



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-004

Application of a STUDENT WITH A DISABILITY, by her parent, 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:

New York Legal Assistance Group, attorneys for petitioner, Phyllis R. Brochstein, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, Jessica C. Darpino, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for direct payment for her daughter's tuition costs at the Cooke Center for Learning and Development (Cooke) for the 2010-11 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, at least one psychologist, and school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of a learning disability, an expressive-receptive language disorder, and an auditory processing disorder (Parent Exs. G at p. 1; H at p. 1). She has also received a diagnosis of benign rolandic epilepsy, for which medication has been prescribed (Parent Ex. H at p. 1). The student's eligibility for special education and related services as a student with a learning disability is not in dispute in this proceeding (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

The parent first enrolled the student in Cooke during the 2008-09 school year (Tr. pp. 124-25; Parent Ex. G at p. 1).¹ The parent signed an enrollment contract with Cooke for the 2010-11 school year that was dated March 12, 2010 (Parent Ex. M).

On May 24, 2010, the CSE convened for an annual review of the student and to develop her special education program for the 2010-11 school year (Parent Ex. J at pp. 1, 2). The May 2010 CSE recommended that the student be placed in a 10-month 12:1 special class placement and that she receive three 40-minute sessions per week of speech-language therapy (*id.* at pp. 1, 11).

In July and August 2010, a private speech pathologist conducted a reassessment of the student's speech and language skills (Parent Ex. H at p. 1).

In a letter to the CSE dated August 24, 2010, the parent asserted that the district had failed to offer the student an appropriate program for the 2010-11 school year and that she planned to enroll the student at Cooke and would seek tuition payment for that placement from the district (Parent Ex. F).

In a letter to the CSE dated August 27, 2010, the parent notified the district that she had received a notice of recommended placement from the district notifying the parent of the particular school to which the student had been assigned (Parent Ex. E). The parent stated that her "continuing concern" remained that a 12:1 classroom was "unlikely to provide the necessary attention and support to enable [the student] to progress," and indicated that she had discussed that concern at the May 2010 CSE meeting (*id.*). The parent stated that, pending her visit to the assigned school, she planned to enroll the student at Cooke until she was able to determine whether the assigned school would be an appropriate placement for the student (*id.*).

The parent visited the assigned school on October 1, 2010 (Tr. pp. 126-27; Parent Ex. D). In a letter to the CSE dated October 5, 2010, the parent notified the district, among other things, that she had visited the assigned 12:1 class and that she concluded that the class was not appropriate to meet the student's needs (Parent Ex. D). The parent indicated that she believed that a 12:1 placement would not provide the student with the level of support she required in order to progress (*id.*). The parent informed the district that the student would remain at Cooke and that the parent would seek the costs of the student's tuition for Cooke for the 2010-11 school year (*id.*).

A. Due Process Complaint Notice

In a due process complaint notice dated August 12, 2011, the parent requested an impartial hearing (Parent Ex. A at p. 1). The parent asserted that the district had failed to provide the student with a free appropriate public education (FAPE) for the 2010-11 school year (*id.*). The parent contended that, for a number of reasons, the May 2010 IEP and particular school to which the student had been assigned were not appropriate (*id.* at pp. 2-3). The parent further contended that the student's program at Cooke provided the learning environment she needed to make meaningful progress, as well as individualized instruction to address her needs in math and reading (*id.* at p. 3). The parent asserted that Cooke provided the student with an "intensive language program" to meet the student's needs (*id.*). As relief, the parent requested that the district directly fund the

¹ Testimony by the parent indicated that as a result of discussions with the parent's attorney, the district paid the student's tuition costs at Cooke for the 2008-09 and 2009-10 school year (Tr. p. 150).

