



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-147

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:

Partnership for Children's Rights, attorneys for petitioner, Thomas Gray, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Neha Dewan, 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 to be reimbursed for the costs of the student's tuition at the Mary McDowell Friends School (Mary McDowell) for the 2012-13 school year. The appeal must be sustained.

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

On April 23, 2012, the CSE convened for an annual review to develop the student's IEP for the 2012-13 school year (Parent Ex. C at pp. 1, 12).¹ Finding that the student remained eligible for special education and related services as a student with a learning disability, the April 2012

¹ On February 8, 2012, the parent executed an enrollment contract with Mary McDowell for the student's attendance during the 2012-13 school year beginning September 2012 (Parent Ex. I at pp. 1-2). The student attended Mary McDowell for the 2011-12 school year (Tr. p. 148). The Commissioner of Education has not approved Mary McDowell as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

CSE recommended a 12:1 special class placement, speech-language therapy services, and occupational therapy services (id. at pp. 1, 8-9).

In a final notice of recommendation (FNR) dated August 15, 2012, the district summarized the special education and related services recommended by the April 2012 CSE, and identified the particular public school site the district assigned the student to attend for the 2012-13 school year (Dist. Ex. 1).

By letter dated August 22, 2012, the parent informed the district that the 12:1 "program" would not support the student's academic and behavioral needs (Parent Ex. J at p. 1). In addition, the parent indicated that she could not visit the assigned school because it was closed, but she intended to call "next week" to arrange a visit (id.). The parent further informed the district of her intentions to enroll the student at Mary McDowell beginning September 6, 2012, and to seek an order directing the district to fund the student's placement at Mary McDowell (id.).

By letter dated November 7, 2012, the parent notified the district that she had visited the assigned public school site (see Parent Ex. K at p. 1). The parent indicated that during the visit she did not get answers to "many" questions, and learned that the classroom "designated" for the student did not comply with the recommended 12:1 special class placement in the student's April 2012 IEP (id.). The parent also expressed concern about the functional levels of the students in the designated classroom, both academically and behaviorally, and the overall environment of the assigned public school site (id.). Because the parent continued to believe that the April 2012 IEP did not accurately reflect the student's behavioral difficulties, and the recommended 12:1 "program" was not appropriate, the parent informed the district that the student would remain at Mary McDowell and that she would seek the costs of the student's tuition from the district (id. at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated February 14, 2013, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2012-13 school year (see Parent Ex. N at p. 1). Generally, the parent alleged that the April 2012 IEP did not adequately describe the student's "significant issues;" the April 2012 CSE failed to conduct required evaluations of the student to determine whether a 12:1 special class placement would provide the student with sufficient support; and the "program, services and class" were not appropriate (id. at pp. 4-6). With respect to Mary McDowell, the parent asserted that it was an appropriate placement and that she provided the district with timely written notice of her intention to reenroll the student at Mary McDowell for the 2012-13 school year (id. at p. 6). In addition, the parent indicated that she did not have the financial means to "pay this tuition in advance and await reimbursement" from the district and that equitable considerations weighed in favor of relief (id.). As relief, the parent requested that an IHO find that the district failed to offer the student a FAPE for the 2012-13 school year, that Mary McDowell was an appropriate placement, and that equitable considerations weighed in favor of the parent's requested relief (id. at pp. 6-7).

B. Impartial Hearing Officer Decision

In this case, an impartial hearing occurred on May 1, and June 5, 2013 (see Tr. pp. 1, 20). In a decision dated July 8, 2013, the IHO first noted that the district conceded that it failed to offer the student a FAPE for the 2012-13 school year (IHO Decision at p. 2).² With respect to the student's unilateral placement at Mary McDowell for the 2012-13 school year, the IHO determined that it was not an appropriate placement, and the IHO did not reach a conclusion as to whether equitable considerations weighed in favor an award of tuition reimbursement (id. at p. 6).

