



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-117

Application of the BOARD OF EDUCATION OF THE WAPPINGERS CENTRAL SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Thomas, Drohan, Waxman, Petigrow, & Mayle, LLP, attorneys for petitioner, by Neelanjan Choudhury, Esq.

New York Legal Assistance Group, attorneys for respondents, by Phyllis Brochstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to reimburse the parents for their son's tuition costs at the Ridge School (Ridge) for the 2017-18 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has received numerous diagnoses, the most recent being Asperger's disorder, attention or concentration deficits, anxiety disorder NOS (not otherwise specified), specific

developmental disorder of motor function, and transient alteration of awareness (Dist. Ex. 3 at p. 2; see Dist. Ex. 4 at p. 4).¹

He was initially found eligible for special education services as a preschool student with a disability in April 2009 and attended a 12:1+4 special class with related services for the 2009-10 and 2010-11 school years (Parent Ex. H at p. 2; Dist. Ex. 4 at p. 3). In May 2011, the student transitioned to the Committee on Special Education (CSE) and was found eligible for special education services as a student with a speech or language impairment (id.). He attended a district general education kindergarten class where he received related services of speech-language therapy, occupational therapy (OT) and physical therapy (PT) for the 2011-12 school year (id.).

For the 2012-13 school year (first grade), the student's eligibility classification was changed to learning disability (Parent Ex. H at p.2; Dist. Ex. 4 at p. 3). He attended a general education class and received resource room services along with speech-language therapy, OT, and PT services (id.). During the course of the school year, the student's teachers and parents developed concerns regarding his difficulty with homework and increased avoidance behavior (Parent Ex. H at p. 2). The CSE convened in March 2013 and recommended that, in addition to related services, the student receive support from a special education teacher in the form of integrated co-teaching (ICT) services for all academic subjects for the remainder of the 2012-13 school year (id.). The student continued to receive ICT and related services through the 2014-15 school year (third grade) (Parent Ex. H at p. 2; Dist. Ex. 4 at p. 3).² The change in placement from related services only to ICT with related services required the student to change elementary schools within the district (see Tr. pp. 994-95).

In July 2014 the student reportedly received a diagnosis of Asperger's "disorder" and, in February 2015, his eligibility classification was changed to autism (Parent Ex. H at p. 3; Dist. Ex. 4 at p. 3).³ A CSE convened on April 7, 2015 for a reevaluation/annual review (Dist. Ex. 18). The IEP developed by the April 2015 CSE indicated that the student required a significant amount of small group or 1:1 support during the day to understand and complete classroom lessons and activities (id. at p. 9). The CSE recommended that for fourth grade the student be placed in the district's "SC Flex" program, which consisted of 15:1+1 special classes for reading and math, provided daily, and ICT services for science and social studies, provided three days each per six-day cycle (id. at p. 13).⁴ The CSE also recommended that the student receive related services

¹ These diagnoses are attributed to the student's neurologist, however, documentation by the neurologist is not contained in the hearing record.

² The hearing record is unclear as to whether the student began receiving counseling services in first or second grade; however, the student received counseling services in the third grade (compare Parent Ex. H at p. 2, with Dist. Ex. 4 at p. 3). The student was also discharged from receiving PT services in March 2014 (Parent Ex. H at p. 2; Dist. Ex. 4 at p. 3).

³ The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

⁴ In contrast, the district's February 2017 psychoeducational reevaluation indicated that the ratio of the Flex classes was 15:1 (Dist. Ex. 4 at p. 3). Additionally, although the self-contained Flex classes were intended to include up to 15 students, the hearing record shows that the number of students in the reading Flex class was typically around five students with a maximum of seven students (Tr. p. 288). The student's math Flex class included a total of 8

including OT, speech-language therapy, and counseling (id. at pp. 13, 15). The change in placement from ICT services to the Flex program required the student to return to his original elementary school (see Tr. pp. 994-96). He remained in the Flex program with the same related services for fifth grade (2016-17 school year) (Dist. Ex. 5 at p. 12). In March 2016 the CSE recommended that the student receive 12-month services for reading and math in a 12:1+1 special class three days per week, as well as once weekly OT services (id. at p. 14).

At the request of the parents, the CSE reconvened in January 2017 to discuss concerns they had regarding the student's placement (Dist. Ex. 1 at p. 1). The student's ELA and math teachers both reported regression in the student's educational performance, while the student's general education teacher indicated that the student was often unfocused and stared off in class (id.). In addition, the student's occupational therapist reported that the student was not productive and his speech therapist noted regression (id. at pp. 1-2). The parent advocate noted a decline in results from the student's initial evaluation (id.). The CSE agreed to conduct an updated assessment of the student (id. at p. 2).

Subsequently, the district conducted psychoeducational and speech-language evaluations of the student, as well as an assessment of his visual-motor, handwriting, and sensory processing skills (Dist. Exs. 4; 22; 28). The evaluations showed that the student was functioning in the very low range of cognitive ability, demonstrated weaknesses in pragmatic language skills and social interaction, and had limitations in his visual-perceptual, fine motor, and visual integration skills which impacted his performance in school (Dist. Ex. 4 at pp. 10, 12; 22 at p. 4; 28 at p. 2).⁵

A CSE convened on March 8, 2017 to review the updated evaluations and to develop the student's program for the 2017-18 school year (Dist. Ex. 3 at pp. 2, 4). During the March 2017 CSE meeting, the parents contested the results of the February 2017 psychoeducational reevaluation and requested that an independent neuropsychological evaluation be funded by the district (id.). The parents further requested that the CSE meeting be "tabled" until an independent neuropsychological evaluation was completed (id.).

The independent neuropsychological evaluation was conducted on June 24, 2017 (Dist. Ex. 2). The evaluator determined that the student's overall cognitive abilities fell in the severely impaired range, but opined that the student's intellectual capacity was potentially higher based on two discrepant subtest scores (Dist. Ex. 2 at pp. 11, 14; 3 at pp. 1-2). The CSE reconvened on August 21, 2017 to discuss the results of the evaluation and to develop an IEP for the student's 2017-18 school year (Dist. Ex. 3 at p. 3).⁶ During the August 2017 CSE meeting, the parent

students, one teacher and two assistants (Dist. Ex. 2 at p. 10).

⁵ The district conducted numerous assessments of the student's cognitive abilities, that showed a consistent decline in the student's full-scale IQ. A March 2012 assessment yielded a full-scale IQ of 107, which fell in the average range of intellectual functioning (Parent Ex. H at p. 5). A subsequent evaluation, conducted in February 2015, yielded a full-scale IQ of 80, which fell in the low-average range of intellectual potential (id. at p. 6). Finally, a January 2017 evaluation, conducted by the district, yielded a full-scale IQ of 70, which fell in the very low range of intellectual potential (Dist. Ex. 4 at p. 12).

⁶ The August 21, 2017 IEP reflected that the CSE wanted to reconvene the week of June 19, 2017 to review the results of the neuropsychological evaluation before the close of the school year; however, due to issues beyond

attempted to call her attorney, but due to connection difficulties, the call was unable to be maintained and therefore, the CSE meeting was postponed to September 8, 2017 (id.).

On September 8, 2017, the CSE reconvened and—after reviewing the June 2017 neuropsychological evaluation, the student's present levels of performance, and annual goals—recommended the student for placement in a 15:1 special class with related services of OT, speech-language therapy, and counseling (Dist. Ex. 3 at pp. 18-19). The CSE also recommended that the student receive summer services in a 12:1+3 special class (id. at p. 20). The September 2017 meeting information summary indicated that during the CSE meeting, the parents indicated that they would be parentally placing the student at Ridge for the 2017-18 school year starting, September 12, 2017 (id. at p. 3).⁷ Following the September 8, 2017 CSE meeting the district provided home instruction to the student up until the time he was formally accepted at Ridge (see Tr. pp. 356-59; see also Parent Ex. A). The student began attending Ridge on November 1, 2017 (Tr. p. 993).

