



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-312

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

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Kerry McGrath, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael P. Heitz, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition at the Darrow School (Darrow) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student exhibited difficulty regulating his behavior and social/emotional challenges as a young child (Parent Ex. C at p. 2). He received a diagnosis of attention deficit hyperactivity disorder (ADHD) in fifth grade and a private neuropsychological evaluation of the student was conducted in August 2018 (see id. at pp. 1-19). Results of the private neuropsychological evaluation indicated that the student's overall intellectual ability was in the average range, with a relative weakness in processing speed (id. at p. 10). Academically, the student's performance in all areas was at or above expectations for his age (id.). The student's executive functioning skills were variable, with weaknesses noted in selective attention, behavioral inhibition, cognitive flexibility, emotional control, planning and organizing, and self-monitoring (id.). He had

participated in family therapy and his parents participated in "parent training to help them learn how to best deal with [the student's] behaviors" (*id.* at p. 3).

According to the parent, in June 2020, a CSE convened and determined the student was eligible for special education as a student with an other health-impairment (Parent Ex. O ¶¶ 1, 2).¹ The parent indicated that the district "deferred [the student's] case to locate a residential placement," and when one was not found, the parents placed the student at Valley View, a residential placement that the student attended for the 2020-21 school year (*id.* ¶ 2). The CSE next convened on October 15, 2021 and recommended a 15:1 special class placement together with individual and group counseling services to be implemented beginning October 30, 2021 (IHO Ex. I at pp. 17-18, 22). The student remained at Valley View during the 2021-22 school year (Parent Ex. O ¶ 2).

In June 2022, the parents entered into an enrollment contract with Darrow for the student's attendance for the 2022-23 school year (Parent Ex. D).² By letter dated August 22, 2022, the parents notified the district of their intent to unilaterally place the student at Darrow and seek funding for that placement (Parent Ex. B). The student attended Darrow for 11th grade during the 2022-23 school year (*see* Parent Exs. E-F; I-N).

A. Due Process Complaint Notice

In a due process complaint notice dated January 31, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year. The parents alleged numerous deficiencies with the student's October 2021 IEP, and that the district failed to recommend a placement for the student for the 2022-23 school year (Parent Ex. A at pp. 1-2). The parents asserted that Darrow was an appropriate unilateral placement to address the student's academic and social/emotional needs and that there were no equitable considerations that would bar funding for that placement (*id.* at p. 2). They requested funding for the costs of the student's tuition and transportation to Darrow for the 2022-23 school year (*id.*).

B. Impartial Hearing Officer Decision

After a prehearing conference on March 7, 2024, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 6, 2024 and concluded on May 8, 2024 after two days of hearings (Tr. pp. 1-161). In a decision dated June 14, 2024, the IHO found that the district conceded that it failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at p. 16). Next, the IHO determined that the parents failed to meet their burden to show that the unilateral placement at Darrow was appropriate to meet the student's needs (*id.*). Specifically, the IHO found that one of the parents' witnesses did not have personal knowledge of the student, what was provided to him, and whether his needs were being met during the school year in dispute (*id.*). The IHO next determined that the student exhibited academic "regression

¹ The student's eligibility for special education as a student with an other health-impairment is not in dispute (*see* 8 NYCRR 200.1[zz][10]).

² The Commissioner of Education has not approved Darrow as a school with which schools may contract to instruct students with disabilities (8 NYCRR 200.1[d], 200.7).

