence, the IHO determined that Greenbrier was an appropriate unilateral placement for the student for the 2020-21 school year (*id.*).

Finally, the IHO examined equitable considerations, and concluded that the hearing record lacked any basis for a reduction or denial of the parent's requested relief (*see* IHO Decision at p. 10).

As relief, the IHO ordered the district to reimburse the parent for the costs of the student's tuition at Greenbrier, upon proof of payments (*see* IHO Decision at p. 11).

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

The district appeals, arguing that the IHO erred by admitting the parent's documentary evidence related to the student's attendance at Greenbrier during the 2019-20 school year. The district contends that parent exhibit "E" was irrelevant and improperly entered into the hearing record, as it consisted of a "program description, class schedule and attendance record" for the 2019-20 school year, and not the school year at issue, the 2020-21 school year. With respect to parent exhibit "I"—a transcript of two school witnesses who testified at the previous impartial hearing—the district argues that the evidence was irrelevant, as it concerned the student's attendance at Greenbrier during the 2019-20 school year, and not the school year at issue, the 2020-21 school year. The district also contends that the parent failed to produce the two school witnesses for cross-examination. Next, the district asserts that the IHO erred by finding Greenbrier was an appropriate unilateral placement, as the hearing record lacked sufficient evidence relevant to the 2020-21 school year, the hearing record lacked evidence regarding the student's progress and whether Greenbrier was meeting the student's needs, and the hearing record lacked evidence regarding whether the student received related services. As a result, the district seeks to annul the IHO's decision and reverse the relief awarded to the parent.

In an answer, the parent responds to the district's assertions and generally argues to uphold the IHO's decision in its entirety.

In a reply to the parent's answer, the district asserts that the answer fails to comply with practice regulations, as it did not include a verification by the parent. As a result, the district argues that the parent's answer must be rejected.<sup>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 independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]). A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]).

A 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. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and

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<sup>5</sup> Subsequent to the district's reply, the parent resubmitted a Verified Answer, together with a parent verification.



criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. IHO's Admission of Evidence**

The district initially argues that the IHO erred by entering the parent's documentary evidence from a prior administrative proceeding into the hearing record as evidence.

SROs have routinely held that the formal rules of evidence applicable in civil actions generally do not apply in impartial hearings (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013] [citing Richardson v. Perales, 402 U.S. 389, 400 (1971) for the proposition that the strict rules of evidence do not apply in an administrative proceeding and noting that application of the Daubert gatekeeper requirement is highly questionable in IDEA proceedings]; Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at \*6 [E.D. Pa. July 26, 2012]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]). This is in part because the "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility that they need to ensure that each side can fairly present its evidence" (Schaffer, 546 U.S. at 61).

State regulations governing the conduct of impartial hearings do not authorize IHOs to impose a rigid, unyielding approach to the admission of evidence at the initial due process hearing. Instead, the regulations provide that each party "shall have up to one day to present its case" and that the IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (NYCRR 200.5[j][3][vii], [xiii]). State regulations provide that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).<sup>6</sup> Thus an IHO is responsible for managing the hearing process and must allow each party a reasonable opportunity to present relevant, nonduplicative evidence and must ensure that there is an adequate record to support his or her decision on the disputed issues, but the IHO must also be prepared to stop parties from wasting time and polluting the hearing record with matters that are simply cumulative with respect to the evidence already received or irrelevant to the disputed issues that are properly within the scope of the impartial hearing. Generally, a blanket inclusion or exclusion of documents is not an example of effectively managing the impartial hearing.

Although, here, the parent's documentary evidence may not carry the day in terms of the outcome of the administrative proceedings, as further described below, the IHO did not err by entering parent exhibits "E" and "I" into the hearing record as evidence. This is especially true where, as here, the IHO explained that the admissibility of the exhibits did not necessarily mean