A. Due Process Complaint Notice

In a due process complaint notice dated February 28, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, that Ridge was an appropriate unilateral placement, and that equitable considerations supported an award of tuition reimbursement (see IHO Ex. I). As relevant to this proceeding, the parents argued that the September 2017 CSE refused to consider the opinions of the independent neuropsychologist and the parents, which significantly impeded the parents' ability to participate in the decision-making process regarding the provision of a FAPE to the student and resulted in an IEP that was not reasonably calculated to provide the student with educational benefit (id. at pp. 5-6). Next, the parents contended that the September 2017 IEP did not reflect that the CSE considered the available evaluative information in developing its program recommendation (id. at p. 6). The parents further asserted that the recommendation for a 15:1 special class placement was not appropriate for the student (id.). The parents also argued that the annual goals bore no relationship to the student's academic levels or social-emotional needs (id.).

With respect to the student's unilateral placement, the parents alleged that Ridge was appropriate because it provided the student with intensive instruction to address his needs and he made progress academically and in terms of social/emotional development (IHO Ex. I at pp. 7-8). Next, the parents alleged that equitable considerations weighed in their favor because they cooperated with the CSE process, visited the assigned public school, and notified the district of their intention to place the student at Ridge in the absence of an appropriate placement recommendation by the district (id. at p. 8). As relief, the parents requested reimbursement for the cost of the student's attendance at Ridge during the 2017-18 school year (id.).

the district's control the report was not available until summer 2017 (Dist. Ex. 3 at p. 3).

⁷ The Commissioner of Education has not approved Ridge as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on May 8, 2018, which concluded on July 10, 2018 after six hearing days (see Tr. pp. 1-1088).⁸ In a decision dated September 12, 2018, the IHO concluded that the district failed to offer the student a FAPE for the 2017-18 school year, Ridge was an appropriate unilateral placement for the student, and equitable factors favored an award of tuition reimbursement (IHO Decision).

With respect to the September 2017 IEP, the IHO found that the annual goals were appropriate based on the student's needs (IHO Decision at p. 19).⁹ Next, the IHO found that the September 2017 CSE's recommendation for a 15:1 special class was not appropriate because the student needed "more intensive contact and support" than could be provided in the 15:1 special class setting (*id.* at p. 20). The IHO noted that the teachers who had contact with the student testified that the student responded "more positively in a 1:1 or small group setting" and could "complete a task only with direct support, refocusing and redirecting" (*id.* at pp. 20-21). The IHO further found that the "intensive attention" that the student needed in order to make progress could not be provided in a 15:1 special class placement (*id.* at p. 21). Next, the IHO found that the district should have considered alternative placements—including out-of-district placements—for the student (*id.* at pp. 21-22). The IHO found that the district's assertion, that 1:1 or small group instruction was not warranted because the student was not capable of learning in that setting, was not supported by the evidence in the hearing record (*id.* at pp. 22-24). Additionally, the IHO found that the district had not demonstrated that a 15:1 special class would be beneficial to the student or that the teacher would be able to address the student's needs in such a class (*id.* at pp. 21, 24-25). Based on the foregoing, the IHO found that the district's explanation as to how the student's needs could be met in a 15:1 special class was insufficient and found that the district denied the student a FAPE for the 2017-18 school year (*id.* at p. 24).

With respect to the parent's unilateral placement of the student at Ridge, the IHO found that the parents established that Ridge was appropriate to address the student's unique needs (IHO Decision at pp. 26, 29). More specifically, the IHO found that Ridge provided the student with a small class size and 1:1 instruction which was the "best way" for the student to learn (*id.* at p. 27). The IHO also found that the school provided socialization, interaction with peers, and that all of the children were on the autism spectrum (*id.*). Next the IHO found that the student made academic and social progress at the school (*id.* at pp. 27-29). Notwithstanding this, the IHO found that Ridge was "less than ideal" because Ridge had not developed an IEP for the student and had not "produced documentation as to its specific plans for" the student, the teachers at Ridge other than the special education director were not State certified to teach, and the hearing record did not include written goals for the student or profiles of the other students at Ridge who would be in the student's class (*id.* at p. 27).

⁸ According to the IHO's decision, a prehearing conference took place on April 11, 2018 (IHO Decision at p. 1); however, no transcript or written summary of the prehearing conference was included in the hearing record, as required by State regulation (8 NYCRR 200.5[j][3][xi]).

⁹ As neither party has appealed this determination, it has become final and binding on the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

Turning to equitable considerations, the IHO found no basis to reduce an award and that the parents cooperated with the CSE process and visited recommended school placements (IHO Decision at pp. 29-30). As relief, the IHO awarded the parents the cost of tuition for the student's attendance at Ridge for the 2017-18 school year (*id.* at p. 30).

IV. Appeal for State-Level Review

The district appeals, asserting that the IHO erred in determining that the district failed to offer the student a FAPE for the 2017-18 school year and that Ridge was an appropriate unilateral placement, and further asserts that equitable factors warrant a reduction in tuition reimbursement.

With respect to the student's program for the 2017-18 school year, the district argues that the IHO erred in finding that it failed to develop an appropriate IEP for the student. More specifically, the district argues that the IHO erred in finding that the recommendation for a 15:1 special class was insufficient to meet the student's needs and that the student required a 1:1 direct instructional model. The district also argues that the IHO's finding that a single teacher in a 15:1 special class could not address the student's needs was based on the IHO's conjecture and not on the evidence in the hearing record.

Turning to the appropriateness of the student's unilateral placement, the district alleges that the IHO incorrectly found that the parents established that Ridge was an appropriate unilateral placement for the 2017-18 school year. The district argues that the parents failed to submit evidence as to how Ridge modified its instruction to meet the student's unique needs. The district further argues that the IHO erred in failing to address that the parents did not present testimony from any witnesses who provided the student with 1:1 instruction in any academic subject area or related services. The district also argues that the parents failed to submit any evidence that Ridge provided any related services to the student, that Ridge "developed specific goals related to [the student's] program" or that the student was placed in a class at Ridge with students who "fit his profile." The district also argues that by awarding tuition reimbursement on the "limited amount of evidence proffered" by the parents, the IHO "improperly lowered the burden of proof necessary to justify tuition reimbursement."

With respect to equitable considerations, the district argues that in finding equitable considerations did not warrant a reduction in tuition reimbursement, the IHO failed to address factors, such as that the district continued to offer tutoring services to the student after the parents rejected the program recommendation for the 2017-18 school year and that the parents withheld information from the district. Accordingly, the district argues that if an SRO upholds the IHO's determination that the parents are entitled to tuition reimbursement, there should be a reduction in the award based on the balancing of equities.

In an answer, the parents generally admit and deny the district's allegations and argue that the IHO's decision should be upheld in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁰

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

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

VI. Discussion

A. September 2017 IEP

1. Student's Needs

Although the student's needs are not directly in dispute, a discussion thereof provides context for the disputed issue to be resolved—namely, whether the September 2017 CSE's

¹⁰ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

recommendation of a 15:1 special class placement for the student was appropriate to meet the student's needs for the 2017-18 school year.

The hearing record shows that the student demonstrated significant delays in academic achievement. During the 2016-17 school year the student's academic skills were formally assessed on two occasions. Initially, the student was assessed by the district in January 2017 using the Woodcock-Johnson IV Tests of Achievement (WJ IV ACH) and the Kaufman Test of Educational Achievement-Third Edition (KTEA-3) (Dist. Ex. 4 at pp. 14-17). On the WJ IV ACH the student obtained a broad reading standard score of 61 (very low), a broad mathematics score of 45 (very low) and a broad written language score of 77 (low) (Dist. Ex. 4 at p. 15; see Dist. Ex. 4 pp. 14-16, 17-18, 26). On the KTEA-3 the student obtained a reading composite standard score of 65 (low), a math composite score of 62 (low) and a writing fluency score of 64 (low) (Dist. Ex. 4 at p. 17). Measures of the student's oral language/oral fluency were "[b]elow [a]verage" (id.). In addition, the district psychoeducational evaluation report indicated that, according to the student's special education teacher for ELA, the student's iReady results in ELA and math indicated that his skills were at a kindergarten to first grade level (Dist. Ex. 4 at p. 26; see Dist. Ex. 3 at p. 14).¹¹ The student's ELA teacher further reported that his independent reading level at that time was at a beginning third grade level (Dist. Ex. 4 at p. 26).