To support the conclusion that Mary McDowell was not an appropriate placement for the student, the IHO found that evidence of the student's functional levels, the student's "inconsistency," and the student's "confusion" contradicted the testimonial evidence indicating that the student made progress during the 2012-13 school year (IHO Decision at pp. 3-4). In particular, the IHO noted that the Mary McDowell progress reports did not include information about the student's "independent functional levels," but instead, reported the levels at which the student worked "with support"—therefore, it was unclear whether the student "made progress in her independent work" (id. at p. 4). The IHO also found that the student made "little progress" in mathematics, the student's inconsistent knowledge and confusion in mathematics resulted from a "flaw[ed]" presentation of the material, and the student did not receive sufficiently individualized instruction in mathematics (id. at pp. 4-6). Finally, the IHO concluded that the hearing record did not contain objective evidence to support a determination that the student made "meaningful progress" in writing, or that the student made any progress in reading (id. at p. 6). Having determined that the evidence did not support a finding that Mary McDowell was an appropriate placement, the IHO denied the parent's request for tuition reimbursement (id.).

IV. Appeal for State-Level Review

The parent appeals, and asserts that the IHO erred in finding that Mary McDowell was not an appropriate placement for the student for the 2012-13 school year. The parent asserts that the IHO improperly placed a more stringent burden on her with respect to the appropriateness of the unilateral placement, the IHO improperly concluded that Mary McDowell did not provide the student with adequate support, and the IHO improperly found that the student did not make progress at Mary McDowell. The parent also appeals the IHO's failure to address whether equitable considerations weighed in favor of her request for an award of tuition reimbursement, and argues that because the hearing record demonstrates that she lacked the financial means to pay the costs of the student's tuition at Mary McDowell, she is eligible for retroactive direct payment of the student's tuition costs. The parent also attaches additional evidence to her petition for consideration on appeal.

In its answer, the district objects to the consideration of the parent's additional evidence as unnecessary to render a decision in this case, and seeks to uphold the IHO's decision that Mary McDowell was not appropriate to meet the student's needs. The district asserts that the IHO did not utilize an overly stringent burden with regard to the appropriateness of the parent's unilateral placement, and the hearing record demonstrates that Mary McDowell was both an overly

² Since the district conceded that it failed to offer the student a FAPE for the 2012-13 school year, it is unnecessary to address this issue further in this decision (see Tr. p. 8; IHO Decision at p. 2).

restrictive and otherwise inappropriate placement for the student. The district also argues that the IHO correctly determined that the student did not make progress at Mary McDowell. Next, the district asserts that equitable considerations do not weigh in favor of the parent's request for an award of tuition reimbursement, as the parent did not truly consider a public school, as demonstrated by evidence that the parent sign the Mary McDowell enrollment contract prior to the April 2012 CSE meeting. Finally, the district asserts that even if equitable considerations weigh in favor of the parent's request for relief, the parent did not demonstrate an inability to pay the costs of the student's tuition upfront or that she was obligated to pay the costs of the student's tuition under the terms of the enrollment contract.

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 v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra 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).

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

VI. Discussion

A. Additional Evidence

As an initial matter, the parent submits one exhibit as additional documentary evidence for consideration on appeal to support her assertion that the student made progress in mathematics, decoding and encoding multisyllabic words, and reading and writing at Mary McDowell during the 2012-13 school year (see Pet. Appeal Ex. 1 at pp. 1-43). The district objects, noting that

although the documentary evidence was not available at the time of the impartial hearing, it is duplicative of testimonial evidence, and the consideration of the new evidence on appeal deprives the district of its right to cross-examination regarding the contents of the new evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, although the parent's additional documentary evidence was not available at the time of the impartial hearing, it is not necessary in order to render a decision herein, and as such, the parent's request to consider the additional evidence must be denied.

B. Unilateral Placement

In concluding that Mary McDowell was not appropriate placement, the IHO primarily relied upon what she identified as the student's lack of progress in mathematics, reading, and writing during the 2012-13 school year (see IHO Decision at pp. 4-6). However, contrary to the IHO's conclusion, while a finding of progress is a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; L.K. v. Northeast Sch. Dist., 2013 WL 1149065, at *15 [S.D.N.Y. Mar. 19, 2013]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]), a finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [holding that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 2013 WL 1277308, at *2 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 2012 WL 6684585, at *1 [2d Cir. Dec. 26, 2012]; L.K., 2013 WL 1149065, at *15; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Instead, the relevant inquiry requires that a private school placement must be "proper under the Act" (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 12, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 370 [1985]), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 112, 115 [2d Cir. 2007]; 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]). "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 at 364 [2d Cir. 2006], quoting Rowley, 458 U.S. at 207 [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, , quoting Rowley, 458 U.S. at 176; see Gagliardo, 489 F.3d at 115; Berger, 348 F.3d at 522 [stating that "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).