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<sup>6</sup> One of the purposes of the hearsay rule in a court proceeding is to exclude evidence that is inherently unreliable, but at times the arguments that the statements must be excluded are overbroad (see H.D. v. Cent. Bucks Sch. Dist., 902 F. Supp. 2d 614, 621 [E.D. Pa. 2012] [noting that the hearing officer correctly admitted the testimony because it was being offered to show the basis for an opinion or a decision—usually the revision of an IEP—not for the truth of the matter asserted]). Furthermore, even if the statements are hearsay, it is well settled that reliability for hearsay statements can be sufficiently established for admissibility purposes through other safeguards and thus there are a litany of exceptions to the hearsay rule. Moreover, hearsay exclusions are usually carefully tailored (see J.W. v. Gardner Sch. Dist. No. 231, 2011 WL 1234389, at \*4 [D. Kan. Mar. 31, 2011] [admitting an exhibit that consisted of an evaluation report but excluding the last page, which was a separate email produced after the fact because the parent did not seek to introduce it until after the evaluator had finished testifying; the court declined to find that the hearing officer improperly excluded the evidence because the author of the email was present at the hearing and could have testified about the email]).

the exhibits were relevant or reliable and indicated that such a finding was to be made solely by the IHO as the finder of fact (see IHO Ex. VI at pp. 2-3).

## **B. Unilateral Placement at Greenbrier**

Having determined that the IHO properly admitted the parent's exhibits, the analysis now turns to whether the parent sustained his burden to establish that Greenbrier was an appropriate unilateral placement for the student for a portion of the 2020-21 school year. As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Therefore, in order to reach a determination regarding the appropriateness of Greenbrier for the 2020-21 school year, a discussion of the student's needs is required, as well as a discussion of whether Greenbrier provided the student with specially designed instruction to meet those needs.

### **1. Student Needs**

The hearing record contains little, if any, evidence of the student's needs at the time the parent unilaterally placed her at Greenbrier for the 2020-21 school year (see generally Tr. pp. 1-222; Parent Exs. A-K; IHO Exs. I-VIII). Instead, the hearing record includes evidence concerning the student's unilateral placement at Greenbrier for the 2019-20 school year, such as a psychological evaluation of the student conducted in August 2019 (August 2019 psychological evaluation), which was completed by a clinical psychologist at the wilderness program she had attended prior to her enrollment at Greenbrier in September 2019, as well as an October 19, 2019 letter written by the student's previous treating psychiatrist—both of which were entered into the hearing record in the previous impartial hearing for the 2019-20 school year (see Parent Exs. C at p. 1; D at p. 1; J at p. 8). Of concern is the absence of any evidence updating this information about the student's needs, such as an updated evaluation or progress reports or report cards from Greenbrier, prior to the 2020-21 school year (see generally Tr. pp. 1-222; Parent Exs. A-K; IHO Exs. I-VIII).<sup>7</sup>

At the time of the August 2019 psychological evaluation, the student had been at the wilderness program for eight weeks (see Parent Ex. C at p. 6). According to the testing results, the student's overall intellectual functioning—assessed through the administration of the Wechsler Intelligence Scale for Children, Fifth Edition (WISC-V)—fell within the average to very high average range, with subtest scores falling within the average to superior ranges (id. at pp. 7-9). Similarly, an administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) to assess the student's academic achievement functioning revealed composite scores that fell within the average to above average ranges, with subtest scores falling within the 27th to 97th percentiles (id. at pp. 10-11). As part of the psychological evaluation, the student completed the

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<sup>7</sup> For example, as noted in the IHO's decision in the previous administrative proceeding, the parent submitted five documents that respectively reflected the student's grades and progress reports from Greenbrier from September 2019 through May 2020 (see Parent Ex. J at p. 9). In comparison, the hearing record is devoid of any similar progress reports from Greenbrier for the 2020-21 school year (see generally Tr. pp. 1-222; Parent Exs. A-K; IHO Exs. I-VIII).

Brown Executive Function/Attention Scales—Adolescent Self-Report Form to assess her executive functioning; the student's total composite score of 63 revealed a "significant" problem with her executive functioning at that time (id. at p. 12). Both parents completed the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) (Parent Version), revealing a "clinically elevated" overall index (Global Executive Composite) score, as well as "elevated" index scores in the areas of behavioral regulation, emotion regulation, and cognitive regulation (id. at pp. 12-13).