The student's academic skills were assessed for a second time as part of an independent neuropsychological evaluation conducted in May and June 2017 (Dist. Ex. 2). The results of academic achievement testing conducted by the independent psychologist revealed academic deficits and needs similar to those identified by the district's testing (compare Dist. Ex. 2 at pp. 8-9, 30-31, with Dist. Ex. 4 at pp. 14-18). Here, administration of certain subtests of the Wide Range Achievement Test-Fourth Edition (WRAT-4), the Gray Oral Reading Tests-Fifth Edition (GORT-5), the Test of Written Language-Fourth Edition (TOWL-4) and the Kaufman Test of Achievement- Second Edition (KTEA-2) indicated that the student's skills in reading, writing, and mathematics ranged between moderately and severely impaired and between a first and second grade instructional level (Dist. Ex. 2 at pp. 8-9, 13, 30-31). Accordingly, the evaluator included in her report, a diagnosis for the student of a developmental disorder of scholastic skills, unspecified (Dist. Ex. 2 at p. 14).

With regard to the student's ability to attend to academic instruction, the hearing record shows that the student had difficulty maintaining focus during classroom lessons. The district psychoeducational evaluation report included information provided by the student's special education teacher regarding the student's learning behaviors (Dist. Ex. 4 at pp. 25-27). According to the teacher, the student "need[ed] support to maintain his focus and attend to lessons, activities, independent work and tests" (id. at p. 26). She reported that the student was more successful with tasks involving listening comprehension than independent reading comprehension because "his focus easily transfer[ed] from reading to something else" (id.). The special education teacher further reported that the student benefitted from explicit instruction, needed concepts and skills repeated several times in order to master them, and opportunities to practice skills periodically, in order to prevent regression (id.). Consistent with her description of the student, the special

¹¹ Testimony by the student's special education teacher for ELA indicated that iReady is an online computer based assessment that analyzes phonics, phonemic awareness, vocabulary, comprehension of literature, and comprehension of non-fiction texts (Tr. pp. 231-32).

education teacher's rating of the student using the Behavior Rating Inventory of Executive Function (BRIEF) (teacher form) yielded "[c]linically [s]ignificant" scores on the initiate, working memory, plan/organize, organization of materials, and monitor scales, which were indicative of executive dysfunction (id. at pp. 24-25).

In addition, both the school and independent psychologists commented on the student's attending difficulties. The school psychologist documented the student's significant attending deficits and need for direct support in an observation of the student that took place early in the 2016-17 school year during a small group science lesson in his ICT class (Dist. Ex. 4 at p. 7). The psychologist observed that during the science activity the student stood and watched the other students do most of the work, played with the rocks that were part of the activity and only contributed to the discussion once in a while, and was then usually off topic (id.). According to the school psychologist, when tasked with writing up the activity independently, he required a teacher near him to "walk him through each step" (id.). When something was explained to the student, he completed the first part then waited for an adult to return and assist him with the rest (id.). In a second observation conducted several days later, the school psychologist observed the student in an unstructured study hall (id.). She noted that the student "stared off" twice, once for four minutes and once for nine minutes (id.).¹²

Similarly, the student's attending difficulties were also noted by the independent psychologist in her neuropsychological evaluation report (Dist. Ex. 2 at p. 14). The evaluator stated that the student was "inattentive and had trouble mentally manipulating, screening out and inhibiting responses to distracting stimuli" both internal and external, which she indicated were behaviors consistent with ADHD (id. at pp. 12, 14). The independent psychologist further indicated that the student's attention waned when he was overwhelmed and that he appeared sensitive to auditory stimuli during class activities (id. at pp. 11, 13). Consistent with the observations of the school psychologist, the evaluator noted that during testing the student exhibited "frequent lapses in attention in which he stared blankly into space while performing tasks" (id.). She further noted that the student exhibited delayed processing, that information had to be repeated when possible, and that the student sometimes lost track of task demands while performing a task (id.).

In addition to the February 2017 district psychoeducational evaluation and the June 2017 independent neuropsychological evaluation the hearing record contains testimony by the student's special education teachers describing the student's academic and attending difficulties during the 2016-17 school year (fifth grade). With respect to the student's reading needs, the student's special

¹² The student's staring behavior was also observed by the school psychologist during her assessment of the student (Dist. Ex. 4 at p. 9). She noted that during cognitive testing the student had "episodes of staring off and not understanding a task, then getting 4 or 5 right in a row" (id.). She reported that when staring off the student did not understand directions or expectations (id.). For example, for writing tasks the student had to be told to pick up the pencil and begin after directions were given (id.). The school psychologist further reported that the student needed excessive prompting and multiple sessions to complete academic subtests (id.). For spelling, the student needed the examiner to repeat the word, hand him his pencil, and tap the paper showing him where to write (id.). For the math portion of the evaluation, the student did not look at the operation signs for each of the math problems and completed them with a "scattering of addition, subtraction and multiplication" (id.). Despite this, she deemed it probable that the scores on the evaluation reflected an accurate estimate of the student's cognitive and academic functioning (id.).

education teacher for ELA testified that the student required more 1:1 support in fifth grade than he had in fourth grade (Tr. p. 144). She indicated that because concepts got more complicated as the year progressed, the student needed more refocusing and redirecting (id.). She further indicated that the student had a particular interest in animals and the natural environment and that his attention to other topics was minimal (Tr. pp. 144-45). In addition, the special education ELA teacher indicated that if the student was not interested in a topic, his attention was not on the instruction or the reading (Tr. p. 144). The special education teacher testified that a variety of strategies were used to gain the student's attention (Tr. p. 145). She testified that typically, the student had a 1:1 teaching assistant sitting next to him, who would redirect and refocus the student and check for his understanding (id.). The special education ELA teacher indicated that staff would "chunk" the student's reading into pieces to make sure he understood what was being read (id.). She further testified that a lot of times staff would ask the student a question or ask him what he just read, and he would have to echo something back (id.). The teacher would then repeat it back to the student to ensure the student was hearing it more than once (id.). According to the special education teacher, the student's parents provided candy for the student, which staff would use from time to time as reinforcement, especially when the student was responding to questions and the student looked for this reinforcement (Tr. pp. 145-46).¹³

The student's special education teacher for ELA also discussed the student's Fountas and Pinnell reading assessments during the impartial hearing and noted that overall the student "teetered" between level N and M for both instructional and independent reading levels during his fifth-grade year, despite his small group intensive ELA instruction (Tr. pp. 160-93, 199-209; see Dist. Ex. 12). The special education teacher testified that she prepared a regression statement for the student and recommended that he attend summer school for the following summer (2017) based on the regression she had seen throughout the school year and, in part, on the Fountas and Pinnell assessments (Tr. pp. 208-09; see Tr. pp. 269-71; and see Dist. Exs. 12; 16).

With respect to the student's math needs the student's special education teacher for math testified that the student was less attentive during his fifth-grade year (2016-17) than the previous year (Tr. p. 530). She indicated that his attention was "like a roller coaster" in that he was "either spot on," or he was "very easily distracted with anything" (id.). Testimony by the student's special education teacher for math further indicated that during the 2016-17 school year, the student's ability to focus was "hit or miss," that he always needed someone to be with him working 1:1, and that she would not get a response from the student unless she spoke loudly to him (Tr. p. 534). The special education teacher for math further stated that when giving the student a direction, at

¹³ In an email to the school psychologist, dated November 2, 2016, the special education teacher for ELA reported that the student was having an especially difficult time in math and in the general education class during science and social studies (Dist. Ex. 25 at p. 1). She indicated that the student had been observed by his teachers "completely missing lessons by staring out and not participating in activities because they [were] overwhelming" and that he required "intense 1:1 support in all academic areas to complete any tasks" (id.). The school psychologist replied shortly thereafter indicating she had completed two observations of the student and saw the same things, noting also that the student "definitely struggle[d] with group work, large group lessons, and independent work times" (id.).

times he would follow the direction but at other times, she had to give the direction multiple times (Tr. pp. 534-35).¹⁴

Additionally, the hearing record includes a compilation of notes made by the student's special education teacher for math that document, among other things, the student's ability during instruction to attend to and participate in activities during the 2016-17 school year (Dist. Ex. 27). The special education teacher noted the student's need for constant prompting, 1:1 instruction to complete a task, need for a significant amount of wait time, directions given in a loud voice, as well as the student's unresponsiveness, inability to follow a one-step direction, inability to complete a task independently, blank staring, and lack of focus (*id.* at pp. 1-10). The special education teacher also documented that on two occasions the student complained about his eyes and exhibited constant blinking (*id.* at pp. 9, 10).