Under this analysis and as discussed more fully below, the hearing record supports a determination that Mary McDowell was an appropriate unilateral placement for the 2012-13

school year because it was designed to address the student's unique special education needs and, contrary to the IHO's findings, the evidence supports the conclusion that the student made progress.

1. Special Education Needs

According to the hearing record, Mary McDowell—a special education school—serves students with learning disabilities, and in particular, students with language based learning disabilities who exhibit "issues with attention, executive function, dyslexia, working memory issues or even sensory motor or integration type issues" (Tr. p. 27). In total, Mary McDowell enrolls approximately 318 students from kindergarten through 12th grade (*id.*). Mary McDowell provides small group instruction for its students; to form these small groups, Mary McDowell considers each individual student, the student's progress during the school year, the student's specific learning needs and learning type, similarity of the other students' levels, and the ages of the students (*see* Tr. pp. 50-51). Within small group instruction, Mary McDowell also differentiates instruction based upon each student's particular needs (*see* Tr. pp. 53-54).

In this case, the most recent psychoeducational evaluation report in evidence indicated that the student obtained a full scale IQ in the average range, with perceptual reasoning and working memory scores in the low average to average range, and processing speed in the extremely low range (*see* Parent Ex. E at pp. 2-3). In the area of reading, the student displayed low average word attack skills, mild delays in reading comprehension, and exhibited delays in the area of spelling (*id.* at pp. 4-5). In mathematics, the student displayed low average computational and problem-solving skills (*id.* at p. 4). In summary, the evaluation report noted cognitive delays in the student's "ability to process verbal information accurately" when simultaneously performing written work, difficulty remembering mathematical concepts previously learned, and delays in mathematics and writing skills (*id.* at p. 5).

A speech-language evaluation report indicated that the student exhibited moderate delays in receptive and expressive language, and mild delays in pragmatic language (*see* Parent Ex. F at p. 3). In addition, the student demonstrated difficulty comprehending complex sentence structures, age appropriate concepts, and using age appropriate syntax and morphology (*id.*).

A 2011 evaluation of perceptual and cognitive development (2011 evaluation) revealed visual processing weaknesses, weak fine motor coordination skills, and difficulty integrating information presented through "visual and motor modalities," which interfered with the student's ability to copy from the board and integrate information from different sensory modalities (Parent Ex. H at p. 4).³ In addition, the 2011 evaluation indicated that the student's weak visual spatial skills—which the evaluator identified as "important readiness skills . . . to comprehend mathematical concepts, to visualize three-dimensional shapes and to organize information in an efficient manner"—also interfered with the student's ability to copy information from the board and efficiently process information (*id.*). The student also exhibited difficulties in "visually

³ The 2011 evaluation report also noted that the student had been diagnosed as having an attention deficit hyperactivity disorder (ADHD) in 2010 (*see* Parent Ex. H at p. 1). The student's head teacher at Mary McDowell for the 2012-13 school year testified that the student started medication during that school year to assist the student with her attention (*see* Tr. pp. 100-01).

scanning visual materials," as well as attending to important details, and she demonstrated "weak verbal and visual short-term memory skills" (id. at pp. 4-5).

A review of the hearing record shows that the student's head teacher at Mary McDowell (head teacher) during the 2012-13 school year used several strategies to address the student's needs. The head teacher testified that she had a Master's degree in early childhood, regular education, and special education, and during the 2011-12 school year, she taught the student reading (Tr. pp. 76-77, 104-05). During the 2012-13 school year, the head teacher functioned as the student's homeroom teacher—where she helped the student with organization, scheduling, and transitioning from one place to another—and she taught the student both writing and mathematics (Tr. pp. 77-78). The head teacher also testified that the small group instruction and structure at Mary McDowell assisted the student with her organization needs, and that the social and emotional curriculum used at Mary McDowell helped the student with her social pragmatic needs (see Tr. pp. 100-02).