and not progress" and that Darrow failed to conduct any assessments of the student upon his entry to the school to assist with course selection and failed to provide him with any guidance in that area (id. at pp. 16-17). Further, the IHO found that while Valley View had recommended a residential program with more of an academic focus and less of a therapeutic setting, Darrow was "completely devoid of providing any therapy to the student at all"; the IHO noted that although the student received counseling "off campus," the hearing record lacked evidence to indicate the counseling was incorporated into the student's educational program (id. at p. 17). According to the IHO, while Darrow's Learning Skills program addressed the student's executive functioning needs, it did not "prevent the student from failing a class, and it did not address the student's other needs, such as anxiety or impulsivity" (id.). Lastly, the IHO determined that the unilateral placement at Darrow was "in direct contradiction of" the private neuropsychological evaluation, which recommended a placement with a family therapy component and multimodal interventions (id.). For all those reasons, the IHO found that Darrow did not provide an appropriate program to meet the student's needs and that it was not reasonably calculated to enable him to receive an educational benefit (id. at pp. 17-18). Regarding equitable considerations, the IHO determined that they favored the parents (id. at p. 18). As the IHO found the parents' unilateral placement of the student at Darrow not appropriate, the IHO denied the parents' request for funding or reimbursement of the costs of the student's enrollment at Darrow for the 2022-23 school year (id. at pp. 18-19).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the parents failed to sustain their burden of demonstrating the appropriateness of Darrow for the 2022-23 school year. Specifically, the parents argue that the IHO erred by disregarding the Darrow witness's testimony despite finding her credible, and in finding that Darrow failed to meet the student's individual needs, that the student regressed, that Darrow failed to identify appropriate courses for the student, that Darrow was not appropriate because it was not a therapeutic school, that Darrow was not appropriate because it did not prevent the student from failing, and that Darrow did not address the student's anxiety or emotional needs. The parents request that the undersigned reverse the IHO's decision and find Darrow was an appropriate unilateral placement for the student, uphold the IHO's findings that the district failed to offer the student a FAPE and that equitable considerations favor the parents, and order tuition reimbursement for the student's unilateral placement at Darrow for the 2022-23 school year.

In an answer, the district asserts that the IHO correctly found that the parents did not meet their burden of proving the unilateral placement of the student at Darrow was appropriate. According to the district, the parents presented very little evidence to show that the program at Darrow was tailored to meet the student's specific needs, including emotional dysregulation and anxiety, and that the hearing record did not support finding that the measures taken by Darrow were effective in addressing the student's executive functioning deficits or that they resulted in progress. The district requests that the IHO's decision be upheld and the parents' appeal dismissed.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).³

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

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

The district has not appealed from the IHO's findings that the district failed to offer the student a FAPE for the 2022-23 school year or that equitable considerations weigh in favor of the parents (IHO Decision at pp. 18-19). Accordingly, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v];

³ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). I now turn to the parties' dispute regarding whether Darrow was an appropriate unilateral placement for the student during the 2022-23 school year.

A. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. The Student's Needs

While not in dispute, a description of the student's needs provides context to resolve the issue on appeal.

In August 2018, a private psychologist conducted a neuropsychological and educational evaluation of the student (see Parent Ex. C).⁴ Cognitive assessment results indicated that the student exhibited overall average skills with a relative weakness in processing speed, and his executive function skills were "variable" with weaknesses in selective attention and "inhibiting himself" (id. at p. 10). Additionally, the student's parents reported that he demonstrated difficulty with behavioral inhibition, cognitive flexibility, emotional control, planning and organizing, and self-monitoring (id.). The evaluator concluded that the student exhibited clinically significant inattention and poor focus, difficulty with task initiation, problem solving, and working memory, a high activity level, and sensation seeking behavior (id.). Additionally, while the student's academic skills were at or above age expectations, he demonstrated challenges with transitioning between classes and "impulsivity that contributed to getting into trouble regularly at school" (id.). The evaluator opined that the student "would likely benefit most from placement in a nurturing and structured academic setting with therapeutic support, such as a specialized boarding school" geared towards students with ADHD (id. at p. 11).⁵ Further, the evaluator indicated that the student would benefit from a "comprehensive approach to intervention" related to the student's ADHD diagnosis, which required "medical, educational, behavioral, and psychological interventions" including behavior management techniques, medication, and school programming and supports (id. at p. 13).

Review of information about the student prepared during the 2019-20 and 2020-21 school years reflected in the October 2021 IEP indicated that the student was performing in the average to above average range across academic domains, and that executive functioning supports were necessary to assist the student with task initiation, time management, organization, planning, prioritizing tasks, and homework completion (IHO Ex. I at pp. 4, 6). The student reportedly exhibited below grade level reading skills and his executive functioning difficulties affected his written organization; he needed to accept use of a graphic organizer and tolerate the editing process

⁴ The evaluation report entered into the hearing record was a "modified version" of a comprehensive neuropsychological evaluation report that "exclude[d] confidential personal and family information" but "containe[d] the neurocognitive and educational testing components of the original evaluation most relevant to the educational setting" (Parent Ex. C at p. 1).

⁵ According to the evaluator, behavioral support including structure and addressing the student's aggressive behaviors would "be important" but the evaluator stressed that the student "should not be placed in a program comprised primarily of children or adolescents with conduct disorders" (Parent Ex. C at p. 11).

with support (id. at p. 6). Additionally, the student needed extra time due to processing speed difficulties (id.).