In addition to academic and attending difficulties, the hearing record shows that the student's social skills were a core area of weakness. The student's special education teacher for ELA indicated that the student required support to effectively communicate with peers (Dist. Ex. 4 at pp. 25-26). While able to interact with peers during small group activities, the special education teacher indicated that the student's interaction in a large group setting was very limited and he required support to communicate effectively with peers (*id.*). The special education teacher also indicated that the student required support to request assistance and would often sit and wait for a teacher to provide assistance rather than requesting help (*id.* at p. 26). Similarly, the independent psychologist reported that during an observation of the student at school, he demonstrated mild to moderate social skills difficulties including not being able to effectively interact reciprocally with peers, poor initiation and organization of assigned tasks without assistance, and problems with independently seeking help when needed (Dist. Ex. 2 at p. 11). The independent psychologist indicated that during the observation the student responded well to prompts but required continuous supervision to start, maintain, and complete tasks (*id.*). She indicated that during less structured times, the student engaged in repetitive and isolating activities and seemed to have difficulty maintaining reciprocity with peers, which was rarely facilitated by staff during free, unstructured periods (*id.*). According to the independent psychologist, during math class, a "1:1 aide" sat with the student for most of the observation and although the students were paired off for part of the class, the student in the instant case worked primarily with the aide and had only infrequent interaction with his student peer (*id.* at p. 10). When finished with the assignment the student tried to interact with his peer but was rebuffed (*id.*).

¹⁴ In a draft email composed October 13, 2016, the student's special education teacher for math indicated that the student was struggling in math, and was very unfocused and having extreme difficulty completing any work independently (Tr. pp. 533, 536; Dist. Ex. 24). She noted that when working 1:1 with either her, her teaching assistant, or a peer tutor, the student needed "continuous prompting and help to complete any work" (Dist. Ex. 24). She further noted that the student was extremely distracted, often did not respond unless spoken to loudly and often sat without moving, staring at the wall (*id.*). The math teacher indicated that the student was often lethargic and stared blankly at the wall or floor during math class, even when the teaching assistant sat with him (*id.*). According to the student's special education teacher for math, the proposed letter to the student's parents was shared with the student's special education teacher for ELA to ensure accuracy and to see if she observed similar behaviors (Tr. pp. 532-33). The special education teacher for math testified that the parents received "something very similar to this" (Tr. p. 536).

The independent psychologist further noted that the student had weak pragmatic language skills, including a tendency to interpret information literally, and had difficulty applying his knowledge to solve problems in everyday situations, particularly in novel, socially relevant contexts (Dist. Ex. 2 at p. 12). Based on the student's behavior during her observation, the independent psychologist opined that the student had "tremendous difficulty interacting with peers and navigating his social environments" and that his significant social skills deficits impacted his ability to learn (id. at p. 14).

With regard to the student's adaptive behavior, completion of the Adaptive Behavior Assessment System-Third Edition (ABAS-3), the Behavior Assessment System for Children-Third Edition (BASC-3) and the Behavior Rating Inventory of Executive Function (BRIEF), by the student's parent and teacher, yielded scores that indicated the student lacked self-direction, required more support in taking care of his daily needs than did his peers, was inattentive, withdrawn, and had significant difficulty initiating activities and interacting with peers (Dist. Ex. 4 at pp. 20-23; see Dist. Ex. 2 at p. 4).¹⁵ According to the independent psychologist, the student's adaptive behavior "problems" had been recently affirmed by the student's neurologist and the student's difficulties "significantly restricted his ability to function at home and school" (id.).

Turning to the student's speech-language needs, a summary of a January 12, 2017 speech-language evaluation conducted by the district reflected that the student was relatively cooperative and focused during the evaluation; however, the evaluation report noted that the student required refocusing and redirection to tasks, as well as prompting to interact with the examiner from time to time (Dist. Ex. 22 at p. 4). Results of testing administered by the speech therapist indicated that the student had a moderate delay in semantic relationships and direction following; a mild delay overall in expressive language skills with a moderate delay in sentence assembly; and a mild delay overall in auditory perceptual skills (id.). The student's greatest area of weakness was in pragmatic skills and social interaction with others, where his performance on the Test of Pragmatic Language indicated a severe delay (Dist. Ex. 22 at p. 4 ; see Tr. pp. 414-16). The speech therapist testified that a comparison of testing results from January 2017 with the results of previous testing completed in 2015 indicated that the student had regressed in auditory comprehension as measured by the Test of Auditory Processing Skills-Third Edition (TAPS-3) (Tr. pp. 408-09; compare Dist. Exs. 21 at p. 7, with Dist. Ex. 22 at p. 6) and that on the Clinical Evaluation of Language Fundamental-Fifth Edition (CELF-5), the student had regressed in following directions and in understanding spoken paragraphs (Tr. p. 412).¹⁶

Testimony by the student's speech therapist indicated that when the student was faced with tasks that were not related to animals, he "zone[d] out," began to think about other things and

¹⁵ In addition, the student's regular education teacher rated the student's behavior using the Behavior Assessment System for Children-Third Edition-Teacher Form (BASC-3-C) (Dist. Ex. 4 at p. 20). Her responses yielded scores in the "[c]linically [s]ignificant" range in the area of attention, as well as in learning, withdrawal, atypicality, social skills, leadership, study skills, and functional communication (id.).

¹⁶ Testimony by the student's speech therapist indicated that the 2015 CELF results could not be directly compared to the 2017 CELF results because the 2017 administration used a test version for students 9 to 21 years of age and the 2015 test version was for students 5 to 8 years of age (Tr. pp. 405-06). However, the speech therapist stated that he could make a comparison of the scores on certain subtests that were on both versions of the test (Tr. p. 412).

needed to be redirected and refocused (Tr. pp. 382-83, 384). She further noted that they needed to come up with things in order to motivate the student (Tr. p. 384).

With respect to the student's OT needs, an assessment completed by the student's occupational therapist, in January 2017 indicated that the student displayed limitations with his visual perceptual, fine motor and visual motor integration skills that impacted his performance in the school setting (Dist. Ex. 28 at pp. 1-2). The occupational therapist testified that the student demonstrated an unexplained significant drop in his visual perception score on the Beery-Buktenica Developmental Test of Visual Motor Integration (Beery VMI) since he was last tested in 2015 and that the student's score on the motor coordination subtest of the Beery VMI was so low it was not scoreable (Tr. pp. 582-84; compare Dist. Ex. 3 at p. 9, with Dist. Ex. 28 at p. 1). She further testified that she wrote a regression statement recommending the student receive OT services during summer 2017 because she found that while the student made progress toward his goals when he received steady OT sessions, if he had frequent absences, breaks, or snow days she felt she had to reteach him skills previously acquired (Tr. pp. 588-90; Dist. Ex. 30).

With regard to the student's performance in OT sessions, the occupational therapist indicated that when the student was motivated, "he really really did well" (Tr. p. 601). She also testified that any time she allowed the student to write about animals, he did a better job (Tr. p. 603). Additionally, she testified that when working on concrete activities such as preparing food (i.e., hot chocolate, pizza), the student succeeded on all tasks and demonstrated an "amazing" ability to write about the activity, both in terms of handwriting and content (Tr. p. 602). Notably, the occupational therapist's session notes for the 2016-17 school year reflected much better attending, completion of tasks and independent work, a lower level of prompting, and no staring behaviors compared to what was reported by the student's special education teacher for math (compare Dist. Ex. 27, with Dist. Ex. 31).

Turning to the student's need for counseling, the social worker who provided the student's counseling sessions during the 2016-17 school year testified that the student was more engaged when he first started attending counseling sessions (Tr. pp. 612-13; see Dist. Ex. 32 at pp. 3, 4). She indicated that as the year progressed the student became less engaged with the group and it became more difficult to redirect him back to the topic of the session (id.).

2. 15:1 Special Class Recommendation

On appeal, the parties dispute whether the September 2017 CSE's recommendation for a 15:1 special class was appropriate to address the student's needs. Specifically, the district argues that the IHO erred in finding that the district's recommendation was insufficient and that the student required a more restrictive 1:1 direct instructional model.