According to the head teacher, the student's primary learning difficulties were her attention, memory, language processing, testing and limit setting, and social pragmatics (Tr. p. 79). To address these needs, the head teacher used previewing, to-do lists, breaking tasks down into manageable steps, technology—such as a smart-board and the school-wide "FM" system to help the student maintain attention—privacy shields, noise cancelation headphones, preferential seating close to the teacher, and a lot of one-on-one support (Tr. pp. 79, 83). The head teacher described the student's use of a homework binder and homework checklist to help with her executive functioning and organization, noting that if the student was distracted and forgot to fill it out, she benefitted from redirection and reminders (Tr. pp. 79-81). The head teacher also testified that the student could follow directions when provided with positive reinforcement (Tr. pp. 81-82).

During the 2012-13 school year, the head teacher testified that she had 12 students in the homeroom classroom, who ranged in age between 9 and 10 years old and who all had language based learning disabilities (see Tr. pp. 82-83). For mathematics, the student received instruction in a group of five students with one teacher, and she differentiated the instruction based on each student's individual needs (see Tr. pp. 82-84, 99-100). More specific strategies used to teach the student in the instant case included beginning lessons with questions to review and reinforce previously learned concepts, presenting new information by incorporating multiple modalities, breaking down steps, speaking slowly, limiting the language used, and redirecting the student when she lost focus (see Tr. pp. 84-87). At the time of the impartial hearing, the head teacher testified that in mathematics, the student currently worked at a "late second grade level," but at more of a beginning second grade level for computation as well as word problems" independently (Tr. pp. 88-91).

For writing, the student received instruction in a group of 12 students with 2 teachers (see Tr. p. 91-92). During the 2012-13 school year, the student worked on beginning to "write one topic sentence with three supporting details, and one concluding sentence using a graphic organizer" (Tr. pp. 92-93). In addition, the student wrote in a journal; learned about transition words in connection with writing paragraphs; worked on punctuation, spelling, and editing; and learned to use conjunctions and contractions in writing (see Tr. pp. 93-95). Given her difficulty with attention, the student benefitted from "redirection during writing, during journal time, as well as writing lessons" to stay on task and to stay focused (Tr. pp. 94-95). In light of her difficulty

with memory, the head teacher worked with the student to maintain the sequential order of events in her writing (*id.*). At the time of the impartial hearing, the head teacher testified that the student was currently working at a "mid second grade level" in writing, but at a "beginning second grade level" independently as a result of her difficulties with memory, language processing, expressing language, and attention (Tr. pp. 109-11).

2. Progress

In addition to the student's Mary McDowell midyear progress reports described more fully below, the associate head of Mary McDowell (associate head) provided testimony regarding the student's progress (*see* Tr. pp. 24-75; Parent Ex. M at pp. 1-25). She testified that she was familiar with the student's needs and abilities based on observations of the student and by reviewing her progress reports (Tr. pp. 28-29). According to the associate head, the student struggled with expressive and receptive language; her ability to process and take in information; her ability to organize language; significant attentional issues; and social pragmatics, such as eye contact, appropriate responses to social cues, and the reciprocal "give and take of language" (Tr. pp. 29-30). She also described the student as having visual and spatial issues, which made writing and mathematics challenging for the student, as well as fine motor issues (Tr. p. 30).

The associate head testified that the student benefited from being in a small group and being provided with direct instruction (Tr. p. 31). At Mary McDowell, the student received individual instruction, with information broken down, previewing, the use of an "FM" system, movement breaks, visual aids, graphic organizers, checklists, positive reinforcement, and repetition to provide support for her learning needs and to address needs in the areas of attention, language, memory, social skills and executive functioning (Tr. pp. 29-32).

In reading, the associate head testified that the student received instruction using the Orton-Gillingham program in a group of five students with one teacher (Tr. pp. 36-39). Based upon a comparison of the student's 2011-12 end-of-year report and her 2012-13 mid-year report, the associated head indicated that the student's reading level had improved from a high first grade level in reading to a high second grade level (Tr. pp. 38-39). She described Orton-Gillingham as a "step by step program" with proficiency tests throughout the school year, and noted that the student was advancing through those proficiency tests (Tr. p. 39).

Regarding the student's progress in mathematics, the associate head testified that the student received instruction using the Saxon Math program, which was "very sequential and repetitive" (*id.*). The associate head also testified that because the student had progressed to the "end of the first grade" level and had "developed a more solid understanding of place value," the student had moved into a "Houghton Mifflin second grade program" and was making progress through that program (Tr. pp. 39-42).