student's tuition costs at Cooke for the 2010-11 school year, due to the parent's alleged inability to pay (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on November 9, 2011 (see Tr. pp. 1, 151-54). During the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2010-11 school year (see Tr. pp. 7, 128; IHO Decision at p. 9). In a decision dated November 30, 2011, the IHO found that the parent failed to establish that Cooke was an appropriate placement for the student for the 2010-11 school year and that equitable considerations did not favor the parent (id. at p. 14). With respect to the parent's unilateral placement at Cooke, the IHO found that there was "insufficient evidence to establish that [the student] was appropriately placed in a mixed grade middle school class with older students and seventh and eighth grade content when she was in sixth grade" (id. at p. 11). Further, the IHO noted that the student's greatest area of deficit was decoding, but found that the student made less than one year's progress in decoding at Cooke during the 2010-11 school year (id.). With respect to equitable considerations, the IHO concluded that some facts supported a finding in favor of the parent, but that facts surrounding the tuition contract with Cooke were "problematic" and that equitable considerations did not favor the parent (id. at pp. 12, 14). In particular, the IHO found that: (1) the parent failed to establish that she lacked the financial resources to pay the student's tuition costs at Cooke for the 2010-11 school year; (2) there was no evidence that the parent "ever seriously considered" sending the student to a public placement; and (3) particular facts adduced at the impartial hearing showed that the contract between the parent and Cooke was a "sham" and the parent was not obligated to pay the student's tuition at Cooke (id. at pp. 12-14).

IV. Appeal for State-Level Review

The parent appeals, requesting an order reversing the IHO's findings that Cooke was not an appropriate placement for the student for the 2010-11 school year and that equitable considerations did not support her request for relief. With regard to whether Cooke was appropriate, the parent contends that the IHO applied an erroneous legal standard, disregarded relevant testimony, misconstrued the evidence, and her determination was contrary to the evidence in the hearing record. The parent asserts, among other things that Cooke met the student's unique needs, the student received speech-language therapy at Cooke, the classroom teachers collaborated with the speech-language provider and other instructional staff, and the student made progress at the school. Further, the parent asserts that since decoding was the student's most significant academic deficit, the fact that the student made almost one year's progress in that area was significant.

The parent further contends that the evidence in the hearing record does not support the IHO's determination that equitable considerations do not support her claim. The parent alleges that the IHO did not consider the district's actions in denying the student a FAPE; that the parent cooperated at all times and did not frustrate or obstruct the district's placement process or its ability to properly and timely provide the student with a FAPE; and that the parent gave timely written notice of the student's reenrollment at Cooke. The parent further contends that she provided sufficient information at the impartial hearing with respect to her inability to pay the tuition costs

at Cooke.² The parent alleges that the IHO's finding that there was no evidence that the parent seriously considered sending the student to a public placement was erroneous. The parent also alleges that the IHO's conclusion that the enrollment agreement between the parent and Cooke was a "sham" and that the parent had no obligation to pay the student's tuition at Cooke is not supported by the hearing record.

In its answer, the district requests that the petition be dismissed in its entirety. The district denies that the IHO erred in finding that the parent's unilateral placement was not appropriate and that equitable considerations did not support the parent's claim. The district asserts that the parent failed to prove that Cooke was an appropriate placement. In particular, the district contends that the student was not properly grouped at Cooke, either functionally or by age; that Cooke failed to explain how it instructed the student as it related to the modification of its curriculum; that Cooke did not provide speech-language therapy services that the student needed; and that the hearing record does not show that the student made progress in speech-language therapy or decoding, which were the student's areas of deficit.

With respect to equitable considerations, the district alleges that the IHO properly determined that there was no evidence that the parent ever seriously considered sending the student to a public placement. The district also contends that the IHO correctly found that the parent lacked the obligation to pay the student's tuition at Cooke and that the enrollment agreement was "a sham." Additionally, the district asserts that the parent did not provide it with proper or timely notice of her intent to enroll the student at Cooke for the 2010-11 school year. The district further contends that the parent did not present any testimony or documentation at the impartial hearing that she lacked the financial resources to pay for the student's tuition costs at Cooke and, therefore, the parent did not prove that she was entitled to direct tuition payment to Cooke as relief. Regarding the additional information alleged in the parent's petition, the district argues that the parent provided no documentation during the impartial hearing or on appeal to support her allegations and there was no reason that the parent's financial records could not have been provided to the IHO at the time of the impartial hearing.³

V. Applicable Standards – Unilateral Placement

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]). 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

² Although in her petition the parent alleges additional information regarding her 2010 taxable income and wages and salary, she does not attach any additional evidence for consideration on appeal (see Pet. ¶¶ 108-09).

³ Pursuant to State regulations, a reply is limited to any procedural defense interposed by a respondent or to any additional documentary evidence served with the answer (8 NYCRR 279.6). In this case the district did not proffer any additional evidence in its answer. None of the allegations in the parent's reply respond to procedural defenses submitted with the answer. Accordingly, the reply is beyond the scope of the State regulations and will not be considered on appeal (see 8 NYCRR 279.6).

