



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-314

Application of a STUDENT WITH A DISABILITY, by her 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:

Gutman Vasiliou, LLP, attorneys for petitioners, by Anthoula Vasiliou, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 for respondent (the district) to reimburse them for the costs of their daughter's tuition at the Winston Preparatory School Online Program (Winston Online) for the 2023-24 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 has received diagnoses of autism spectrum disorder, attention deficit hyperactivity disorder (ADHD), generalized anxiety disorder, persistent depressive disorder, and unspecified trauma and stressor-related disorder (Parent Ex. B at p. 28). According to the parent, the student had a long history of school refusal beginning during the 2016-17 school year (Parent Ex. L ¶¶ 4, 5, 7). While residing in another state, the student attended various residential placements from December 2020 to summer 2022, including Spark Academy, a residential treatment center for "neurodiverse" students (Parent Ex. L ¶¶ 5, 7, 9-10).

In July 2022, the student moved back to the district and the parent requested an initial evaluation of the student (Parent Ex. L ¶¶ 12, 13). In September 2022, the parent unilaterally placed the student at an in-person program at Academics West and obtained district funding for the student's tuition through an impartial hearing for the 2022-23 school year (Parent Ex. L ¶ 14). A CSE convened on November 22, 2022 and determined that the student was eligible for special education as a student with an other health-impairment (Parent Ex. C at pp. 1, 18). The November 2022 CSE recommended that the student attend an 8:1+1 special class in a State-approved nonpublic school (NPS) beginning on January 2, 2023, with interim programming consisting of integrated co-teaching (ICT) services in a district non-specialized school beginning in December 2022 (*id.* at p. 13). The November 2022 CSE additionally recommended that the student receive one 40-minute session of individual counseling per week, and one 40-minute session of group counseling per week (*id.*). According to the parent, the district did not identify an NPS for the student to attend for the 2022-23 school year (Parent Ex. L ¶ 17).

In a letter dated June 29, 2023, the parents related to the district that the student needed "ongoing therapeutic services and support, including social skills groups, executive functioning supports, counseling, and parent training," and indicated that, as they "ha[d] not been contacted by any [NPS] with an appropriate seat available for [the student]" or "informed of any public school placement available for [the student]," they intended to unilaterally place the student in a "private program" for the 2023-24 school year and seek public funding for the placement (*see* Parent Ex. D).

The district provided the parents with prior written notice on August 25, 2023, which summarized recommendations for both ICT services and an 8:1+1 special class in a NPS day program, but, according to the parent, the district did not provide any NPS option by September 2023 (Parent Ex. L ¶ 19; Dist. Ex. 6). On August 30, 2023, the parents signed an enrollment agreement for the student to attend Winston Online for the 2023-24 school year (*see* Parent Ex. F). The student began attending Winston Online on September 6, 2023 (Parent Ex. L ¶ 20). According to the parent, the student exhibited school refusal through fall 2023, and in January 2024, the parents enrolled the student at the Laurel Springs School, an asynchronous online program (*id.* ¶¶ 26, 27, 31). The student's last day at Winston Online was January 26, 2024 (*id.* ¶ 29).

A. Due Process Complaint Notice

In a due process complaint notice dated April 15, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (*see* Parent Ex. A). Following a recitation of the student's educational history, the parents alleged that the district failed to develop an IEP for the student and offer her appropriate educational programming for the 2023-24 school year (*id.* at pp. 2-4). As relevant to this matter, the parents requested that an IHO find that the district failed to offer the student a FAPE for the 2023-24 school year, that Winston Online was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents (*id.* at pp. 4-5).¹ The parents sought relief in the

¹ The parents' due process complaint notice also requested tuition reimbursement for the unilateral placement the student attended for the remainder of the 2023-24 school year after she left Winston Online, and the IHO made a finding on that request in her decision (Parent Ex. A at pp. 3-5; IHO Decision at pp. 12-13). However, the IHO's

form of district funding for the cost of the student's tuition at Winston Online during the 2023-24 school year (id. at p. 5).