In writing, the associate head testified that the student demonstrated greater success with her ability to write with "greater length," and expanding her sentences (Tr. pp. 41-42). The student still required teacher support to check her punctuation, but she was more organized in her response to queries and had improved in her confidence and stamina (*id.* at pp. 42-43).

The 2012-13 Mary McDowell midyear report provided information regarding strategies used to enhance the student's skills and promote progress (see Parent Ex. M at pp. 1-25). In particular, the report described the student as benefitting from a preview of daily activities and being informed of changes in the schedule to assist during transitions (id. at p. 1). Teachers worked with the student to create a positive rapport, and introduced her to class expectations and limits (id.). The student required extended time to unpack and organize her belongings in the morning prior to entering the classroom, and teachers "'checked in'" with the student to review the morning journal assignment (id.). In addition, a teacher would sit next to the student, or check in with her every five minutes to ascertain whether the student was on task (id.). The student benefitted from the use of verbal prompts and nonverbal prompts (elapsed timers and visual to do lists), head phones, and a privacy shield to "stay on task," as well as extended time, positive reinforcement, and scaffolding to complete assignments (id.). The report noted that teachers would continue to provide support for the student's attention and organization skills in order for her to develop greater independence throughout the day (id.). To more consistently participate in class lessons, the student benefitted from being provided with guidelines and expectations, previewing material, breaking assignments into small steps, visuals, consistent check ins, prompts, repetition, and experiential and interactive activities (id.). In addition, the student was provided with clear guidelines and checklists with visual and verbal reminders to follow directions and to raise her hand in class (id. at pp. 1-2). To assist the student with expressing her feelings and to help develop self-awareness, appropriate language was modeled and a "happy book" was provided (id. at p. 2). The student was encouraged to communicate her needs in a respectful manner (id.).

The midyear progress report noted that the student received four 60-minute sessions per week of reading instruction with three other students (see Parent Ex. M at p. 3). As noted above, the reading group used the Orton-Gillingham program, which was described as a multisensory curriculum for teaching reading, writing, and spelling, and the student benefitted "tremendously from learning through visual, auditory and kinesthetic modalities" (id.). To help the student focus before her reading lesson, the student engaged in simple movement activities, and then reviewed previously taught skills or concepts (id.). The student received frequent verbal cues during the lesson in order to recognize her role in the group and focus on tasks (id.). With the use of visual cues, such as highlighted writing paper, the student could encode words during dictation with few errors (id.). Reading lessons incorporated movement breaks to help the student refocus (id.). The student worked on comprehension by reading aloud and responding to questions, and she was encouraged to read slowly in order to build fluency and comprehension (id. at p. 4). Comprehension skills were further strengthened by retelling, predicting, summarizing, sequencing and studying character development (id.). At the end reading group, the teacher previewed homework for the evening (id.). In order to stay focused, the student needed frequent redirection, and the routine and structure of the lessons provided the student with the opportunity for repetition and reinforcement (id.). The report noted that the student had shown "growth," and functioned at a "[l]ate [second] grade level with support" (id.).

With respect to writing, the 2012-13 midyear report indicated that the curriculum focused on developing "an understanding of writer's workshop and touched on key language concepts, such as parts of speech, capitalization and punctuation" (Parent Ex. M at p. 5). The student had "many opportunities" to work on her writing skills, and demonstrated an understanding of parts of speech, types of sentences, and conjunctions (id.). To help focus on the morning tasks, which included journaling time, the student benefitted from the use of visual and verbal prompts; similarly, the

use of a privacy shield, noise cancelling headphones, and individual teacher support assisted the student with remaining focused on tasks and to organize and elaborate on her writing (id.). Teachers also assisted the student in proofreading and editing by asking questions to evaluate her writing (id. at p. 6). The student used editing checklists and personal dictionaries to self-correct her work (id.). The report noted that the student had made progress in writing (id. at pp. 6-7).

In regard to the student's mathematics skills, the 2012-13 midyear report indicated that with support and repetition, the student demonstrated a growing understanding of number sense, skip counting, comparing and ordering numbers, place value, sequencing, greater and less than, and determining highest and lowest (see Parent Ex. M at p. 8). The report also indicated that with support, repetition, visual cues, steps broken down, and reminders to draw lines for columns to delineate place values, the student began to demonstrate an understanding of subtraction with regrouping and an ability to subtract two numbers without regrouping using modified worksheets (id. at pp. 8-9). The student also benefitted from the use of verbal and nonverbal cues to focus when presented with multistep problems (id. at p. 9). The student was encouraged to use strategies to help her focus, such as different seating, sitting closer to the teacher, a privacy shield, and noise cancelling headphones (id.). The report noted that the student was working toward a late second grade level in mathematics with these supports (id. at p. 10).