370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR. 300.148).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]; see also Educ. Law § 4404[1][c]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a

unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

VI. Discussion

A. Appropriateness of Cooke

As noted by the parties and the IHO, the question of whether the district offered the student a FAPE has been resolved in the parent's favor. Based on a careful review of the evidence in the hearing record, I find that the IHO erred in concluding that the parent's unilateral placement of the student at Cooke for the 2010-11 school year was not an appropriate placement for the student.

The division head of Cooke's middle school testified that the school was designed to serve students with a range of disabilities (Tr. p. 24). She also testified that Cooke primarily served students with speech-language and communication disorders, and learning disabilities (id.).⁴ The student's thematic studies teacher testified that the student's in his class ranged in age from approximately 12 to 14 years (Tr. pp. 110-11).⁵ With regard to the student's seventh grade curriculum, the division head testified that Cooke followed the New York State standards for its curriculum development and that the student was exposed to seventh grade curriculum content, but that the school modified its curricular instruction based on the individual needs of the individual students (Tr. pp. 26-27, 69). The IHO found that there was insufficient evidence to establish that the student could be grouped with the seventh and eighth grade students at Cooke because the student was unprepared to work on the curriculum at their level (IHO Decision at p. 11).⁶ While the IHO appears to have been dissatisfied with manner in which the student was suitably grouped for instructional purposes, I note that the IDEA does not impose particular

⁴ The division head testified that she was certified in New York State as a teacher of the deaf and hearing impaired (Tr. p. 40).

⁵ The hearing record reflects that the student was 11 years old during most of the 2010-11 school year (Parent Ex. J at p. 1).

⁶ The IHO correctly noted that courts have relied on the Rowley standard to determine whether the parent's selection of a unilateral placement was appropriate for the student and that courts may view the program at the time that the unilateral selection was made (Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]; C.B. v. New York City Dep't of Educ., 2005 WL 1388964, at *18 [E.D.N.Y. Jun. 10, 2005]). I also note, however, that the Second Circuit has indicated that a student's progress in a private school is a relevant factor that may be considered when reviewing whether a private school is appropriate, although progress by itself does not suffice to demonstrate that such a placement is appropriate (Gagliardo, 489 F.3d at 115). Nor is a finding of progress required for a determination that a student's private placement is adequate (G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; see also Frank G., 459 F.3d at 364).

requirements for grouping students for instructional purposes. State regulations require that in special classes, students must be suitably grouped for instructional purposes with other students having similar individual needs (8 NYCRR 200.1[ww][3][ii], 200.6[a][3], [h][3]; Application of the Bd. of Educ., Appeal No. 11-156), but the parties have not pointed to any authority that imposes functional grouping requirements upon parents who have unilaterally placed a student in a private school, or that functional grouping with other student's in a special class setting is a prerequisite for finding that that an educational placement satisfies the Rowley standard.⁷

Assuming for the sake of argument that such grouping requirements were applicable, in this case, the parent provided sufficient evidence to establish that the student was appropriately placed in the classroom at Cooke and that the Rowley standard has been satisfied. The hearing record reflects that the student was enrolled in a "mixed grade," "mixed age" middle school class for special education students (Tr. pp. 40-41, 114-15). The record also reflects that the student's were grouped in the classroom by academic needs (Tr. pp. 40-41, 45, 82). Moreover, within the student's class, the curriculum was modified; the instruction was differentiated to meet the student's individual needs and abilities; and within the classroom, the student was grouped for particular instructional purposes with other students according to the similarity of the students' needs (Tr. pp. 26-28, 29-30, 44-45, 82-83, 86, 89, 107, 113-14).

As part of her program at Cooke, the student received individual and group speech-language therapy (Tr. pp. 50-51; Parent Ex. B at pp. 1, 13-15). The student also participated in a "communications" or "public speaking" class led by a speech therapist, which provided opportunities for students to develop interpersonal skills, and a "heath group" (Tr. pp. 50-51, 62, 63; Parent Ex. B at pp. 1, 13, 16). While all of the students at Cooke have disabilities, the school is located within a regular education nonpublic school, which provides for inclusion opportunities with nondisabled students (Tr. pp. 114-15; Parent Ex. N at pp. 1, 4). At lunchtime, the student's class ate together as a group in the regular education nonpublic school's cafeteria that was also being used by regular education students at that time (Tr. pp. 114-15).