Regarding the September 2017 CSE's recommendation, State regulations provide that a special class placement with a maximum class size not to exceed 15 students is designed for "students whose special education needs consist primarily of the need for specialized instruction which can best be accomplished in a self-contained setting" (8 NYCRR 200.6[h][4]). With regard to increasing adult support beyond a 15:1 special class setting, State regulation further provides that "[t]he maximum class size for special classes containing students whose management needs interfere with the instructional process, to the extent that an additional adult is needed within the

classroom to assist in the instruction of such students, shall not exceed 12 students, with one or more supplementary school personnel assigned to each class during periods of instruction" (8 NYCRR 200.6[h][4][i]).

At the time the student's IEP for the 2017-18 school year was developed, the student was receiving ICT services for science and social studies and attending special classes for ELA and math that could include up to 15 students (15:1+1) (Tr. pp. 281, 523; Dist. Ex. 1 at p. 1).¹⁷ However, testimony by the student's special education teacher for ELA for both fourth and fifth grade indicated that the ELA class size hovered around five students, with seven students being the most (Tr. pp. 136, 140, 288). The IEP for the 2017-18 school year reflected that the student had been "one of 5 students in the reading group" and was "in a small group math class" at the time his program for the 2017-18 school year was being developed (Tr. p. 272; Dist. Ex. 3 at p. 13).¹⁸

With respect to the parents' argument that the September 2017 CSE failed to consider the June 2017 private neuropsychological evaluation, the hearing record indicates that the August 2017 and September 2017 CSE considered the June 2017 private neuropsychological evaluation but as permitted under the IDEA—decided not to adopt its recommendations (Dist. Ex. 3 at p. 3; J.D. v. New York City Dep't of Educ., 2015 WL 7288647, at *14 [S.D.N.Y. Nov. 17, 2015]; T.G., 973 F. Supp. 2d at 340 [stating that "'although a CSE is required to consider reports from private experts, it is not required to follow all of their recommendations'"], quoting M.H. v. New York City Dep't of Educ., 2011 WL 609880, at *12 [S.D.N.Y. Feb. 16, 2011]; J.C.S., 2013 WL 3975942, at *11 [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; Watson, 325 F. Supp. 2d at 145).

The present levels of performance of the September 2017 IEP indicated that in the ICT "setting" the student required adult assistance to copy notes from the board, "a lot" of questioning or prompting from a teacher or teaching assistant to complete assignments, and facilitation by a teaching assistant to interact with peers (Dist. Ex. 3 at p. 13). The IEP indicated that when given a reading task that was at his independent reading level, but not about animals, the student would need refocusing and redirection throughout the task to complete it (id.). The IEP further noted that it could often take double, or more, time for the student to complete reading and reading comprehension questions (id.). With respect to the small group math class, the IEP indicated that the student needed 1:1 assistance to complete any and all work and required multiple reminders throughout class to stay focused and on task (id. at p. 14).

With regard to the 2017-18 program recommendation, the student's special education teacher for ELA testified that during the CSE meeting, the recommendation of the CSE was that a

¹⁷ Although the comments section of the student's January 4, 2017 IEP indicated that the student-to-teacher ratio of the Flex special classes was 15:1, overall, the hearing record indicates that the ratio for the recommended special class was 15:1+1 and that the class was staffed by both a teacher and a teaching assistant (Tr. pp. 281, 514; Dist. Exs. 1 at pp. 1-2, 13; 2 at p. 2; 5 at pp. 1, 12; 18 at pp. 1, 13; 19 at pp. 1, 14).

¹⁸ The June 24, 2017 neuropsychological evaluation included a June 9, 2017 observation of the student in his math class at the district school, where the student's class included a total of 8 students, one teacher, and two assistants (Dist. Ex. 2 at p. 10).

"more intensive setting was needed for [the student]," to wit, "a self-contained setting" (Tr. p. 230). The school psychologist described the 15:1+1 Flex program as a stepping stone to see if a "full self-contained would be necessary" (Tr. p. 459). She explained that the student was not meeting with success in that program and the next class would be a "regular self-contained program" where he would be in a special class for the whole day (Tr. p. 459). The assistant superintendent of special education and support services testified that he believed the student needed more support than the Flex program could provide and therefore, the CSE recommended the 15:1 special class placement (Tr. pp. 318-19). He noted that the student had attended the Flex program for two years, the district had "plenty of data" and the Flex program "simply wasn't meeting [the student's] needs" (Tr. p. 320).

Considering the extent of the student's academic deficits, attending difficulties, and weaknesses in socialization, the evidence in the hearing record does not support a finding that the September 2017 CSE's recommendation of a 15:1 special class would have provided sufficient support to address the student's needs (Dist. Ex. 3 at p. 18). In particular, the evidence in the hearing record does not establish how the recommended 15:1 special class placement could have provided the student with the needed level of support when he had regressed in the special classes as part of the Flex program with a higher level of support during the 2016-17 school. There were fewer students and more staff in the ELA and math Flex classes yet the district acknowledged that the student was unsuccessful in that setting (Tr. pp. 320, 455).

While, for the 2016-17 school year, the student's special class for ELA contained a maximum of seven students (Tr. pp. 136, 140, 288), and the recommended 15:1+1 special class for math was not at capacity (Tr. p. 326), testimony by the assistant superintendent of special education and student support services for the district indicated that the 15:1 special class recommended for the 2017-18 school year was at full capacity with 15 students at the beginning of the 2017-18 school year (Tr. pp. 340-42; see Parent Ex. A).

To the extent that the assistant superintendent for the district explained that the September 2017 CSE was comfortable recommending a larger, less supportive 15:1 special class, because the student would be homogeneously grouped with students with similar cognitive and academic achievement levels, this argument seems to be misplaced (Tr. pp. 324, 326-27). The assistant superintendent opined that this homogeneous grouping would aid the teacher in developing lesson plans, by not having to plan for a large developmental span, and that having one teacher for all subjects would make it easier for the teacher to engage the student academically (Tr. pp. 324, 327). However, for the reasons cited above, the hearing record supports the IHO's determination that "[t]he sort of intensive instruction that [the student] needs and that his IEP calls for in order to make any progress simply cannot be provided in the context of just one teacher and 15 other students" (IHO Decision at p. 21).¹⁹

In view of the foregoing, with particular concern that the student was not making progress in his 15:1+1 special classes for ELA and math, the recommendation of the CSE to place the student in a 15:1 special class for all academic subjects was not reasonably calculated to enable

¹⁹ In addition, the district school psychologist opined in a November 22, 2016 email, that she was worried about placing the student in a full-time self contained class in the district where "significant behaviors could be occurring" because the student was not a behavior problem (Parent Ex. C).

the student to make progress consistent with his abilities (see, e.g., C.F. v. New York City Dep't of Educ., 746 F.3d 68, 81 [2d Cir. 2014] [finding that the failure to consider 1:1 instruction when the hearing record established that it was necessary constituted a denial of a FAPE]; P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 140 [2d Cir. May 21, 2013]).

B. Unilateral Placement

In this case, because the district failed to offer the student a FAPE for the 2017-18 school year, the next issue is whether the parents' unilateral placement of the student at Ridge was appropriate.

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

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

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

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

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

1. Specially Designed Instruction

The district argues that the hearing record fails to provide sufficient evidence as to how Ridge provided specialized instruction to meet the student's unique needs in the areas of cognitive functioning, occupational therapy, and speech/language. Contrary to the district's claim, however, review of the hearing record shows that the program at Ridge, while "less than ideal" (IHO Decision at p. 27), addressed the student's identified special education needs sufficiently to support an award of tuition reimbursement for Ridge.

As discussed above, the student presents with significant academic delays, difficulty attending, and limited ability to socialize and interact with peers independently. In finding Ridge appropriate, the IHO noted that the school provides a small class size, 1:1 sessions for math and writing and individual instruction "whenever needed," thereby creating an educational setting reflecting "the best way that [the student] learns" (IHO Decision at p.27).

According to the director of special education at Ridge, the school consisted of just six students, four full time staff, and approximately seven volunteer and part-time staff (Tr. pp. 882, 947).²⁰ The special education director is New York State-certified in special education for kindergarten through eighth grade (Tr. pp 935, 941). Although the director of special education initially testified that all of the teachers at Ridge were "master certified" in their area of instruction, she later testified that the executive director (listed as a teacher on the daily schedule) held a provisional certification in the State of New York; however, she was not sure if it was expired (Tr. p. 937).²¹ She later testified that the executive director had a bachelor's degree in reading and additional training in academic testing in math (Tr. pp. 943-44). She testified that the art teacher had a bachelor's degree in art but did not answer when asked if she was certified, and that the music teacher was a certified English teacher with a minor in special education (Tr. pp. 940-41). Although she initially indicated that the music teacher was a music therapist, on cross examination she testified that she was not certain of the teacher's music training (Tr. pp. 940-41). The director of special education initially identified an individual as the math teacher for the class, but later

²⁰ A review of the student's schedule does not reflect that there are four full-time staff members teaching at Ridge (see Parent Ex. D).