To assess the student's psychological and emotional functioning, the evaluator administered the Minnesota Multiphasic Personality Inventory—Adolescent (MMPI-A) to the student, as well as the Millon Adolescent Clinical Inventory (MACI), the Rorschach Inkblot Test, the Substance Abuse Subtle Screening Inventory (Adolescents) (SASSI-A2), the TeenAge Sentence Completion Test (TASC), the Beck Depression Inventory—II (BDI-II) (see Parent Ex. C at pp. 13-17). In addition, the both parents completed the Behavior Assessment System for Children, Third Edition (BASC-III) (id. at p. 17). Based on these assessments, the evaluator determined, among other things, that the student exhibited a "high degree of psychological distress at th[at] time," symptoms of anxiety and depression, "poor impulse control and a lack of acceptance of societal standards of behavior," "somewhat superficial" relationships, having "fewer resources available than most people of th[a]t age for coping with the ordinary ideational and emotional demands of everyday living," and a "tendency to misperceive events and to form mistaken impressions of people and what their actions signif[ied]" (id. at pp. 13-15). In addition, the evaluator found that the student's responses suggested that she "may be classified as chemically dependent" (id. at p. 16). With respect to the TASC, the student's responses reflected difficulties with "depressions and anxiety, oppositional attitudes and aggressive behaviors, social relationships, family relationships, substance use, and other treatment-relevant issues" (id.). On the BASC-III, the parents' responses reflected "clinically significant" difficulties in several areas, such as "hyperactivity, aggression, conduct problems, and activities of daily living," and within the "at-risk range" for other categories, including "[a]nxiety, attention problems, adaptability, and functional communication" (id. at pp. 17-18).

Overall, the evaluator indicated that the testing results demonstrated that the student struggled with depression and anxiety, exhibited difficulties with her behaviors and her relationships, and exhibited a "significant problem with her executive functioning" (see Parent Ex. C at pp. 18-21). The student's testing results did not, however, demonstrate any learning disabilities (id. at p. 20). Based on the assessments administered as part of the August 2019 psychological evaluation, the clinical psychologist diagnosed the student as having the following: "Persistent Depressive Disorder with intermittent major depressive episodes," "Generalized Anxiety Disorder," "Cannabis Use Disorder," "Oppositional Defiant Disorder" (ODD), and "Parent-Child Relational Problem" (id. at p. 25). The evaluator included various recommendations in the evaluation report to address the student's needs (id. at pp. 21-25).

As noted, the hearing record also includes a letter, dated October 31, 2019, written by a psychiatrist who treated the student from January 2018 through June 2019 (see Parent Exs. D at p. 1; H ¶ 11).<sup>8</sup> According to the psychiatrist's letter, he last saw the student in June 2019 (see Parent

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<sup>8</sup> As a point of clarification, the parent's affidavit in lieu of direct testimony—or parent exhibit "H"—was the

Ex. D at p. 2). The psychiatrist's letter documented the student's mental health issues, medication treatment, and therapy over the course of their doctor-patient relationship (*id.* at pp. 1-2). According to the psychiatrist, although the student had resumed medication treatment in April 2019, it was not helpful and the student "continued to struggle with; depression, fighting with her parents, oppositional behavior, not meeting school responsibilities, and smoking marijuana" (*id.* at p. 2). The psychiatrist noted that, at that time, it was "clear that [the student] required a much more intensive form of treatment," as she was "not agreeing to outpatient therapy," the medication treatment was insufficient, her parents "no longer felt they had the power to control [her]," and her mother "felt physically unsafe when [the student] got angry" (*id.*). As a result, they discussed the "options of a wilderness program and a therapeutic boarding school," and it was the psychiatrist's "professional opinion that these treatments were absolutely necessary because of the severity of [the student's] symptoms, her lack of compliance with treatment, her aggressiveness with her parents, her oppositional behavior with her parents, and her continued abuse of marijuana" (*id.*). When the psychiatrist last saw the student in June 2019, he had diagnosed the student as having the following: "Major Depressive Disorder, severe, recurrent"; "Cannabis use Disorder, moderate"; and "Conflict with parents, poor school performance" (*id.*).

At the impartial hearing, the parent testified that the student was unilaterally placed at Greenbrier for the 2019-20 school year due to her emotional issues and the effect these issues had on the student's "ability to be successful in school" (*see* Tr. pp. 190-91). He noted that the student, at that time, was "distracted" and "emotionally volatile," and, while the student had been an "A student throughout elementary and middle school," she had "started failing classes, not doing her assignments," and "generally not really being present in the way that she had been her whole life prior to that" (Tr. p. 191). The parent also testified that, in spring 2019, the student had engaged in "some incidents of physical altercations" with all of her family members (Tr. p. 191). The parent testified that the student did receive "both medication management and therapy" with a psychiatrist, who eventually recommended that the student attend a "wilderness program and then to the therapeutic school" (Tr. pp. 191-93; *see* Parent Ex. H ¶¶ 11, 20, 22-23). In his affidavit submitted in the previous impartial hearing, the parent had described the student as a "mess, very angry, volatile, not in control of her emotions or behaviors" prior to entering the wilderness program (Parent Ex. H ¶ 22). By the end of her enrollment in the wilderness program, the parent described the student as "much more self-aware, open, and pleasant to deal with"; however, the parent also noted that the student was not yet ready to return home, and it was "recommended that she needed to continue in a therapeutic residential program to continue in school," which he located with the assistance of an educational advocate (*id.* ¶¶ 22-23). The parent testified that, when the student left the wilderness program on September 12, 2019, she went directly to Greenbrier (*id.* ¶ 29).