The division head testified that Cooke administered formal assessments in the fall and spring of the school year, and that informal assessments were implemented during the course of the year as specific topics or skills were addressed (Tr. pp. 30-31). She testified that the purpose of the assessments was to identify the areas in which each student struggled and to make a plan to help that student grow in that specific area (Tr. p. 31). She further testified that Cooke tailors a student's program in order to address the student's unique needs based on the weaknesses revealed in the assessments (Tr. pp. 27, 31). With respect to the student in this case, the division head testified that the assessments indicated that her primary deficits were in language and language processing and that these affected her fluency, reading and decoding skills (Tr. p. 31; see Tr. p. 88). I note that this testimony is consistent with evaluative data in the hearing record relative to the student's needs (see Parent Exs. B at pp. 1-15; C; G at p. 4; H at p. 5).

The division head also testified that for purposes of academic instruction, Cooke looked at its students' language and literacy skills, grouped students accordingly, adapted the curriculum to the students' levels, and targeted the specific skills in which students demonstrated a need in very

⁷ Whether a unilateral placement has met State standards is not dispositive (see Arlington Central School Dist. v. D.K. and K.K., 2002 WL 31521158, at *10 [S.D.N.Y., Nov. 14, 2002] citing Carter, 510 U.S. at 14).

small groups (Tr. pp. 27-29). She further indicated that Cooke instructed students in groups of two to four students and that such instruction provided the school with the flexibility to address the students' academic, adaptive, and therapeutic needs (Tr. pp. 25-26). The division head testified that Cooke could thus tailor the students' instruction to help meet their goals and find "great success" (Tr. p. 26).

The division head testified that during the 2010-11 school year, the student was grouped for her academic instruction in a class of ten students whose language abilities were very similar to her own, and that within that group, the instruction occurred in "much smaller groups" (Tr. p. 29).⁸ The student's thematic studies teacher testified that his class, which also included two assistant teachers, combined social studies and English language arts (ELA), the latter included reading and writing (Tr. pp. 82, 85, 86). The teacher has a Master's degree in special education and is certified to teach students with special needs (Tr. pp. 78, 106). Consistent with the testimony of the division head, the thematic studies teacher testified that his class's curriculum was modified and differentiated to meet the individual students' reading levels, or – for shared reading -- to the mean reading level in the class (Tr. pp. 89, 113-14).

The division head testified that the student's teachers at Cooke developed individualized goals for the student based on formal and informal assessments (Tr. p. 72). She further testified that the student's goals, which were reflected in the progress report, determined the approach and the skills that were taught the student in the classroom (id.; see Parent Ex. B at pp. 1-15). Moreover, a review of the skills targeted in the student's 2010-11 progress report indicated that Cooke targeted appropriate areas based on the student's needs (see Tr. pp. 31, 49, 87-88, 95, 98, Parent Exs. B; C at pp. 2, 8; H).⁹

The hearing record reflects that the student's teachers at Cooke used individualized strategies to address the student's academic needs. For example, with regard to reading, the 2010-11 progress report reflected that based on the student's performance on the Basic Reading Inventory (BRI), the student needed to improve her ability to read aloud with fluency and expression, to use resources to locate and sort information, to compare and contrast two texts, and to gather information from graphs, charts, tables and maps (Parent Ex B at p. 2). The progress report also indicated that during the course of the 2010-11 school year, Cooke addressed these reading needs in a number of ways, including that the student was taught different strategies to identify unfamiliar words (see id. at pp. 2-3). These strategies further included the use of context clues, the use of beginning letter sounds, the use of a dictionary, the development of sight word knowledge, and the implementation of a word study program, the latter which included, among other things a "within word pattern phase" which focused on prefixes; suffixes; short and long vowel sounds; vowel patterns such as oi, ou, au, and ow; and long vowel patterns (id.). Cooke also taught the student strategies to assist her in reading and comprehending independently. These included retelling and summarizing what she had read, connecting what she read to prior

⁸ I note that the student's thematic studies teacher testified that the student's class had ten students at the beginning of the 2010-11 school year and nine students at the end of that school year (Tr. pp. 84-85).

⁹ On September 29, 2010, Cooke assessed the student's reading skills by the administration of the Group Reading Assessment and Diagnostic Evaluation (GRADE) (Parent Ex. C at p. 2). That assessment indicated that at that time, the student demonstrated weaknesses in word reading, word meaning, sentence comprehension, and passage comprehension subtests, and that she performed in the average range in listening comprehension (id.).

knowledge, using context clues to determine the meaning of an unfamiliar word, and rereading texts for increased understanding (id. at pp. 2-3).