²¹ The executive director is listed on the class schedule as a teacher for homeroom, English and reading, social studies, science and math (Parent Ex. D). He was the sole teacher listed for homeroom, social studies and science (Parent Ex. D).

identified a second, different individual as the math teacher (Tr. pp. 887, 941). She described the second individual as a "master's certified math teacher" (Tr. p. 941).²²

The director of special education at Ridge testified that the largest class size was six students to two adults, but the smallest instructional ratio offered for academic instruction was 1:1 (Tr. p. 883). She testified that the school was designed to serve students in grades six through 12, who are on the autism spectrum and who are of average to above average intellectual ability but require intense instruction due to language-based disabilities (Tr. pp. 879-81). Her testimony indicated that the students at Ridge are considered higher functioning autistic students, who can carry on conversations, perform academic tasks, and intend to become Regents accredited high school students (Tr. p. 882; see Tr. pp. 978-80). None of the students at Ridge had extreme behavioral issues (Tr. p. 882). The hearing record further reflects that for the 2017-18 school year, the goal of Ridge was to provide an educationally and emotionally supportive environment for its middle and high school students, a group that was described by its executive director as "intelligent but socially inept" (Parent Ex. G at p. 1). The special education director indicated that the school did not assign students to a grade level and that to determine whether a student met the qualifications for graduation they "adjust[ed] requirements" (Tr. p. 949).

With respect to how the small class size and availability of 1:1 instruction were utilized to meet the student's needs, the director of special education testified concerning the structure of the academic classes at Ridge and how they were conducted, including some specific instruction that was provided to the student. She explained that the environment at Ridge is very small and nurturing (Tr. p. 889). She stated that the student's day began with homeroom which is when students come in and get settled, and have an opportunity to discuss for example, what happened the night before, their expectations for the day and for the upcoming evening, as well as talk about the weather, the news, and current events (Tr. pp. 884-85; Parent Ex. D). Homeroom was followed by an hour-long period for English and reading instruction, then a 15-minute break before an hour of social studies instruction, which was followed by a half hour lunch period (Parent Ex. D). After lunch, students had either adapted physical education (APE), art, or music for 45 minutes (Tr. p. 886; Parent Ex. D). This was followed by a 45-minute period of science, and then a 45-minute period for math instruction (Tr. pp. 886-87; Parent Ex. D). At the end of the day, prior to dismissal, there was a 15 to 30-minute "regroup" period where students discussed things they did during the day and had the opportunity to catch up on any independent work that they may not have completed and receive extra instruction (Tr. pp. 887-88, 963).

Testimony by the director of special education indicated that there are opportunities for guided peer interaction at Ridge (Tr. p. 890). She indicated that because there is a range in age in the class, some of the students look up to other students for peer interaction and for guidance while at times an older student may get feedback from younger students (Tr. p. 890). She also indicated that there is equal respect for all of the students' input during class discussion (Tr. p. 891). According to the special education director, all of the students at Ridge had a specific area of interest that they focused on and they tried to incorporate those interests into all of the students'

²² The hearing record does not reflect what this term encompasses but it is not a term that is recognized under State regulations. Also, the hearing record is unclear as to whether the math teacher was fully certified in the state of New York, despite the director of special education's testimony that she was "master's certified" (Tr. p. 941).

everyday learning (Tr. pp. 882-83). With regard to curriculum, testimony by the director of special education indicated that the curriculum at Ridge was consistent with New York State standards (Tr. p. 888).

The special education director described the reading classroom as an "open setting," that is set up like a living room where the students sit in a circle, receive their reading instruction, and participate in discussions (*id.*). The director indicated that she used several different reading programs at the school and with the student, beginning with an Orton-Gillingham multisensory approach, followed by the Glass Analysis program, a word families approach (i.e., cat, mat, sat, bat, etc.) and the Sullivan Reading Program, which she also described as a word family approach (Tr. p. 912; see Tr. pp. 976-77).²³ She added that she also used sight words and a "high interest [low] vocabulary" series that encourages students to read material that would appeal to their interests and also build their vocabulary and reading capacity (*see* Tr. pp. 913). The director also testified that the student was primarily reading books that had to do with reading intervention, specifically, she had the student read the Sadlier and Worth remedial intervention series (Tr. p. 957).²⁴

For English, the special education director testified that students at Ridge read various books that were on the State recommended reading list for middle school and high school levels, including "The Good Earth" and "A Time Machine" [*sic*] (Tr. p. 921).²⁵ The Ridge School first semester 2017-18 summary indicated that the students had read "20,000 Leagues Under the Sea," "A Christmas Carol," "The Incident of the Curious Dog in the Nighttime," [*sic*] and "A Wrinkle in Time" (Parent Ex. G at p. 1). The director of special education testified that students read a chapter or two at a time, and then had a discussion and answer session where all of the students were involved in the discussion (Tr. p. 885). With regard to the student's ELA instruction, the director of special education testified that the student's grades reflected how well he listened and attended to class discussions (Tr. p. 921). Her testimony indicated that the student was frequently one of the first few students to respond to questions after the class had been read to and was "right on target" with his answer (*id.*). She further testified that the student understood and paid attention to what was read and contributed nicely to what was going on in the class (*id.*).

For social studies, the director of special education indicated that instruction primarily consisted of reading aloud, with students taking turns reading, and if one had difficulty another

²³ Testimony of the director of special education at Ridge indicated that she had received training in but was not certified in the Orton-Gillingham method (Tr. p. 975). She indicated that during her training she learned how to break down and teach words in "word parts, basically letter by letter determination" (Tr. pp. 975-76). She also testified that she used only the beginning portion of the Orton-Gillingham program because she found it to be too restrictive (Tr. p. 976).

²⁴ The director of special education testified that Sadlier and Worth is a publishing company that publishes "[l]earning books" (Tr. p. 957).

²⁵ Testimony by the director of special education indicated that the student's ELA class reading prepares students for eleventh and twelfth grade Regents exams, even though the student is in a lower grade (Tr. pp. 921-22). She explained that the student gets exposure to these books and that "a lot of times the books are written on the lower end, so it's high interest lower level vocabulary and then they work on up" (Tr. p. 922).

child took over, or one of the staff read (Tr. pp. 970-71). Students also answered end of chapter and end of section questions and reviews, either orally or in writing (Tr. p. 886). The director of special education testified that at some point school staff had students write their answers because many of the students had needs related to writing answers, planning, and handwriting and that some students preferred to do their writing in a 1:1 setting (Tr. p. 886).²⁶

For science, the director of special education testified that the subject was taught similarly to social studies, with reading and going over questions and answers (Tr. pp. 886). She testified that the students studied primarily earth science, geology and the formation of the earth, and discussed the formation of the continents, the continental divide, earthquakes, and mountain formations (Tr. p. 924; see Tr. p. 961). She further testified that the student liked earth science a lot, and particularly enjoyed participating in a field trip to a fossil dig (Tr. pp. 924-25).

The director of special education testified that some of the students already had Regents credits (Tr. p. 968). With regard to how she dealt with the different academic levels in one classroom, the director of special education reported that the students who already had Regents credits in science and social studies were "also doing other things in order to further develop their things in the sense that they are reading on their own at other times. And when we are in a group they are also mentoring other students" (Tr. pp. 968-69). She reported that at the time some of the younger students were doing science and social studies the older students were out in the college program, because the high school students were "bridged" (Tr. pp. 969-70).