According to undated reports reflected in the October 2021 IEP, the student exhibited problematic interpersonal interactions with peers and staff, impulse control deficits, and defiant behavior toward staff (IHO Ex. I at p. 7). The parents reported that the student was challenged by complying with school rules and that his negative peer interactions negatively impeded his functioning and learning at school; the student reported that he felt dysregulated and that he could not function, which led to frustration (id. at pp. 6, 7). The IEP indicated that the student typically required behavioral supports and breaks throughout the school day to remain regulated and focused, supports and accommodations to meet the social demands of the classroom, and coaching from staff to interact appropriately and navigate complex social interactions (id. at p. 7). Although the student had made progress in his ability to focus on regulating himself and use coping strategies prior to disrupting others, the IEP indicated that the student "ha[d] significant social dysregulation" and reflected that if he "were not in a therapeutic environment, this would lead him [to] being expelled or suspended from school" (id.). The parents reported that the student needed support for anxiety symptoms, counseling to develop coping skills, and to "work on emotional dysregulation skills" (id. at p. 8). Somewhat in contrast, the IEP also reflected reports that the student engaged with his therapist, was aware of and articulated motives for his behavior and the need to develop his internal controls, and that the number of negative incidents "greatly reduced" (id. at p. 5). Further, the student had shown great improvement in the social skills group and was an "excellent candidate for individual therapy" (id. at pp. 5-6).

As of September 2022, the parent reported that the student required support to manage his ADHD symptoms including difficulties with attention and focus (Tr. p. 33; Parent Ex. O ¶ 5). Due to his anxiety, the student required "additional strategies" to help him navigate daily challenges (Parent O ¶ 5). Additionally, the parent reported that the student needed "guidance on impulse control and decision-making" as well as "specific interventions" to address executive functioning needs such as time management (id.).

2. Darrow

A Darrow school profile for the 2022-23 school year indicated that it is an "[i]ndependent [c]ollege [p]reparatory [b]oarding and [d]ay [s]chool for [g]rades 9-12 and [p]ostgraduates" (Parent Ex. G at p. 1). According to the school profile, Darrow "serves diverse backgrounds and abilities" and the "academic program stresses a multi-disciplinary approach to a rigorous college-preparatory education" (id.). The academic coach and college counselor at Darrow (academic coach) testified that Darrow serves approximately 100 students, with 20 to 30 percent of those students "coming in for Learning Skills type support, specifically with either diagnoses or previous school experience that leads us to understand that they'll need that support while they're here" (Tr. pp. 63, 69).⁶ The parent testified that Darrow is a "smaller school offering small class sizes," and a Learning Skills program "designed to help students with mild to moderate learning needs," that provides support in areas such as "time management, understanding instructions, organization,

⁶ At the next hearing, the academic coach identified her title as "the learning skills coach at Darrow School" (Tr. p. 118). For consistency in the decision, this witness will be referred to as the academic coach.

long-term task management, and creating an effective writing process" (Tr. p. 60; Parent Ex. O ¶ 4).

Specifically, according to the academic coach, it is "well understood that [Darrow is] a school that serves a population" of students who have strong cognitive skills, but who are "lagging in executive function or have ADHD"; some of whom have IEPs (Tr. pp. 67-68, 72-73). The academic coach testified that students who "need extra help with academic work" are enrolled in the Learning Skills program and assigned Learning Skills coaches based on their level of need and the coach's area of expertise (Tr. pp. 67-68, 72-73, 75-76, 121, 123). She continued that "most" of the Learning Skills staff "have some either teaching experience or interest in . . . psychology or behavioral intervention and things like that" (Tr. p. 87). In a typical Learning Skills session, students complete activities such as "walking through the steps of an assignment," "helping [students] to organize their to-do list," "getting through specific" challenging assignments, and all students used Google Classroom as a tool for organization (Tr. pp. 76, 77). The academic coach continued that "after a while, for a lot of students, it becomes a – more like a supervised, proctored study hall where [students] have time to do work with an adult who is dedicated to them if they need it" (Tr. pp. 76-77).