Further, the hearing record reflects that instruction at Cooke was appropriate for the student's emotional needs. The student has a history of low self-esteem and anxiety associated with her difficulties in school (Parent Exs. G at p. 4; H at p. 5). The witnesses from Cooke testified that the student could exhibit anxiety and difficulty with self-esteem (Tr. pp. 60-61, 70-71, 95-96, 100-101, 102, 109). As discussed above, the student was provided with small group academic instruction in which she was able to feel comfortable and confident about herself and was able to express herself and benefit from instruction (Tr. pp. 62, 100-101). With respect to this, the thematic studies teacher testified that the "small groups really did benefit" the student's interpersonal interactions with her peers during the 2010-11 school year (Tr. p. 101).

Additionally, the student's participation in the health group and the communications class at Cooke provided her with additional opportunities to develop interpersonal skills. The division head testified that such opportunities "really helped" the student feel more confident and enabled development of her communication skills (Tr. p. 63). The student was also provided with "some counseling support . . . for a period of time" (Tr. p. 74).

B. Related Services

I will turn next to the district's contention that Cooke did not provide the student with the necessary speech-language therapy recommended in the student's private summer 2010 speech-language evaluation. The evidence shows that the summer 2010 private speech-language evaluation recommended that the student receive speech-language therapy three times per week, twice on an individual basis and once in a group of no more than three (Parent Ex. H at p. 5). During the 2010-11 school year at Cooke, the student received 40 minutes of speech-language therapy once per week individually and once per week in a group of three (Tr. pp. 50-51; Parent Ex. B at pp. 1, 14-15). As indicated above, the student also participated in a communications or public speaking class, which focused on pragmatic language skills (Tr. pp. 51, 63; Parent Ex. B at pp. 1, 13, 14-15). The class included nine students, two speech-language pathologists, and two paraprofessionals (Tr. p. 51).

The hearing record reflects that Cooke addressed the student's needs in the areas of expressive, receptive, and pragmatic language abilities including, among other things, listening skills, processing skills, critical thinking skills, sentence structure and grammar (Parent Ex. B at pp. 13-15). These needs were consistent with those identified in the summer 2010 private speech-language evaluation (see Parent Ex. H).¹⁰ The hearing record also reflects that the skills targeted by the student's program at Cooke were consistent with or similar to a number of the skills targeted in the goals that were recommended in the summer 2010 speech-language evaluation (compare Parent Ex. H at pp. 5-6, with Parent Ex. B at pp. 13-15). Moreover, the student's performance on the Curriculum for Oral Language Development (COLD) assessment conducted by Cooke,

¹⁰ The evaluation indicated that the student presented with specific deficits in receptive and expressive language skills, most significantly in word retrieval and phonological awareness, which negatively affected her ability to express herself and to decode, and therefore, to comprehend written text (Parent Ex. H at p. 5). The evaluation indicated that the student also presented with difficulties with the comprehension of narrative text, which negatively affected her ability to comprehend orally presented narrative and her reading comprehension (id.).

indicated speech-language needs in the areas of listening skills, sentence structure, semantic development, functional language use, and self-initiative; all of which were addressed by the program at Cooke (see Parent Ex. B at p. 14).

The 2010-11 progress report relative to the student's speech-language needs indicated that the speech-language therapist at Cooke identified particular strategies to use with the student to accomplish her speech-language goals. These strategies included underlining and highlighting information, and reviewing material to help the student better process and understand both written and auditory information (Parent Ex. B at pp. 14, 15). The therapist also used scaffolding to help the student independently understand instructional material and better express her opinions (id. at p. 14). The therapist had the student answer "wh" questions to improve her listening and narrative skills, and the therapist engaged the student in evaluating the pros and cons of a given situation in order to improve her critical thinking skills (id.). The therapist also utilized prompting to assist the student in self-correction and minimal cuing in appropriate circumstances (id.).