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same affidavit entered into the hearing record in the previous impartial hearing concerning the student's unilateral placement at Greenbrier during the 2019-20 school year (*compare* IHO Decision at p. 13, *with* Parent Ex. J at p. 9; *see* Parent Ex. H at pp. 1, 5-6). Thus, when citing to parent exhibit "H" in this decision, it is important to recall that the exhibits referred to within the body of the parent's affidavit are not the exhibits otherwise entered into the hearing record as evidence in the instant proceeding, and pertained solely to the impartial hearing held for the 2019-20 school year, except for the exhibit identified in the parent's affidavit as exhibit "D," which appears to be the same August 2019 psychological evaluation entered as evidence at the impartial hearing held for the 2020-21 school year as parent exhibit "C" (*see, e.g.*, Parent Ex. H ¶¶ 11, 13-14, 16-17, 20-21, 30-31, 35-36, 38).

While the student attended Greenbrier during the 2019-20 school year, both parents "participated in weekly therapy session" with her and her therapist (Tr. pp. 194-95). The parent testified that the therapy sessions were "clearly helpful" to the student, in that she was "calmer, "more present, more attentive to her academics," and she was receiving "good grades"; he also testified that the student's relationships with him and her mother "improved even though it was mostly from a distance" (Tr. p. 195).

When asked to describe the student's then-current status (in July 2020) compared to when she first entered Greenbrier, the dean testified in the prior matter that: she came to school "regularly" and did not "miss any school day," she was "independent" and "follow[ed] through [with] plans," the student was "fairly organized," "more empathetic towards other peers and teachers," she took "feedback very well," "listen[ed] to teachers" when given directions, she "respond[ed] positively without aggression towards redirection," and she "recognize[d] her mistakes" and "accept[ed] the redirection" (Parent Ex. I at p. 31). In addition, the dean testified that her grades were "higher" than before (id.). The dean further testified that, previously, the student had "difficulty inhibiting her behavior" and "taking redirection from teachers"; the student had also been "very oppositional and sometimes even verbally aggressive towards teachers" and "very loud" (id. at p. 33). Previously, the student was "highly disorganized" and would "lose materials, even binders"; the dean also testified that the student was previously "unmotivated" and "took shortcuts," doing the "bare minimum" and would not "think outside the box" (id. at pp. 33-34). He confirmed that the student's organization, at the end of the school year, was "much better" and he testified that she was "prepared to be in any—any setting now when she le[ft] here" (id. at p. 34).

Finally, the dean testified in the prior matter that the student had "improved" at Greenbrier, but she "still ha[d] room to learn some more skills and improve even more" (Parent Ex. I at p. 41). In addition, he testified that the student had "improved a lot," noting that "she c[ould] listen to people without attacking them verbally, [and] that right there [wa]s a great progress" (id.). He also testified that the student could "go back home," and her parents would "have a functioning child"—because before Greenbrier, the student was "not functional," she was not attending school or accepting any feedback—and "now, all that, the contrary [wa]s happening" (id. at pp. 41-42). The dean testified that the student regularly attended school now, she was "accountable for her work, and she[ wa]s being a calmer child, capable of regulating and not 100 percent, but she—she[ wa]s definitely more aware of her emotions" (id. at p. 42, 47-48). He further testified that when the student felt overwhelmed, she understood what was happening and could advocate to take a walk or a break—but that that "ha[d] happened less and less throughout the time" at Greenbrier (id. at pp. 42-44).