The 2012-13 midyear report also noted that in speech-language therapy to address receptive, expressive, and pragmatic language delays, the student benefitted from multisensory activities, movement breaks, clear expectations, visual and auditory supports, and praise (see Parent Ex. M at p. 16). The student made steady progress on receptive language goals, such as increasing attention, comprehension of novel vocabulary, answering questions, understanding categories, temporal and sequential concepts, and following multi-step directions (id.). In addition, the student's auditory processing skills improved since the beginning of the school year, and the student benefitted from visual cues paired with verbal directions, cues to listen before giving directions, verbal directions presented slowly, directions repeated, and extra time for the student to process and respond (id.). An "FM" amplification system used in the classrooms supported the student's ability to attend and process auditory information (id.). The speech-language pathologist noted in the midyear report that the student's pragmatic language goals focused on turn taking, maintaining topics, listening to others, asking appropriate questions, asking for clarification when needed, and decreasing verbal interruptions (id. at p. 17).

The 2012-13 midyear report noted that in the area of occupational therapy, the student had shown improved gross motor strength, coordination, ball handling and typing skills, and had shown good progress overall (see Parent Ex. M at p. 20). The therapist indicated that practicing typing skills had helped the student with significant visual perceptual difficulties (id. at p. 21).

Based on the foregoing evidence, the hearing record indicates that Mary McDowell offered the student educational instruction specially designed to meet her unique special education needs, and therefore, the parent's unilateral placement of the student at Mary McDowell for the 2012-13 school year was reasonably calculated to enable the child to receive educational benefits (Frank G., 459 F.3d at 364; see M.B., 2013 WL 1277308, at *2; D. D-S., 2012 WL 6684585, at *1; Gagliardo, 489 F.3d at 115).

C. Equitable Considerations

Having found that Mary McDowell was an appropriate placement for the student, the final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d 167, 185, 194; 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., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 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).

In this case, the parent argues that she timely notified the district of her concerns about the appropriateness of the student's April 2012 IEP, she made repeated efforts to visit the assigned public school site, and she timely notified the district of her intention to enroll the student at Mary McDowell for the 2012-13 school year. The district asserts that equitable considerations do not weigh in favor of the parent's request for an award of tuition reimbursement because the parent executed the Mary McDowell enrollment contract prior to the April 2012 CSE meeting, which demonstrates that the parent never truly considered a public school.

In this case, the hearing record establishes that the parent cooperated in the CSE process and made the student available for assessments (Tr. p. 23). The hearing record also demonstrates that although the parent signed the enrollment contract with Mary McDowell prior to the April 2012 CSE meeting, she did so in order to hold a place for the student for the 2012-13 school year, and further, that she continued to have an open mind toward enrolling the student in the public school (see Tr. pp. 137-38). Based upon this uncontroverted evidence, the hearing record supports a conclusion that equitable considerations weigh in favor of the parent's request for an award of tuition reimbursement in this case.

D. Relief

Finally, the parent asserts that she is entitled to an award of retroactive direct payment of the student's tuition in this case because she lacked the financial means to pay the student's tuition costs at Mary McDowell. The district contends that the parent has not established an inability to pay the student's tuition costs or that she was legally obligated to pay the student's tuition costs.

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order 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. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). 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; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). 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).⁴ Since the parent has selected Mary McDowell as the unilateral placement, and her financial status is at issue, the parent has the burden of production and persuasion with respect to whether she has the financial resources to "front" the costs of Mary McDowell and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., Appeal No. 12-132; Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 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 hearing record reflects that on February 8, 2012, the parent executed an enrollment contract with Mary McDowell for the student's attendance during the 2012-13 school year beginning September 2012 (Parent Ex. I at pp. 1-2). According to the enrollment contract, the full amount of tuition (\$49,177.00) for the 2012-13 school year was due on or before September 30, 2012, and the parent, by signing the contract and in testimony, acknowledged that she was responsible for the full payment of the tuition under the terms of the contract (id. at p. 1; see Tr. p. 135). If, however, the parent accepted a public school placement, and notified Mary McDowell no later than October 1, 2012, the contract terms allowed the parent to be released from the enrollment contract with no financial penalties or further responsibilities for continued tuition payments (Parent Ex. I at p. 2). According to most of the evidence hearing record, the parent made no payments toward the costs of the student's tuition at Mary McDowell for the 2012-13 school

⁴ 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, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

year (see Tr. pp. 1-156; Dist. Ex. 1; Parent Exs. A-C; E-N; IHO Exs. I-II).⁵ The parent testified that she could not pay the student's tuition costs "upfront" (Tr. pp. 135-36).