The student's classroom instruction at Cooke also addressed particular aspects of the student's speech-language needs, including those relating to phonological awareness, listening comprehension, the organization of expressive language, and critical thinking skills (Parent Ex. B at pp. 1-5). The hearing record also reflects collaboration between the student's classroom teachers and the speech-language therapist. Specifically, the speech-language therapist pushed into the student's classroom to provide group or individual instruction to the student, modeled a variety of instructional techniques for the classroom teacher, and partnered with the classroom teacher to work on similar skills in order to develop the student's decoding skills (Tr. pp. 32-33, 90). The thematic studies teacher testified that throughout the school year he had worked "very closely" with the student's speech-language therapist and that the therapist would "regularly" come into his classroom (Tr. pp. 90, 91). He also testified that the speech-language therapist would "scaffold" what he was presenting to the large group, join the student's guided reading group, or work 1:1 with the student (id.). The thematic studies teacher testified that he had a "very high level of collaboration" with the student's speech-language therapist during the 2010-11 school year (Tr. p. 90). Moreover, the Cooke staff, including related services providers, head teachers, and assistant teachers, met as a unit weekly for 90 minutes (Tr. p. 34). During these sessions, school staff would discuss curriculum issues, interventions, how specific strategies that were successful in one environment could be applied in another environment, and ways in which the related services providers could push into a guided reading group or a math class in a way that would be supportive and meaningful (Tr. pp. 33-35).

For the reasons discussed above, I find that the hearing record establishes that the educational program and related services provided to the student at Cooke during the 2010-11 school year was specially designed to address the student's unique needs, including her speech-language needs.

C. Progress at Cooke

The IHO based her determination Cooke was not appropriate, in part, on her finding that the student made less than one year of progress in decoding during the 2010-11 school year (see IHO Decision at p. 11). As noted above, a student's progress in a private school is a relevant but not dispositive factor that may be considered when reviewing whether a private school is appropriate (Gagliardo, 489 F.3d at 115). "[I]f the child's lack of progress under a particular IEP

does not render the IEP inappropriate, . . . the fact that the child may not have progressed under the parents' chosen program should not automatically mean that the program was inappropriate at the time the placement decision was made" (C.B., 2005 WL 1388964, at *18, citing Antonaccio v. Bd. of Educ. of Arlington Cent. Sch. Dist., 281 F. Supp. 2d at 710, 724 [S.D.N.Y. 2003]).

In this case, as described below, the hearing record demonstrates that the student made progress at Cooke during the 2010-11 school year. The division head testified that the student's performance on "informal assessments" at Cooke demonstrated that she had "gleaned the skills that the teachers had expected from the content that was taught" (Tr. p. 68). The progress report reflected that the student's overall proficiency levels improved over the course of the 2010-11 school year. The student increased from receiving primarily proficiency levels of two ("taking a subordinate/shared role in completing a task") and three ("having the primary role in completing a task") at the end of the first trimester, to primarily three and four ("completing a task independently on a regular basis") (Parent Ex. B at pp. 2, 4, 6-9, 11, 13).¹¹ In reading, the 2010-11 progress report also reported that the student's performance on the Basic Reading Inventory increased over the course of the school year (id. at pp. 2, 3). Teacher comments included in the progress report relative to the student's reading indicated that during the school year, the student had made "exceptional progress in the development of her comprehension skills," progress in applying her letter sound knowledge when reading unfamiliar words, as well as progress in working with prefixes and suffixes during word study (id. at p. 3). In decoding, which was an area of significant weakness for the student, she progressed from a "beginning" second grade level to a "late" second grade level (Tr. pp. 87, 105).

Formal testing performed during the 2010-11 school year showed that the student increased her performance from a 2.2 grade equivalent in September 2010 to a 4.1 grade equivalent in May 2011 on the comprehension composite of the Group Reading Assessment and Diagnostic Evaluation (GRADE) (Parent Ex. C at pp. 1, 2). The student's "total test" grade equivalent score on the GRADE increased from 2.0 in September 2010 to 2.9 in May 2011, reflecting nearly one full year of improvement (id.). In writing, the 2010-11 progress report advised that the student's progress since the beginning of that school year was "evident" in the development of her pre-writing strategies, understanding of the writing process, and ability to construct a five paragraph essay or narrative on a specific topic (Parent Ex. B at p. 5). The progress report also reflected that the student showed strengths in organizing her ideas with the use of graphic organizers; working for longer periods of time; incorporating "voice" in her writing; and writing with a clear beginning, middle, and end (id.). The progress report also indicated that the student had begun to revise her writing using an editing checklist with minimal prompting (id.).