At the previous impartial hearing, the Greenbrier clinical director—who was the student's "direct therapist" at Greenbrier since October 2019—testified that the student initially presented with observed symptoms of depression and anxiety, difficulty regulating her behavior (appearing as anger or aggression), and issues with body image and lack of confidence (Parent Ex. I at pp. 53-57). The student also presented with "concerns about self-harming behavior" (id. at p. 57). Based on almost daily communication with an academic liaison at Greenbrier, the director was aware of the student's academics and how she presented within the classroom (id. at pp. 57-58). The director testified that the student was unmotivated, exhibited difficulty initiating academic assignments, could become agitated when faced with "planning and preparation" to complete assignments, and

had difficulty regulating her emotions (*id.* at pp. 58-59). She further testified that the student had required a "24/7 residential program" to make academic progress because it provided the student with "around the clock" access to the "therapeutic department, residential department, [and] the academic department" and she, herself, was available to the student "from the hours of 9 to 5" (*id.* at p. 59). In addition, the director testified that the student had a "very clear structured and constant routine," and the "separation" from her "home environment and her triggers and what she [was] exposed to that was interfering with her learning and her . . . mental health" was "needed" (*id.* at pp. 59-60).

On cross-examination at the previous impartial hearing, the director testified that the student was "recognizing her strengths and her capabilities" and she was "starting to put those into action," which increased her confidence (Parent Ex. I at pp. 62-63). In addition, she testified that the student was becoming "less concerned about others' judgment and perceptions" (*id.* at p. 63). With regard to aggressive behaviors, the director testified that she could be "verbally aggressive" in making her opinion known and in maintaining her position and could be intimidating to peers to maintain a sense of safety (*id.* at pp. 63-64).

Turning to the 2020-21 school year, the parent confirmed at the impartial hearing that the student had remained as a student in the residential program at Greenbrier from September 2019 through October 2020 (*see* Tr. p. 196). When asked why the student did not leave Greenbrier at the end of June 2020, the parent testified that "things were going well," the student was "doing well" and had "clearly improved," and "[they] did not want to, nor was it recommended . . . , to make any change to that" (Tr. p. 197). He further testified that "it was felt that to send her back to New York would've been a mistake" (*id.*).

However, other than the parent's testimony concerning why the student remained enrolled at Greenbrier for the 2020-21 school year, the hearing record is devoid of evidence describing the student's needs—or continued needs—with respect to the parent's decision to unilaterally place the student at Greenbrier for the 2020-21 school year (*see generally* Tr. pp. 1-222; Parent Exs. A-K; IHO Exs. I-VIII). Rather, the evidence demonstrates that the student made significant progress at Greenbrier during the 2019-20 school year in her school attendance, completing assignments, self-confidence and self-awareness, behaviors, and family and peer relationships. And while the evidence further reflects that the student's unilateral placement at Greenbrier during the 2019-20 school year may not have completely eliminated the student's needs underlying her initial placement, the descriptions of the student's progress and needs as of July 2020 calls into question the parent's position that the program at Greenbrier continued to offer specially designed instruction thereafter. It is to this question that I now turn.

## **2. Specially Designed Instruction**

Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; *see* 34 CFR 300.39[b][3]).

At the previous impartial hearing, the Greenbrier dean described Greenbrier as a therapeutic boarding school that served female students in grades 9 through 12 (*see* Parent Ex. I at

p. 20). When the dean testified in July 2020, Greenbrier had approximately 24 students in attendance because it was "summertime," but generally, Greenbrier's enrollment was approximately 44 students (id. at p. 21). At the time of the dean's testimony, Greenbrier's faculty included "nine teachers, seven instructional, and two non-instructional"—meaning herself, as academic dean, and a registrar (id.). One teacher was a special education teacher (id. at p. 22).

The evidence in the hearing record reflects that Greenbrier operated year-round, from June through early May, with "five terms, each offering .25 credits per class with rolling admission" (Parent Exs. E at p. 1).<sup>9</sup> According to the program description of Greenbrier in the hearing record, students graduated from Greenbrier with the "[state's] Professional Pathways diploma for college prep students, which require[d] 22 credits" in disciplines including mathematics, science English, social studies, a foreign language, health, fine arts, physical education, and an elective (id. [emphasis in original]). The program description also reflects that students attended classes for approximately "32 hours per week" (id.). Greenbrier also required all students' participation in "Unique Programming," which included "African Drumming lessons, Performance Arts, Balanced Body & Mind to meet [physical education] and balanced living requirements" (id.).