B. Impartial Hearing Officer Decision

A prehearing conference convened before the Office of Administrative Trials and Hearings (OATH) on May 13, 2024, and an impartial hearing convened and concluded on May 31, 2024 (Tr. pp. 1-88).² In a decision dated June 15, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 11). As relevant to this appeal, the IHO determined that Winston Online "had no expertise in providing special education and support services for students with emotional and behavioral disorders," which for this student, manifested in school refusal that, according to the IHO, the student "exhibited immediately upon matriculating" at Winston Online (id.). The IHO continued that because Winston Online "did not cater to students with disabilities," such as those which the student exhibited, the private school "understandably did not offer counseling services to address the [s]tudent's emotional and behavioral disorders" (id. at pp. 11-12). According to the IHO, although Winston Online provided the student with a "focus instructor," that was a service provided to all students, and focus instructors did not provide support for emotional and behavioral disorders, but rather "instead serve[d] as remedial academic instructors" (id. at p. 12).

Additionally, the IHO found that the student's report did not "reflect[] measurable goals or overall instruction that [wa]s designed specifically to meet the [s]tudent's needs," in that the focus period goals were "vague and immeasurable," and the student's core class goals "appear[ed] to apply to all students in her class" (IHO Decision at p. 12). Further, the IHO determined that the hearing record lacked evidence to "support the conclusion that the [s]tudent would excel in an online classroom with limited oversight and few supports to redirect her attention"; to the contrary, evaluative information in the hearing record "recommended that the [s]tudent receive more oversight, more supports, and more interaction to help her stay engaged, remain on-task, manage her emotions and coping skills, and improve her social interactions and social skills" (id.). Therefore, given her review of the totality of the evidence, the IHO found that the parents did not establish that the unilateral placement of the student at Winston Online "provide[d] educational instruction specially designed to meet her unique needs, supported by such services as [we]re necessary to permit her to benefit from that instruction" (id.). The IHO dismissed the parents' claims with prejudice (id. at p. 14).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that the unilateral placement of the student at Winston Online was not appropriate because the school 1) did not cater to students with disabilities like the student in this matter, 2) failed to develop program goals for the student, 3) failed to provide appropriate oversight and support to the student, and 4) failed to provide

finding regarding that unilateral placement was not raised on appeal in this matter and will not be further discussed in this decision.

² After the prehearing conference on May 13, 2024, the IHO issued a "Pre-Hearing Conference Summary and Order" dated May 13, 2024, setting forth the IHO's expectations for the impartial hearing (see Pre-Hr'g Order).

educational instruction individualized to the student's unique needs. The parents assert that the IHO's reasoning is not supported by the evidence in the hearing record, and they request reversal of that portion of the IHO's finding of fact and decision which found Winston Online was not appropriate, and an order requiring the district to reimburse the parents for the cost of tuition to Winston Online in the amount of \$28,028.89.

In an answer, the district asserts that the evidence in the hearing record supports the IHO's determination that the parents failed to sustain their burden to show that the student's individual special education needs were addressed at Winston Online. The district argues that the hearing record did not include sufficient evidence to show that Winston Online provided the student with specially designed instruction to meet her unique needs, and requests that the IHO's decision be upheld.

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" (Andrew 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-

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).

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—Unilateral Placement

The sole issue on appeal is the parties' dispute regarding whether Winston Online was an appropriate unilateral placement for the student for a portion of the 2023-24 school year.

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).

A. The Student's Needs

While not in dispute, a discussion of the student's needs is necessary to determine whether Winston Online provided specially designed instruction that was appropriate to meet those needs. Based on the student's January 2021 neurocognitive evaluation report and October 2022 psychoeducational evaluation report, her general cognitive ability was in the high average range (Parent Ex. B at p. 4; Dist. Ex. 2 at p. 2). On the January 2021 administration of the Kauffman Test of Educational Achievement-Third Edition, the student obtained a reading composite standard score of 109 (73rd percentile), in the average range (Parent Ex. B at pp. 7-8). The student also achieved standard scores in the average range on subtests measuring writing fluency, math fluency and math computation skills (id.). On the Test of Written Language-Fourth Edition, the student's scores were in the above average range (id. at p. 8). The October 2022 psychoeducational evaluation report noted that, on the Woodcock-Johnson IV-Tests of Achievement, the student achieved standard scores in the average range on subtests of passage comprehension and calculation and in the high average range on the letter-word identification, applied problems, spelling, and writing samples subtests (Dist. Ex. 2 at p. 2). The student's November 2022 IEP reported that the student was performing on grade level in reading, writing, and math, but had some difficulty using punctuation and grammar, showing the steps of multi-step problems, and recognizing patterns (Dist. Ex. 1 at p. 1).

With respect to executive functioning, the January 2021 neurocognitive evaluation report further identified the student's "relative weaknesses" in auditory sustained attention, shifting auditory attention and cognitive flexibility, and identified "relative strength" in response inhibition, shifting visual attention, processing speed, and verbal retrieval accuracy (Parent Ex. B at p. 9). Based on the Behavior Rating Inventory of Executive Function-Second Edition, Parent Form, the student's scores were in the clinically significant range on self-monitoring, shift, emotional control, emotion regulation, and initiate scales, and in the at-risk range on the inhibit and behavior regulation scales, which placed the student's global executive composite score in the clinically significant range (id. at p. 10). The November 2022 IEP indicated that the student needed support

with task prioritization, teacher prompting, and frequent redirection due to challenges with attention and focus (Dist. Ex. 1 at p. 1).

Regarding the student's social/emotional functioning, the January 2021 neurocognitive evaluation report related that the student's "social-emotional functioning was a main presenting concern" for the evaluation and she presented with "challenges in her social interactions and social communication skills" (Parent Ex. B at p. 25). The student exhibited deficits in social/emotional reciprocity, nonverbal communication, and maintaining and understanding relationships, as well as stereotyped and restricted repetitive patterns of behavior, interests or activities, and sensory sensitivities (*id.* at pp. 25-26). Additionally, the student's symptoms of generalized anxiety disorder and persistent depressive disorder included anxiety related to school performance, feeling nervous, and worries people might tease her, worries when at school, worries people would get mad at her, and worries about making mistakes (*id.* at p. 26).

A review of the student's October 2022 psychoeducational evaluation report revealed that the student was "experiencing behavioral [and] social-emotional difficulties that [we]re interfering with her ability to participate in the school setting" (Dist. Ex. 2 at p. 1). The October 2022 psychoeducational evaluation report related that on the Behavior Assessment System for Children-Second Edition (BASC-3) parent rating scale, the composite scale t-score for externalizing problems was in the average range (*id.* at p. 2). The internalizing problems composite scale t-score, including anxiety, depression, and somatization, fell within the clinically significant range and the report identified "significant concerns regarding [the student's] ability to maintain a positive affect and display feelings of worry or nervousness" (*id.* at pp. 2, 3). On the behavioral symptoms index, the student's composite scale t-score was in the at-risk range, with attention problems falling in the average range, atypicality falling in the at-risk range, and withdrawal falling in the clinically significant range, reflecting "significant concerns with her ability to willingly form friendships and participate in groups" (*id.*). The student's t-score for the adaptive skills composite scale, including adaptability, social skills, leaderships, activities of daily living, and functional communication, was also in the at-risk range (*id.*). On this scale, the parent's rating "suggested mild concerns regarding [the student's] ability to adapt to new situations and display adequate expressive and receptive communication skills" (*id.* at p. 2).

The student's November 2022 IEP reflected parent report that the student "ha[d] a history of school refusal and serious social concerns" and was then-currently "making gains and [wa]s attending school on a limited schedule (1-2 hours daily)" (Parent Ex. C at p. 2). The November 2022 IEP noted the student was "approachable and friendly, and peers gravitate[d] to her" (*id.* at p. 3). She did not initiate conversations with peers but responded when peers initiated conversation with her, and she initiated conversation with adults (*id.*). The November 2022 IEP reported that student experienced "emotional distress throughout the school day" and required "a lot of support" (*id.*). When overwhelmed, the student would "shut down" and not seek support, refuse to speak or communicate aside from nodding her head, and took "a substantial amount of time up to [an hour and a half] to reengage" (*id.*). Triggers for these behaviors included sensory overload, depressive thoughts, and "at times random mood swings with no apparent trigger" (*id.*). The November 2022 IEP noted that the student received "outside therapy," saw a psychiatrist, and was "recently involved in a support group" (*id.* at p. 4).

B. Winston Online

Review of the evidence in the hearing record shows that a myriad of factors affected the student's school performance and attendance. Specifically, the January 2021 neurocognitive evaluation report identified the student's "relative weaknesses in auditory sustained attention, auditory shifting attention, executive functioning skills, cognitive flexibility, memory, achievement performance on timed academic tasks, impulsivity, oppositional behaviors, emotional dysregulation and rejection sensitive dysphoria . . . characterized by intense mood shifts" and noted that the student's ADHD symptoms "create[d] anxiety for her both academically and socially" (Parent Ex. B at p. 26). While the hearing record supports that the student's executive functioning skills were one factor impacting her school performance, the issue identified repeatedly in the record as the overarching concern was the student's school refusal, which was significantly impacted by her social/emotional difficulties. For example, the January 2021 neurocognitive evaluation report identified that the student's "social-emotional functioning was a main presenting concern for [the] evaluation" and recommended that the student's parents consider a "therapeutic boarding school for [the student] which specialize[d] in an academic and emotional curriculum appropriate for [students] with [autism] and ADHD" (*id.* at pp. 25, 28). The October 2022 psychoeducational evaluation report noted that the student was "experiencing behavioral/social-emotional difficulties that [were] interfering with her ability to participate in the school setting," and related that, based on parent report, the student's "social anxiety [was] preventing her from wanting to engage in school full time" (Dist. Ex. 2 at p. 1). The hearing record included ample evidence of the student's social/emotional difficulties and the interplay between symptoms of the student's autism, ADHD, anxiety, depression, and trauma diagnoses (see Parent Exs. B at pp. 3, 9-10, 12-27; C at pp. 2-5; Dist. Exs. 1 at pp. 1-3; 2).

The parent's testimony by affidavit further detailed the student's social/emotional difficulties, which the parent described as "substantial psychological issues," and "severe school refusal," which eventually resulted in the parents placing the student in residential programming (Parent Ex. L ¶¶ 4-10). In their June 29, 2023 letter notifying the district of their intent to unilaterally place the student, the parents expressed that the student required "ongoing therapeutic services and support, including social skills groups, executive functioning supports, counseling, and parent training" (Parent Ex. D at p. 1).

According to the Winston Online head of school, Winston Preparatory School is a network of campuses, both physical and virtual, for students with learning differences including dyslexia, executive functioning difficulties, and nonverbal learning disorders (Parent Ex. M ¶¶ 1, 6). Winston Online provides "intense academic skill remediation while focusing on the development of critical skills that lead to independence" and "builds resilience, responsibility, self-awareness, and self-advocacy skills" (*id.* ¶ 9). The Winston Online head of school testified that "[a] key feature of Winston Online is the Focus Program," which provides a daily 45-minute, one-on-one session of remedial instruction for each student, targeting the student's individual goals (*id.* ¶ 12). Winston Online students also attend daily "interactive and synchronous" online classes in language skills, literature, mathematics, history, science, and asynchronous art and physical education classes (*id.* ¶ 18).

The Winston Online head of school testified that Winston Online is not an "emotional or behavior disabilities school," and does not provide individual or group counseling (Tr. pp. 37-39;

Parent Ex. M ¶ 24). The Winston Online head of school testified that, during the student's admissions process, Winston Online reviewed materials including her January 2021 neurocognitive evaluation, a March 2022 update from the Heritage School residential treatment center, and the student's report card (Parent Ex. M ¶ 24). She stated that the 16-point gap between the student's processing speed and fluid reasoning scores "points to academic challenges" Winston Online had seen in other students, and they "had a group of students with a similar learning profile and determined that it would be a good fit" (*id.*). The Winston Online head of school testified that, based on the information provided, the student's interview, and a conversation with the education director from the Heritage School, and "with the understanding that [the student] was going to be seeing a new therapist," Winston Online felt they "could address her academic needs" (Parent Ex. M ¶ 24).⁴ According to the Winston Online head of school, the program "really focus[ed] on academics," including academic problem solving, reading comprehension, and written expression, and did not include counseling (Tr. pp. 47-49). The parent testified that, prior to enrolling the student, he was aware that the student "had social and emotional needs that would need to be addressed at school" and knew that Winston Online "did not address emotional and behavioral issues" (Tr. pp. 57-58). The parent further testified that he was aware that Winston Online did not provide individual or group counseling and the student's Focus class "was as close to that as you could expect" (Tr. p. 58).

A review of the student's undated Winston Online fall 2023 report (fall 2023 report) shows a program designed to meet the student's academic needs (*see* Parent Ex. H). The Focus curriculum included academic problem solving goals for increasing academic confidence, resilience, and endurance in the online classroom, using strategies in order to sustain academic attention and address challenging or non-preferred tasks, and developing effective communication and self-advocacy skills when tasks or assignments were challenging, and additional goals for reading comprehension, written expression, and media literacy (*id.* at p. 2). The fall 2023 report described that Focus class used a consistent structure, daily schedules and checklists, plans for completion of classwork when the student did not attend content classes, and weekly self-reflections to improve self-advocacy skills (*id.* at pp. 2-3). The fall 2023 report further described the student's curriculum in each of her content classes and included target skills for each class (*id.* at pp. 4-9).