With regard to mathematics, teacher comments in the 2010-11 progress report reflected that the student ended the school year working on tasks associated with a mid to late fourth grade level (Parent Ex. B at p. 7). The progress report detailed the student's progress in both computation and problem solving and her understanding of relationships between numbers and operations (id. at pp. 6-7). In addition, the student's performance on the October 2010 and the May 2011 administration of the Group Mathematics Assessment and Diagnostic Evaluation (GMADE) reflected that the student had increased her total test grade equivalent score from a 2.6 grade

¹¹ The areas scored included reading, writing, math, social studies, science, and speech-language therapy (Parent Ex. B).

equivalent to a 3.8 grade equivalent; more than one full year of growth (Parent Ex. C at pp. 7, 8). The June 2011 progress report also reflected that the student made progress with respect to her goals in writing, social studies, and science (Parent Ex. B at pp. 4-5, 8-12).

The division head and the student's thematic studies teacher both testified that during the 2010-11 school year, the student also exhibited social/emotional growth at Cooke. Specifically, the hearing record shows that over the course of the school year, the student grew in her ability to advocate for herself, and she "[came] out of her shell" and her self-esteem and confidence increased (Tr. pp. 35, 62, 63, 74, 100-101, 102). Additionally, the student increased her ability to share in conversation and to better communicate her ideas in meaningful ways (Tr. pp. 35-36, 63). The student also demonstrated a "very obvious change...in her interpersonal interactions with her peers" (Tr. p. 101).

The progress report also indicated that the student had made "steady progress" during the 2010-11 school year in speech-language therapy and that she had improved her expressive and receptive language abilities (Parent Ex. B at p. 15). The progress report indicated that since the first trimester, the student had improved in the following areas: (1) listening and narrative skills; (2) describing the main idea of a simple story; (3) learning to understand text on a deeper level and make predictions regarding the conclusion of a story with minimal cueing; (4) certain listening and narrative skills; (5) expanded utterances to include the use of subordinating conjunctions, and adding more details and information; (6) continuing work on sentence structure and grammar; (7) linguistic understanding and organization; (8) the identification of synonyms and antonyms; (9) classification of nouns; (10) semantic understanding; and (11) critical thinking (*id.* at p. 14).

Accordingly, for the reasons discussed above, I find that the hearing record contains sufficient evidence to conclude that the parents have met their burden to show that Cooke was an appropriate unilateral placement for the student for the 2010-11 school year. In reaching this conclusion, I have considered the "totality of the circumstances" (see Frank G., 459 F.3d at 364) and have determined that the evidence shows that the parents' unilateral placement reasonably served the student's individual needs, providing educational instruction specially designed to meet the student's unique needs, supported by such services as are necessary to permit the student to benefit from instruction (*id.* at 364-65).

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5

[N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IHO concluded that equitable considerations did not support the parent's claim on the basis that, among other things, the enrollment contract with Cooke was a "sham" and that the parent was not obligated to pay the tuition in accordance with the contract (IHO Decision at pp. 12-14). As discussed below, I find that the hearing record supports the IHO's decision.

The hearing record reflects that on March 12, 2010, the parent entered into an enrollment contract with Cooke for the student's tuition for the 2010-11 school year (Parent Ex. M). Under the contract, the parent acknowledged that she was "responsible for full payment of the tuition due" under the contract (id. at ¶ 2[a]). The contract provided that payment of the full amount of tuition was due on or before September 30, 2010 (id. at ¶ 8[b]). However, the document also provided that Cooke would permit payment of the tuition owed under the contract to be delayed beyond the September 30, 2010 if the parent pursued her due process rights and sought tuition funding from the district (id. at ¶ 8[c]). The contract further provided that in the event that the parent decided to seek direct funding from the district, the parent agreed "to take all necessary steps to secure such funding as promptly as possible" (id. at ¶ 9[a]).¹² The contract also provided that Cooke had the right to elect, upon 30 days notice, to terminate the student's enrollment at the school in the event that the parent did not "cooperate fully" in the process required to secure direct funding (id. at ¶ 9[b]). The contract also reflected that Cooke reserved the right to "cancel" the contract, "at any time" due to "lack of financial support for placement of [the student]" (id. at ¶ 10[a]).