While the hearing record does not include a class schedule for the 2020-21 school year, the Greenbrier dean testified at the previous impartial hearing in July 2020 that the student arrived at class at 8:30, attended a 10-minute advisory period and then drumming, and she would then begin her first period class at 9:20 (see Parent Ex. I at p. 24).<sup>10, 11</sup> According to the dean, the student's second period class took place from 10:35 to 11:45, she then had lunch, and had two afternoon

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<sup>9</sup> Notwithstanding that the Greenbrier school year extends from June through early May, as a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). In the previous administrative proceeding concerning the 2019-20 school year, the parent sought reimbursement of the costs of the student's attendance at Greenbrier from September 12, 2019 through "June 30, 2020," which, according to the parent's affidavit, included an "estimated additional 20 day's [sic] cost at \$350.00/day"—for a total of \$88,887.50 (Parent Ex. H ¶ 38[a]). The IHO in the previous impartial hearing awarded the parent tuition reimbursement in the amount of \$81,887.50, for the student's attendance from "September 12, 2019 through June 10, 2020," but did not explain the reduction in the amount awarded (Parent Ex. J at pp. 6-7).

<sup>10</sup> According to the student's class schedule for the 2019-20 school year, she was enrolled in the following courses: Balanced Body & Mind (daily, 3:05 to 3:35), Spanish III/IV (Monday, Wednesday, Friday; 8:45 to 9:55), Algebra II (Tuesday, Thursday, Friday; 8:45 to 9:55), 21st Century Civics/Economics (Monday, Wednesday, Friday; 10:00 to 11:10), English 3-4 (Monday, Wednesday, Friday; 10:00 to 11:10), Drumming/Community Drumming (daily, 11:15 to 11:45), Drawing (Monday, Wednesday, Friday; 12:35 to 1:45), Creative Writing (Tuesday, Thursday, Friday; 12:35 to 1:45), Advanced Science (Monday, Wednesday, Friday; 1:50 to 3:00), College Readiness Class (Tuesday, Thursday, Friday; 1:50 to 3:00), and a Friday Afternoon Advisory (Friday, 3:25 to 3:45) (see Parent Ex. E at p. 2). In addition, the student's schedule included a morning advisory period (daily, 8:30 to 8:40) and lunch (daily, 11:50 to 12:30) (id.). It is unclear how, exactly, the student's schedule allowed her to attend what, at times, appeared to be two classes on the same day at the same time (see id.). For example, according to the schedule, the Spanish III/IV class and the Algebra II class both met on Fridays at 8:45 to 9:55; similarly, the 21 Century Civics/Economics class and the English 3-4 class both met on Fridays at 10:00 to 11:00 (id.).

<sup>11</sup> To be clear, the dean did not affix a date or a timeframe to the student's schedule as he described it in July 2020; however, given that the student's schedule described by the dean does not align with the student's schedule from the 2019-20 school year in the hearing record, one could presume that the dean was describing the student's schedule as of July 2020.



classes, from 12:35 to 1:45 and 1:50 to 3:00 (*id.* at pp. 24-25). After that, the student attended gym from 3:05 to 3:45, and concluded her "academic day" (*id.* at p. 25). Apart from the academic components of her day, the student's day included a therapeutic component, consisting of a therapy group meeting at 4:00 (*id.*). The dean testified that "[e]ach day [the therapy group] ha[d] a different theme," but on Wednesdays, the student would attend a 60-minute group meeting that included the "academic advisor of that caseload" and "two residential staff and the therapists"—for a total of four adults "representing each department"—which was referred to as the "family unit" (*id.* at pp. 25, 28-29). The dean also testified that the drumming classes had "therapeutic elements" as well (*id.* at pp. 25-26).

The Greenbrier dean further testified at the previous impartial hearing that the treatment team—which, as described above, consisted of four adults—met without the student once per week to "exchange information" brought to them by the residential staff, such as concerns about "interaction with other peers, the interaction with adults," and sometimes, the emergence or reemergence of a pattern exhibited by the student (Parent Ex. I at pp. 28-29). With regard to this specific student, the dean testified that, for her parents, it would be the "ODD mess" and how she was handling it (*id.* at p. 29). The treatment team also shared emails, referred to as "shift to notes," describing the students' evenings, bedtimes, check-in questions, mood, and social interactions (*id.* at pp. 29-30). The emails, or shift notes, would then be available to teachers and staff the following morning so they would all be apprised of any situations that may require assistance (*id.* at p. 30).