For math, the director of special education testified that students broke up into small groups and went to smaller rooms (Tr. p. 890). She added that if they wanted to break away and do individualized instruction, there were rooms available to do so (Tr. p. 890). Her testimony indicated that the student was behind in math and accordingly, that his math instruction was primarily done in a 1:1 setting and was geared to his own levels and achievements (Tr. pp. 919, 922-23). The director of special education testified that the student worked either with her or another staff member doing addition and subtraction using borrowing and carrying hundreds and thousands, as well as multiplication and division, and was beginning to do "tens times ten" (Tr. pp. 922-23). The director of special education also testified that the student did better using large graph paper due to his difficulty keeping the numbers lined up properly (Tr. p. 923). In addition, the hearing record reflects that at least twice per month, students attended field trips that have to do with the science and social studies curriculum, such as visiting historic sites, science centers, art exhibits, and museums (Tr. pp. 891-92, 919). Testimony by the director of special education indicated that these trips were not only educational outings but also provided a lot of opportunity for students to use their socialization skills outside of a classroom setting (Tr. pp. 892, 953).

The director of special education further testified that instruction in social skills took place on a daily, sometimes hourly basis depending on the needs of the class (Tr. p. 931). She described social skills as fluent and explained "[i]f your social skills are not where they should be, if they're inept, you're not going to be able to learn properly and neither is anyone around you. If you are too busy interrupting everybody, then your learning is interrupted and so is everybody around

²⁶ The special education director further testified that the student in the instant case received 1:1 instruction in handwriting (Tr. p. 919).

them, their learning is also interrupted" (Tr. p. 932). According to the director of special education, for the most part the students interacted during open discussion (Tr. p. 932). She explained that during teaching time the students were not interacting with each other, rather listening and at different times during the lesson different student would read out loud (Tr. p. 932). She reported that when it came time to do questions students took turns doing them out loud, which was in a sense using social skills in that they learned how to take turns (Tr. pp. 932-33).

The district also argues that the hearing record did not contain any documentary evidence or testimony from service providers concerning the student's receipt of related services at Ridge. The district's concern is well-founded as the hearing record does not reflect that the student received related services at Ridge. However, the failure to furnish every special service necessary for the student, including related services, will not render a unilateral placement inappropriate if the placement as a whole is reasonably calculated to enable the student to receive educational benefits (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014]). To this point, there is information included in the hearing record that Ridge addressed some of the student's needs related to OT and speech-language therapy. For example, testimony by the director of special education indicated that Ridge worked on language pragmatics every day and almost every hour, which was one of the student's core areas of significant weakness (Tr. pp. 913-14, 931). The director of special education explained that language pragmatics is a constant skill that is used in everyday language, rather than a classroom lesson and that it makes more sense to address it and use it in daily conversation than to address it in a classroom format (Tr. pp. 913-14). The director's testimony also indicated that pragmatic language skills are practiced during field trips, such as ordering and paying for lunch, making sure they have money, and that they are being socially appropriate during lunch (Tr. p. 892). Nevertheless, the director of special education did not indicate how Ridge addressed the student's difficulty following oral commands or his weak auditory reasoning skills, language needs identified in the January 2017 IEP (Dist. Ex. 1 at pp. 9). With respect to OT, the hearing record reflects that the student had deficits in handwriting skills and the director of special education testified that Ridge addressed the student's handwriting needs by providing the student with 1:1 instruction (Tr. p. 919). However, she did not detail what that instruction consisted of or how it addressed the student's visual-perceptual, fine motor, or visual-integration needs (see Dist. Exs. 1 at pp. 10, 13; 28 at p. 1).

The lack of counseling at Ridge is also of notable concern. While the district had recommended the student receive 15 30-minute sessions of psychological counseling services in a small group during the course of the 2017-18 school year, and the June 2017 neuropsychological evaluation report included a recommendation for individual counseling (Dist. Exs. 2 at p. 20; 3 at p. 19), there is no indication in the hearing record that the student received any counseling services at Ridge. Consistent with the recommendation in the neuropsychological evaluation report, the social/emotional/behavioral annual goals included in the September 2017 IEP were aimed at helping the student improve in understanding his own emotions and those of others and developing coping strategies (see Dist Exs. 2 at p. 20; 3 at p. 18). Although the hearing record indicates that at Ridge, the student was not exhibiting anxiety about peer acceptance, school matters, or academics (Tr. p. 907), simply removing the student from an anxiety-provoking environment does not address the student's counseling needs, as avoiding a need does not serve the same purpose or have the same effect as addressing it (see R.H. v. Bd. of Educ. Saugerties C. Sch. Dist., 2018 WL 2304740, at *6 [N.D.N.Y. May 21, 2018] [unilateral placement inappropriate because it avoided

student's anxiety-related needs rather than addressing them]). Accordingly, Ridge cannot be said to have addressed the student's need for counseling services; however, as noted above, the failure to provide counseling must be weighed with the totality of the circumstances and whether the placement as a whole is reasonably calculated to enable the student to receive educational benefits (T.K., 810 F.3d at 878).

2. Progress

With respect to the student's progress at Ridge, a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting 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., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 82 [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467,486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; see also Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a unilateral placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]). However, although not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; 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"]).

Turning to the student's progress at Ridge, a comparison of the student's performance in March 2017 on the Woodcock Reading Mastery Tests, Form H, (Revised/NU), with his performance on the same test in June 2018, shows that the student attained higher percentile ranks in all of the areas tested on the June 2018 administration of the test (Parent Ex. E at p. 2; see Parent Ex. E at pp. 3, 4). The hearing record reflects that the student's 2017 percentile ranks ranged from a low of 0.1 to a high of 13, while the 2018 percentile ranks ranged from a low of 9 to a high of 31 (Parent Ex. E at p. 2).²⁷

²⁷ The report of these test results also includes a column indicating "confidence level" (Parent Ex. E at p. 4). Testimony by the director of special education indicated that this number referred to the student's own self confidence, that they indicated the student had "no confidence," and that she did not come up with these numbers herself but rather, indicated that they were numbers "deemed" by the test and the American Guidance Corporation, who developed the test (Tr. pp. 898-99). She further opined that the column designated "RPI" indicated a percentage of how many questions the student got right and that the reason there were three numbers; 13/90, 11/90 and 9/90, also had to do with the student's confidence level (Tr. pp. 900-01; Parent Ex. E at p. 4). However, testimony by the district assistant superintendent of special education and student support services more accurately described confidence levels and RPI as "a qualitative data point for clinicians to use to assess student functioning as compared to same age peers" and that the range of the three numbers represents the band of confidence, should the student be given the test again (Tr. pp. 1054-56).

The director of special education testified that the student made progress in all areas of reading, as well as in listening comprehension and math computation (Tr. p. 913). The director of special education indicated that she measured whether the student was making progress by taking daily notes and recording whether he is keeping up (Tr. pp. 971-72).²⁸ The director testified that she did not use "hard and true tests in the sense that you want me to do tests" but that she did do chapter reviews (Tr. p. 972). She further testified that "You have to remember that these kids are test phobic. You are dealing with autistic students who don't do well in a testing situation so I have to be very careful how I do evaluations" (Tr. p. 972). The director of special education explained that if she wanted to show that a student made progress she would hold a verbal conference with a parent to show the kinds of things the student was able to do at the beginning of the school year and the things the student would be doing at the end of the school year (Tr. p. 973).

The director of special education reported that in math, at the end of the year the student was successfully borrowing and carrying and in reading he went from reading and comprehending three and four sentence paragraphs to reading and comprehending three and four paragraph stories and from 50 to 100 percent accuracy (Tr. p. 974). The director reported that at the beginning of school year the student was reading out loud with approximately 50 percent accuracy and at the end of the year he was reading independently with 100 percent accuracy (*id.*). In addition, she testified that the student's reading moved from "a middle second grade to a high fourth grade ability," which she characterized as two years of academic growth in 15 months (Tr. pp. 974-75; compare Parent Ex. E at p. 3, with Parent Ex. E at p. 4).

A report card for the 2017-18 school year reflects that the student primarily earned a grade of B for all of his academic classes (Parent Ex. F).²⁹ With respect to English, the report card indicated that the student listened and contributed to class discussions (*id.*). The report card further indicated that the student participated in middle school math for word problems and also in individual (remedial) math (*id.*). The report card indicated that math was not the student's favorite subject but that he worked at it (*id.*).³⁰ With respect to social studies (Global) the report card stated that the student enjoyed social studies and contributed to class discussions and chapter reviews (*id.*). The report card stated that, in science, the student contributed to class discussions and readings, enjoyed reading aloud and wrote some answers (*id.*). In addition, the comments on the

²⁸ The IHO advised the director of special education that it "would be helpful to see the written goals you referred to in your testimony, if they are available" (Tr. p. 982); however, the written goals from Ridge were not submitted as evidence during the hearing.