During the impartial hearing, the parent testified that she was not responsible to pay the student's tuition at Cooke and that when she signed the enrollment contract, she did not expect to pay anything for the 2010-11 school year (Tr. pp. 138-39, 148; see IHO Decision at p. 13). The hearing record reflects that the parent did not request an impartial hearing until just before the start of the 2011-12 school year and that this was almost one full year after the parent's August 24, 2010 letter asserting that she would seek payment from the district for the student's tuition at Cooke (Parent Exs. A at p. 1; F). In view of the terms of the contract described above and the parent's testimony, I decline to disturb the IHO's determination that the parent did not comply with the enrollment contract's requirement that she take all necessary steps to secure direct tuition funding to Cooke "as promptly as possible" (see Parent Ex. M at p. 2). Additionally, the hearing record reflects that notwithstanding the parent's acknowledgement of her responsibility to make full payment due under the contract by September 30, 2010, unless she took all necessary steps to secure direct payment "as promptly as possible," as of the date of the impartial hearing on November 9, 2011, the parent had not made any payment to Cooke under the contract (Tr. p. 140). Further, contrary to the parent's contentions, and as the IHO found, the hearing record also reflects that Cooke took no steps to enforce the enrollment contract (see id.). The evidence does not support the conclusion that the parent actually remained "legally obligated" to pay the tuition at

¹² ¶ 9 of the enrollment contract is erroneously denominated as ¶ 3 (see Parent Ex. M at p. 2).

Cooke (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. Feb. 1, 2011]). Based on the evidence above, the hearing record supports the IHO's conclusion.¹³

VII. Relief

Regarding the IHO's finding that the parent did not establish that she lacked the financial resources to pay for the student's tuition costs at Cooke and that as a result, she was not entitled to direct tuition payment to Cooke for the student's tuition costs for the 2010-11 school year, In a case of first impression, one court has recently addressed whether it has the authority under the IDEA to grant relief it deems appropriate, including ordering a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A., 769 F. Supp. 2d at 406). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 358-60). The Mr. and Mrs. A. Court held that in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).¹⁴ Since the parent has selected Cooke as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether the parent has the financial resources to "front" the costs of Cooke and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

Although unnecessary to my determination in this case, I note that in Mr. and Mrs. A., the court did not establish what should be considered as part of parents' "financial resources" for purposes of determining their ability to pay the costs of tuition for a private school. For instance, it is unclear whether a determination of a parent's financial resources should take into account only his or her annual wages or whether it should also consider items such as cash or its equivalents that the parent has on hand, the parent's ability to access financing, other investments, the

¹³ The IHO also found that there was no evidence that the parent "ever seriously considered sending [the student] to a public placement" for the 2010-11 school year rather than continuing to send her to a private school (IHO Decision at p. 12). I have reviewed the evidence and have not found a basis in the hearing record to overturn the IHO's decision on this ground.

¹⁴ The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 129 S. Ct. at 2494 n.11 see 20 U.S.C. § 1415[i][2][C][iii]).

unrealized earning potential of a nonworking parent, or the value of luxury items belonging to the parent just to name a few (see Connors, 34 F. Supp. 2d at 806 n.6 [describing that the calculation of a parent's need should be conducted by drawing from a school's experience in determining a parent's eligibility for financial aid]; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the evidence in the hearing record contains little information regarding the parent's financial resources and her ability to pay the student's tuition costs at Cooke. The student's mother testified that the tuition costs for Cooke was "\$44,000 more or less" (Tr. p. 140). She further testified that she was "a single mother," that her income was "low," and indicated that it was going to be difficult to pay the tuition costs for Cooke (Tr. p. 143). While there is no reason to disbelieve the parent's statements, the evidence that was submitted leaves out some information. The hearing record contains no further information regarding the parent's income.¹⁵ Additionally, the hearing record is noticeably silent with respect to whether the student's father bears any obligation to support the student and his income and financial resources, if any. Under these circumstances in which basic information regarding the student's parents is missing, I cannot conclude that the parent has established that there was a lack of financial ability to "front" the student's tuition costs for the 2010-11 school year (Mr. and Mrs. A., 769 F. Supp. 2d at 428).

Based on the above, I find insufficient grounds to reverse the IHO's decision that equitable considerations do not support the parent's claim for tuition for the 2010-11 school year.

VIII. Conclusion

In summary, I find that the parent established that Cooke was an appropriate placement for the student for the 2010-11 school year, but that the evidence supports the IHO's conclusion that equitable considerations do not support the parent's request for direct payment to Cooke of the student's tuition costs. I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 30, 2011 is modified, by reversing that portion which determined that Cooke was not an appropriate unilateral placement for the student for the 2010-11 school year.

Dated: **Albany, New York**
 March 19, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER

¹⁵ As indicated above, although the parent's petition includes written statements alleging additional information regarding her 2010 taxable income and wages and salary, the parent did not attach any documentation in support of her contentions or explain why it could not be offered at the impartial hearing.