The dean was also asked at the July 2020 impartial hearing to describe how Greenbrier implemented the recommendation in the August 2019 psychological evaluation report to address the student's planning and organization needs, as well as her executive functioning needs (see Parent Exs. I at pp. 34-36). In response, the dean testified that Greenbrier provided a "support system" allowing teachers to "know the student with depth," staff remained in constant communication about the students, and the small classrooms allowed teachers to help students keep from falling behind (*id.* at pp. 36-37). In addition, the student's academic advisor at Greenbrier would meet with her daily to make sure she was prepared for class, her teacher would make sure she had her binders and was completing assignments, and the student would have a printed sheet of missing assignments that would allow the student to verbally report on a plan to complete any missing work (*id.* at pp. 37-38). For this student, the dean testified that her assignments would be broken down and teachers would check for understanding of instructions (*id.* at pp. 38-39). The dean also testified at the prior impartial hearing that Greenbrier offered support through study halls, which the student "voluntarily" attended (*id.* at p. 39).

At the previous impartial hearing, the clinical director testified that Greenbrier provided several types of therapeutic support to its students, including individual therapy, group therapy, family therapy, equine therapy, and "experiential therapy" that offered students with the opportunity to "hike up the mountain off campus" on a "quarterly basis" (Parent Ex. I at pp. 55-56). She further testified that Greenbrier offered an "immersive sort of programming and services to address mental health issues" (*id.* at p. 56). Greenbrier also used "peer relationships" for peer interventions (*id.*).

In addition, the parent confirmed that the student's "therapeutic program" at Greenbrier was the "same program" from July 2020 through October 2020 as during her attendance from September 2019 through June 2020 (Tr. p. 197). He also testified that the student's therapist

remained the same individual for both school years (*id.*). According to the parent, the student's academics improved at Greenbrier, and her academic difficulties did not continue (*see* Tr. p. 198). When the student returned home in October 2020 after graduating from Greenbrier, the parent testified that she was "pleasant, not as volatile," and that she had "changed from this experience in—in a totally positive way" (Tr. pp. 198-99).

It is understandable that the parent wanted the student to continue at Greenbrier after her progress during the 2019-20 school year; however, the parent's desire in this respect is insufficient to show that Greenbrier provided the student with specially designed instruction to meet her needs. The evidence in the hearing record does not describe the program as delivered to the student during the 2020-21 school year, other than perhaps the parent's statement that the student continued therapy with the director, or the focus of the therapeutic or academic supports provided during the relevant time period. Rather, the hearing record includes only a general description of the program offered at Greenbrier, some specifics about the supports provided during the 2019-20 school year, and anecdotal reports from the parent that the student benefited from the entirety of her time there (*see* *L.K. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]; *L.Q. v. Ne. Sch. Dist.*, 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs where "[t]here was no evidence . . . presented to establish [the counselor's] qualifications, the focus of her therapy, or the type of services provided" and, further, where "[the counselor] did not testify at the hearing and no records were introduced as to the nature of her services or how those services related to [the student's] unique needs"]; *R.S. v. Lakeland Cent. Sch. Dist.*, 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], *aff'd sub nom.*, 471 Fed. App'x 77 [2d Cir. June 18, 2012]). Instead, the general description of the program at Greenbrier, including the therapeutic components supposedly available throughout the time the student attended, presents "the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not" (*Gagliardo*, 489 F.3d at 115). Consequently, I find that the parents did not establish that Greenbrier was an appropriate placement for the student for the 2020-21 school year, and that the IHO's determination must be overturned.

## **VII. Conclusion**

In summary, although the IHO properly admitted the parent's evidence from the previous impartial hearing, the hearing record does not contain sufficient evidence to conclude that the parent's unilateral placement of the student at Greenbrier for the 2020-21 school year was appropriate.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated May 24, 2023, is modified by reversing that portion which found that the parent sustained his burden to establish the appropriateness of the student's unilateral placement at Greenbrier for a portion of the 2020-21 school year; and,

**IT IS FURTHER ORDERED** that the IHO's decision, dated May 24, 2023, is modified by reversing that portion which ordered the district to reimburse the parent for the costs of the student's tuition at Greenbrier for a portion of the 2020-21 school year.

**Dated:**           **Albany, New York**  
                  **August 23, 2023**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**