She testified that academic coaches met with students "anywhere" from four 1:1 sessions per week, to "as few as" two sessions per week in a group of two to three students (Tr. pp. 65, 121-22).⁷ Academic coaches provided "a lot of support" for students with executive functioning challenges including difficulty with organization, keeping schoolwork "straight," prioritizing tasks, initiating tasks, and "following through and completing things" (Tr. pp 65-66). According to the academic coach, staff worked with students using an "individualized approach" that included assessing a student's needs, developing a rapport, understanding what they were struggling with, and reviewing evaluative information to "understand whether there is a learning disability that's present or not" (Tr. p. 66). Staff then "build scaffolding around [the students'] work so that they get adult supervision" for homework, note taking, and "shoring up [the students'] skills" (Tr. pp. 66-67). Although the academic coach testified at some length about the Learning Skills program in general, she was not at Darrow during the 2022-23 school year and did not know the student then (see Tr. pp. 65-69, 72-73, 75-77, 83, 96, 121, 133-37). However, the academic coach testified that in preparation for the impartial hearing, she interviewed all the people who worked with the student during the 2022-23 school year to understand "what he was like when he arrived, what kinds of things they worked on while he was in Learning Skills . . . the trajectory of his time here" (Tr. p. 78).

Regarding the student in this matter, the evidence shows that he was registered for the 2022-23 school year on August 26, 2022 and attended Darrow for 11th grade as a boarding student (Tr. p. 37; Parent Exs. I-J; M; N). The Darrow contract shows that the student was to receive "2:1 4 Weekly Learning Skills" (Parent Ex. D). During the first semester of the school year, the student took courses entitled programming, BIG history, jazz ensemble, and had four blocks per week of

⁷ The hearing record was not clear as to whether the roles of the Learning Skills coach, which was also referred to as an academic mentor, and the academic coach and academic advisor were interchangeable (see Tr. pp. 65-68, 71, 83; Parent Exs. I at p. 1; J at p. 1; K at p. 1; L at p. 1).

"[a]cademic [m]entorship" (Parent Ex. F).⁸ The student was enrolled in calculus, programming, and writing & literature III both semesters (*id.*). The academic coach identified the student's educational and academic needs at the start of the 2022-23 school year as "all about organization, impulse control, planning ahead, basically everything that falls under the umbrella of executive function," adding that it was "very difficult for him to stay on top of what was expected" (Tr. pp. 79-80).

The parent testified that, during the 2022-23 school year, the student "performed strongly" in English and history, excelled in music, but "[u]nfortunately, Calculus and Programming were a different story," which is consistent with the teacher grade reports included in the hearing record (compare Parent Ex. O ¶ 6, with Parent Exs. I-L). The student achieved the following final grades: BIG history (B+), writing & literature III (B+), calculus (C), programming (F), and in the A range in his music classes (Parent Exs. J at p. 2, L at p. 2). Review of the teacher comments prepared during the course of the year reflected that while the student's performance in classes he liked was satisfactory or above, in some classes he continued to need improvement in time management skills, his presence in class was sporadic, he did not consistently participate in class discussions or turn in homework on time, and he did not use office hours for help when needed or use class work time effectively (see e.g. Parent Exs. I at pp. 1, 4; J at pp. 3, 4; K at pp. 3-4; L at pp. 3, 4).

When asked what steps Darrow took to assist the student with his programming and calculus courses, the parent testified that staff were "trying to work with him," and support the student, but that "at the end of the day . . . they couldn't hold [the student's] hand the whole time" (Tr. pp. 59-60). The academic coach testified that in the second half of the school year, Darrow reassigned the student's Learning Skills coach "to somebody who was stronger in math" (Tr. pp. 96, 124-25). To improve the student's ability to turn in work and seek academic support during office hours, the academic coach stated "it had to do with helping [the student] understand . . . what kinds of tools he needed to employ himself" and that "he really did need to step up and [] get there on his own," with "a great deal of persistence by his academic advisor, also by his Learning Skills coach" (Tr. pp. 97-98).

The academic coach also testified that, according to conversations with the two Learning Skills coaches the student worked with during the 2022-23 school year, he needed Learning Skills "for checking in with what was due, making sure that he understood what assignments were due currently and . . . what assignments were coming up very soon, so that he did not miss the cues that he was getting from his Google classroom or from his teachers directly, so that he was staying on [] target with his work"; that the "primary" objective was to keep the student on target and "moving forward," agreeing that a secondary focus was "tutoring" (Tr. pp. 135-37, 141-43). When it was clear the student was struggling in programming and calculus, in addition to changing Learning Skill coaches, the academic coach testified that the student had "assigned study halls that he went to during the day," every student had a proctored study hall at night, and twice weekly "math help," and teacher office hours (Tr. p. 139).

⁸ According to the academic coach, the "Academic Mentorship" block on the student's schedule was actually Learning Skills, as that had "been labeled a couple of different names over the years" (Tr. pp. 82, 147; Parent Ex. F).