The Focus section of the fall 2023 report noted that the student "arrived to Winston Online with notable social anxiety and school avoidance issues" and, as such, "the primary focus" of her program was to "develop her academic and social stamina and her ability to appropriately utilize self-advocacy and self-reflection skills" (Parent Ex. H at p. 1). The fall 2023 report noted that because the student's struggle to attend class was "consistently affected by weaker executive functioning skills," she would also be working to develop time management skills, prioritize tasks and responsibilities, including completing content assignments independently, and sustain focus when working on novel exercises (*id.*).

⁴ Specifically, when asked during the hearing whether, based on the review of the student's application materials, Winston Online believed that the student "had emotional or behavioral needs to be addressed" the head of school responded that Winston Online "would be able to provide . . . an appropriate . . . academic setting" for the student (Tr. pp. 37-39).

The Winston Online head of school testified that, "[i]t became apparent right away that [the student] was struggling to attend all of her classes[, s]he very rarely had her camera on in her content classes, and she began to stop attending," and a "plan to get her back into her classed was developed" (Parent Ex. M ¶ 28). According to the Winston Online head of school, the student's "[F]ocus teacher was in constant communication with [the student's] parents, her therapist and psychiatrist, and teachers, and a schedule was created for [the student] to follow about which classes to attend and when" (*id.*). The plan was, "[a]t first, [the student] was asked to attend [l]iterature and [m]ath" classes, and to complete history and science assignments independently, but according to the Winston Online head of school, the student eventually stopped attending all classes and completing assignments (*id.*).

At the time the fall 2023 report was prepared, the student was "making an effort" to "attend Focus class more consistently" but was "not attending most of her content classes"; instead, she worked with her Focus instructor to complete outstanding assignments (Parent Ex. H at p. 1). The fall 2023 report related that, while an "integration plan" had been introduced and implemented, the student "ha[d] not yet been able to attend the selected content class ([l]iterature) with consistency, so another content class ha[d] not been reintroduced" (*id.*). The student's Focus teacher was communicating with the student's therapist and "moving to a lighter course load in the next semester [wa]s a possibility" (*id.*). Despite the strategies included to address the student's executive functioning and academic needs, notably absent from the fall 2023 report is any discussion of the specially designed instruction Winston Online implemented to address the student's social/emotional needs, which played an least an equal if not greater role in her school refusal (see *id.* at pp. 1-9). The parent testified that the student had "ups and downs" with school refusal throughout the fall 2023 semester and the student's Focus teacher was "very responsive and immediately communicated with [the parent] and [the student's] teachers to change the strategies that they were using to keep her engaged"; however, the only strategies the parent identified were that the student's teachers "allowed her to sometimes turn off her camera or reduce pressure to interact with peers" during class (Parent Ex. L ¶ 26).

Here, despite the recommendations of the 2021 neurocognitive evaluation report for consideration of a therapeutic boarding school specializing in an "academic and emotional curriculum" appropriate for students with autism and ADHD, and the parents' assertion that the student needed "ongoing therapeutic services and support, including social skills groups, executive functioning supports, counseling, and parent training," there is no evidence that Winston Online provided specially designed instruction other than academic and executive functioning supports for the student. Moreover, the approach of reducing demands on the student did not serve to address the student's social/emotional needs, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under the IDEA (John M. v Brentwood Union Free Sch. Dist., 2015 WL 5695648, at *9 [E.D.N.Y. Sept. 28, 2015]). Although the hearing record shows that the student worked with outside therapists and the student's Focus teacher communicated with those therapists, the evidence is silent regarding those conversations, the strategies discussed or implemented by Winston Online staff, and what, if any effect they had on the student's classroom participation and school attendance. While I am sympathetic to the parents' plight in their efforts to obtain services to address the student's social/emotional needs, taking into account the totality of the circumstances, there is insufficient basis to disturb the IHO's

determination that the parents did not meet their burden to prove that the student's placement at Winston Online was appropriate.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's determination that Winston Online was not an appropriate unilateral placement for the student for a portion of the 2023-24 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
August 21 , 2024**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**