²⁹ With respect to the student's Ridge School report card, the director of special education testified that the student grades were "calculated based on oral answers to questions and also by written question answers and also by what he's done specifically in the math area" (Tr. p. 958). She further explained that the student's grade was based on the number of answers he got correct (*id.*). The director of special education testified that she thought that there were at least two tests per semester and "other than that, some are more informal than others (*id.*).

³⁰ The director of special education testified that the student had made progress in math computation but noted that he continued to have difficulty in problem solving because it involved a lot of language pragmatics and language processing, which was an issue of autistic students (Tr. p. 913). The director of special education testified that the "B" on the student's report card signified not that he was getting Bs in algebra, but that he was getting Bs on the level that he was working at (Tr. p. 923).

report card indicate the student enjoyed helping out with classroom jobs such as getting materials out, taking care of the fish and teaching peers how to play chess (id.).

The special education director further indicated that the parents described the student to her prior to his attending Ridge (Tr. pp. 893-94). They indicated he was anxious at home and school, was withdrawn and had no friends (Tr. p. 894). The parents also indicated to her that the student was not happy going to school, that he felt he had no friends, and didn't feel accepted at school (id.). The special education director testified that, at Ridge, the student was a little reserved at the start of the school year but as the year progressed he became more self-reliant and very much a part of the group, interacting well and able to initiate (Tr. pp. 903-04). She further indicated that he enjoyed being with the other students, worked very well in pairs or groups, and would rather be with his peers than taken out for math instruction (Tr. pp. 907-08). The director reported that at Ridge, the student has friends, enjoys playing chess with his peers during lunch, and is much more outgoing and verbal (Tr. pp. 908-09).

Similarly, the student's mother indicated that the student did remarkably well at Ridge, despite being scared at first (Tr. p. 1045). She testified that he learned to ride a bike, liked to go out more, was more assertive which helped him get along better with his brother, liked to talk about school, and participated in parties at school (Tr. pp. 1045-46). She indicated that the student liked to read and read much better, and liked to go to the library where, previously, it was difficult to get the student to go out (Tr. p. 1046). She further testified that the student was now engaging with his aunts, uncles, and cousins, talking and playing with them, that she could actually have a conversation with him, and that he had a wider range of interests, beyond just animals (Tr. pp. 1046-47).

While district reports regarding the student's ability to attend to and participate in activities indicated very significant deficits and was at the core of his lack of success in district schools, the student's ability to attend was not identified as a significant concern at Ridge, by either the parent or the director of special education (Dist. Ex. 4 at p. 3; 4 at pp. 4, 7, 25-26). As noted above, the neuropsychological evaluation indicated that the student's social skills remained a core area of significant weakness that impacted the student's ability to learn, the district's January 12, 2017 speech and language evaluation identified the student's greatest areas of weakness as his pragmatic skills and his social interaction, and the student's 2017-18 IEP also reflected pragmatic skills as an area of weakness (Dist. Exs. 2 at p. 14; 3 at p. 13; 22 at p. 4). The student's success at Ridge appears to be tied less to a particular type of modified instruction, that would address the student's attending difficulties and poor engagement, but rather, was tied more to motivating the student to participate in instruction and to participate appropriately in social interaction in his educational environment. For example, as discussed above, the student was exposed to high interest, low vocabulary reading material, participated in frequent field trips with hands on activities, participated in classes of no more than six students, and had peer mentoring from older students in the school. Most significantly, the school addressed language pragmatics and social skills almost every hour of every day, and the field trips, beyond being educational outings, provided opportunity for students to use their socialization skills (Tr. pp. 913-14, 931, 953).

Although the district asserts that the hearing record does not demonstrate how Ridge modified its instruction to address the student's unique needs or how the 1:1 instruction delivered at Ridge was specialized to meet the student's needs, the hearing record supports finding that the

student received instruction tailored to meet his academic, attending, and social-emotional needs. Additionally, while a more fully developed hearing record regarding the particularity of the student's instruction at Ridge may have been preferable, courts have recently deemed evidence of the general educational milieu of a unilateral placement sufficient for purposes of tuition reimbursement (see, e.g., T.K., 810 F.3d 878; W.A. v. Hendrick Hudson Cent. Sch. Dist., 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), in an apparent retreat from the standard, articulated in Gagliardo, that the unilateral placement must provide instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Here, the hearing record contained some details regarding how Ridge met the student's unique needs. The small group instruction model described by the special education director using group interaction, participation, active question-and-answer sessions, peer modeling, turn-taking, guided peer interactions, and interactive field trips addressed some of the student's social skills deficits and allowed for small group and 1:1 academic instruction to address the student's academic needs. The student also received multisensory reading instruction, including instruction geared specifically toward remedial reading intervention, as well as 1:1 math instruction focused on the student's level. Accordingly, and particularly in light of the more relaxed standard increasingly applied by courts when evaluating the sufficiency of the "specialized instruction" required of unilateral placements, the hearing record supports the IHO's finding that Ridge "adequately address[ed] some [of the student's] fundamental needs" making it an appropriate placement for the student for the 2017-18 school year.

In sum, the hearing record does not include much detail regarding the special education instruction that was designed specifically for the student at Ridge; however, it appears that the student benefitted from the overall design of the program to the extent described above. Based on the foregoing, the totality of the circumstances presented in this case, including the student's progress at Ridge, supports the IHO's conclusion that although Ridge was "less than ideal," Ridge sufficiently addressed the student's needs such that the parents met their burden to establish that Ridge provided the student with instruction and services specially designed to meet his unique needs.³¹

C. Equitable Considerations

Having concluded that Ridge was an appropriate unilateral placement for the student's 2017-18 school year, 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; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 [indicating that "Courts

³¹ The district asserts that the hearing record does not contain any evidence that the student was placed in a class at Ridge with students who fit his profile as a student with autism or that his placement in a class of six students whose ages ranged from 12-17 was appropriate. The district fails to provide any authority, however, that a unilateral placement must comply with functional grouping requirements in the first instance. Indeed, parental placements generally "need not meet State education standards or requirements" to be considered appropriate to address the student's needs (Frank G., 459 F.3d at 364; see Carter, 510 U.S. at 13-14). Accordingly, a lack of evidence concerning the appropriateness of the student's functional grouping at Ridge is insufficient to demonstrate that the placement, as a whole, is not appropriate to meet the student's needs.

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"; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). 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]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IDEA allows that reimbursement may be reduced or denied if parents did not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice 10 business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68).

As noted above, the IHO found that equitable considerations favored the parents' request for tuition reimbursement at Ridge for the 2017-18 school year. The district argues that the IHO failed to address the fact that the district continued to offer tutoring services for the student after the parents rejected the program recommendation for the 2017-18 school year and that the IHO failed to address that the parents withheld the following information: (1) that the parents attended a CSE meeting along with their counsel without notifying the district; (2) that the parents failed to notify the district that Ridge evaluated the student prior to the end of the 2016-17 school year; and, (3) that the parents failed to disclose the student's visit to a physician on July 23, 2017. Assuming for the sake of argument that the district's allegations are true, I see no reason to disturb the IHO's conclusions with respect to equitable considerations based on the evidence in the hearing record. In the instant case, the parents attended and participated in the September 2017 CSE meeting and did not impede or otherwise obstruct the CSE's ability to develop a program for the student (Dist. Ex. 3 at pp. 1, 3). Moreover, the parents made the student available for evaluations and expressed their disagreement with the IEP during the CSE meeting, informing the CSE that they were placing

the student at Ridge (*id.*). Accordingly, the parents did not fail to raise the appropriateness of the IEP in a timely manner or act unreasonably (*E.M.*, 758 F.3d at 461; *C.L.*, 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). Moreover, the district does not argue how the parents prevented it from developing an appropriate IEP for the student. In conclusion, there are no other facts or circumstances justifying a reduction in an award of tuition reimbursement; therefore, the IHO did not err in concluding that the parents should be awarded reimbursement for the full cost of the student's tuition at Ridge for the 2017-18 school year.

VII. Conclusion

In summary, having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2017-18 school year, that the parents sustained their burden of demonstrating the appropriateness of the student's unilateral placement at Ridge, and that equitable considerations weigh in favor of the parents' request for relief, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
December 13, 2018**

**STEVEN KROLAK
STATE REVIEW OFFICER**