Turning to the student's social/emotional needs and prior therapeutic residential placement, the parent testified that the student did not have the option to attend Darrow as a day program student, rather, he had to board at the school because of his disabilities, specifically, his executive functioning in that he struggled without routine and structure "24/7" (Tr. pp. 42-44).⁹ The academic coach testified that the boarding component of Darrow provided structure and supervision for students from morning until night, which the student needed "because of his executive functioning difficulties" as he would be "off task" without that level of support (Tr. pp. 143-45). According to the parent, Darrow was "geared to help students with ADHD," and the student no longer needed the full-time therapeutic support, i.e. counseling, he had received at Valley View as a boarding student the prior school year (Tr. pp. 47, 53-56; see Parent Ex. O ¶ 2).¹⁰ The parent testified that Darrow was "not known as a therapeutic boarding school" and that the school did not offer "that type of support" (Tr. pp. 55, 56).¹¹ When questioned by the IHO whether Darrow offered "therapy, counseling in general, whether group or otherwise," the parent responded that the school did not have those services, and that students would have to go off campus to receive services (Tr. p. 57). The parent testified that the student received counseling once per week off campus, which the parents provided "on [their] own" (Tr. p. 58).

Consistent with the parent's testimony, the academic coach testified that Darrow was not a therapeutic school and did not provide counseling to the student, but supported his emotional needs during the 2022-23 school year by "the nature of our community and the sort of authentic relationships that [Darrow staff] build with students," and that the student "knew that kind of support and that kind of authentic relationship with every adult in his life here" (Tr. pp. 99-100, 127). According to the academic coach, Darrow had "one therapist who c[ame] on campus," not to conduct formal therapy but to "check-in," and she did not believe the student was a patient of that therapist (Tr. pp. 131, 140). She continued that if the student needed social/emotional supports, the therapist would have been the person the student would have "checked in with"; however, "as [she] underst[ood] it, that was not a thing for him" (Tr. pp. 139-40). She stated she understood that the parent had obtained counseling "separately" for the student during the 2022-23 school year, but did not know when that service was delivered to the student (Tr. pp. 131-32).

The IHO found that the evidence in the hearing record failed to establish that Darrow addressed the student's identified special education needs (IHO Decision at pp. 16-18). At the time the student was enrolled at Darrow, he had spent the past two school years in a therapeutic residential placement where he received both individual and group therapy "treatment," with a "very structured routine within the residential piece" (Parent Ex. O ¶ 2). Although the parent

⁹ The parent also testified that the parents were "two and a half hours away, so that would not be possible" (Tr. p. 43).

¹⁰ The parent testified that the student "did well academically" at Valley View, passed all his classes, progressed, and met the requirements (Tr. p. 54).

¹¹ I note that while Darrow did not offer counseling as part of its programming, the academic coach testified that Darrow had "a number" of students "who have anxiety and depression and things like that," estimating that "probably 50 percent of the students here have some sort of mental health or academic [needs]" . . . those things are impacting a student's life enough so that a small school with a specific focus on individual support is necessary and the right fit" (Tr. p. 73).

testified that "[i]n consultation with Valley View . . . it was recommended that [the student] continue with a residential program but one with a more academic focus," the hearing record lacks evidence from Valley View such as discharge/progress reports, assessment results, or testimony from staff describing the progress the student made such that he no longer required a therapeutic placement to meet his needs (see Tr. pp. 1-161; Parent Exs. A-O). Additionally, review of the teacher grade report comments do not provide information about what occurred during the student's specific Learning Skills sessions or how his unique social/emotional deficits were addressed (see Parent Exs. I-L).

Further, the evidence supports the IHO's finding that although the student received off-campus counseling, there was no information in the hearing record about how Darrow staff interacted, if at all, with the private counselor, or otherwise addressed the student's social/emotional needs such as impulsivity, and the anxiety the parent identified (IHO Decision at p. 17; Parent Ex. O ¶ 5). Therefore, while review of the hearing record shows that Darrow may have addressed the student's executive functioning needs, it does not include evidence sufficient to overturn the IHO's finding that the parents failed to sustain their burden to demonstrate that Darrow provided specially designed instruction to address the student's special education needs as the hearing record lacks information as to how the student's social/emotional needs were addressed at Darrow.

VII. Conclusion

Finding that the evidence in the hearing record supports the IHO's determination that the parents failed to show that Darrow was an appropriate unilateral placement for the student during the 2022-23 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: Albany, New York
September 27, 2024

STEVEN KROLAK
STATE REVIEW OFFICER