Regarding the parent's proof of inability to pay the student's tuition to Mary McDowell, the parent testified that she received public assistance as her only source of income, she did not own any property, and she had no savings account or "other types of accounts" (Tr. pp. 134-35). The evidence also shows that pursuant to the terms of the enrollment contract, a second individual—who was "financially responsible for the student"—also executed the student's enrollment contract with Mary McDowell for the 2012-13 school year (Parent Ex. I at p. 2).⁶ There is no evidence in the record regarding this individual's financial resources (see Tr. pp. 1-156; Dist. Ex. 1; Parent Exs. A-C; E-N; IHO Exs. I-II).

After a review of the hearing record, although the evidence sufficiently supports the conclusion in this case that the parent remained "legally obligated" to pay the tuition at Mary McDowell for the 2012-13 school year, the hearing record fails to contain sufficient evidence of the parent's inability to pay the costs of the student's tuition at Mary McDowell under the factors described in Mr. and Mrs. A.. Therefore, under the circumstances of this case, I find that the parent's claim for retroactive direct payment of the student's tuition at Mary McDowell for the 2012-13 school year is insufficiently supported by the evidence available in the administrative hearing record. This case is different from circumstances in which objective information regarding financial resources and a spouse was not presented to the IHO or SRO during the administrative proceedings (see A.R., 2013 WL 5312537, at *11 [accepting additional evidence that was proffered at the District Court level and determining that the additional evidence supported parent's assertion regarding a lack financial resources]). However, not unlike the A.R. case, it would be unfortunate if issue of "appropriate relief" were to proceed to judicial review if an "income verification" is the only genuine issue to be resolved between the parties (A.R., 2013 WL 5312537 at *11 n.10). If the parties agree that this individual listed on the contract is in a parental relationship to the student and similarly lacks the financial resources to front the costs of the student's tuition in conformity with Mr. and Mrs. A. (i.e. is eligible for public assistance similar to the student's mother due to a lack of financial resources), I will enter a conditional order that authorizes direct funding of the costs of the student's tuition at Mary McDowell upon such an agreement.

VII. Conclusion

Based on the above, the IHO's conclusion that Mary McDowell was not an appropriate unilateral placement for the student for 2012-13 school year must be reversed, as it was reasonably calculated to enable the student to receive educational benefit (Frank G., 459 F.3d at 364; see M.B., 2013 WL 1277308, at *2; D. D-S., 2012 WL 6684585, at *1; Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522). Equitable considerations in this instance favor an award of tuition

⁵ At one point the parent testified that she paid a deposit to Mary McDowell, but other than this one statement, the hearing record does not contain any evidence of the payment, and the Mary McDowell enrollment contract did not require payment of a deposit as part of the tuition payments (compare Tr. pp. 138-39, with Parent Ex. I at p. 1).

⁶ This individual appears to have the same last name as the student, but is different from the student's mother (Parent Ex. I). I cannot determine whether it is the student's father or another individual.

reimbursement for any monies paid by the parent and, in the event that the parties can agree as described above, appropriate relief may also include direct funding by the district for the remaining costs of tuition at Mary McDowell for the 2012-13 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 8, 2013, is modified by reversing that portion which found that Mary McDowell was not an appropriate unilateral placement for the student for the 2012-13 school year; and,

IT IS FURTHER ORDERED that upon the submission of proof of payment to the district, the district shall reimburse the parent for tuition paid for the student at Mary McDowell for the 2012-13 school year; and,

IT IS FURTHER ORDERED that in the event the parties agree consistent with the body of this decision, the district is authorized directly fund the remaining costs of the student's tuition at Mary McDowell for the 2012-13 school year.

Dated: Albany, New York
October 8, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER