



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 20-114

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Hae Jin Liu, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, by Lauren Eisler, Esq. and Linda A. Goldman, 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 the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondents' (the parents') daughter and ordered it to reimburse the parents for their daughter's tuition costs at the Alpine Academy (Alpine) for the 2018-19 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 parties' familiarity with the detailed facts and procedural history of this matter and the IHO's decision is presumed and will not be recited in detail here. Briefly, the student attended district schools from pre-k through fifth grade in general education classes (Parent Ex. B at p. 2). She was homeschooled during sixth grade and subsequently attended a district middle school for seventh and eighth grades in general education classes (*id.*). During middle school the student reportedly made "a couple of close friends" and "performed well in most areas," although she struggled with math and began seeing a social worker weekly for individual therapy (*id.*). The

student attended ninth grade at a district high school and began "showing signs of social withdrawal" after winter break, which escalated to increased anxiety, academic struggle, panic attacks, and depression by that spring (*id.* at pp. 2-3). During the 2017-18 school year (tenth grade) the student attended a "therapeutic independent school" where, after an uneventful first two months of school, the student began arriving late, struggled to attend, and experienced increasing anxiety and depression (*id.* at pp. 3-4). By letter dated April 18, 2018, the parent shared a private evaluation report with the district and indicated that the student "required" classification as a student with a disability so that she could obtain an IEP (Parent Ex. U). The district conducted evaluations of the student and convened a CSE meeting on August 9, 2018, at which time it determined the student was eligible for special education programming as a student with an emotional disturbance (Dist. Ex. 7 at p. 15; *see* Dist. Exs. 2-6). The CSE recommended a 12:1+1 special class placement in a State-approved nonpublic school (NPS) day program for the student starting September 2018 (Dist. Ex. 7 at p. 11).

In a due process complaint notice, dated December 19, 2018, the parents alleged that the district failed to offer the student a FAPE for the 2018-19 school year (*see* Parent Ex. A). The parents asserted that despite submitting a request for a CSE review in April 2018, the district failed to timely convene a review meeting and recommend a placement for the student (*id.* at p. 3). The parents contended that the CSE failed to recommend a residential program, and instead deferred the student's case to the Central Based Support Team (CBST), which failed to timely identify a school placement (*id.* at pp. 2-3). The parents further asserted that the CSE failed to recommend an appropriate educational program that was reasonably calculated to confer a benefit to the student, counseling or other related services and a 12-month program, and instead recommended an inappropriate class setting (*id.* at pp. 4-5). Additionally, the parents contended that the CSE failed to convene a legally compliant, professionally qualified review team (*id.* at pp. 3-4). Finally, the parents attested that the CSE failed to develop a transition plan to prepare the student for postsecondary life (*id.* at pp. 6-7). As relief, the parents requested that the district reimburse them for tuition at Alpine for the 2018-19 school year, as well as compensate them for round-trip transportation and hotel stays four times per year (*id.* at p. 8).

An impartial hearing convened on March 5, 2019 and concluded on March 24, 2020 after 11 days of proceedings (Tr. pp. 1-395). In a decision dated May 19, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 school year, that Alpine was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 7-12). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at Alpine and transportation costs in accordance with applicable policies for the student and her parents for the 2018-19 school year (*id.* at p. 13).

IV. Appeal for State-Level Review

The district appeals from the IHO's determinations that the district did not offer the student a FAPE for the 2018-19 school year, that the student was entitled to 12-month services, that Alpine was an appropriate placement, and that travel reimbursement was warranted.

The parents, in an answer, generally admit and deny the district's allegations and assert that the request for review was not filed within the timelines set forth in State regulation and that the IHO decision should be upheld in its entirety.

The district replies, alleging that the request for review was timely served.¹

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

¹ Due to the COVID-19 pandemic, the Chief State Review Officer issued a temporary order directing that the disaster emergency is good cause for an untimely request for review filed from an IHO decision dated on or after February 10, 2020 ("Revised General Order," Office of State Review [August 21, 2020], available at <https://www.sro.nysed.gov/common/sro/files/eighth-revised-general-order8.21.20.pdf>). Although the request for review did not state a reason for the request for review not being served within 40 days from the date of the IHO's decision, as is required by State regulation (8 NYCRR 279.13), considering the temporary order issued by the Chief State Review Officer and the district's subsequent reply indicating the COVID-19 pandemic contributed to the delay in filing the request for review, I find that there is no basis to dismiss the request for review in this matter due to timeliness.

procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 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]).²

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

² 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).

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. FAPE

The district appeals from the IHO's determination that the district denied the student a FAPE for the 2018-19 school year asserting that the district's obligation to offer the student a FAPE commenced on October 5, 2018, 60 days from the receipt of the parents' informed consent on July 6, 2018. The district further argues that the IHO's reliance on the parents' April 18, 2018 letter requesting an evaluation as triggering the 60-day timeline was in error because the letter did not provide informed consent.

State regulation requires that a student suspected of having a disability "shall be referred in writing" to the chairperson of the district's CSE—or to a "building administrator" of the school in which the student attends—for an "individual evaluation and determination of eligibility for special education programs and services" (8 NYCRR 200.4[a]). While a parent and certain other specified individuals may refer a student for an initial evaluation (8 NYCRR 200.4[a]1[i]), a professional staff member of the school district in which the student resides and certain other specified individuals may request a referral for an initial evaluation (8 NYCRR 200.4[a]2[i][a]). If a "building administrator" or "any other employee" of a district receives a written request for referral of a student for an initial evaluation, that individual is required to immediately forward the request to the CSE chairperson and the district must, within 10 school days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a]2[ii], [a]2[iv][a], [a]3-[a]5; see also 34 CFR 300.300[a]). State regulation also provides that, upon receiving a referral, a building administrator may request a meeting with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, academic intervention services (AIS), and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a]9). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a]9[iii][a]-[b]).

Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). After parental consent has been obtained by a district, the "initial individual evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).

The parents referred the student for an initial evaluation by letter dated April 18, 2018 (Parent Ex. U). The district provided the parents with a formal consent to evaluate on July 6, 2018, which the parents signed the same day (Dist. Ex. 1).³ While, the district is correct in that the date of the parents' informed consent triggers the 60-day timeline by which to complete the initial evaluation and 60-school day timeline to arrange for appropriate special programs and services (8 NYCRR 200.4[b], [d], [e][1]), the district cannot rely on this timeline because it failed to document any reason for the two and a half month delay in obtaining parental consent.⁴ Although State regulation does not provide a specific timeline for requesting consent to evaluate after receipt of a referral for an initial evaluation, the regulations indicate that the district's delay in this instance was unreasonable. Initially, as noted above, after receipt of the referral, the district was required to immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, if the district received a request for a referral, the district would have been required, within 10 school days, to either request parent consent to initiate the evaluation or provide the parent with a copy of the request for a referral (8 NYCRR 200.4[a][2][iv]). Finally, if a district does not obtain parental consent within 30 days from the date of the referral for an initial evaluation, the chairperson of the CSE "shall document attempts, including, but not limited to, telephone calls made or attempted and the results of those calls and correspondence sent to the parents and any responses received, made by the chairperson or other representatives of the committee to obtain parental consent" (8 NYCRR 200.4[a][8]). Here, the district did not request parental consent until July 6, 2018, approximately two and a half months after the parents' request for evaluation and has not submitted any evidence of any other attempts to obtain parental consent.

Having determined that the district failed to timely evaluate the student, the parent is entitled to relief for such a procedural violation of the IDEA only if the violation affected the student's right to a FAPE (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.H. v. New York City Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; Jusino v. New

³ The consent for evaluation was created and signed the same day as multiple assessments conducted by the district, including vocational interviews with the student and the parent and a psychological update (see Dist. Exs. 1; 2; 3; 5). Accordingly, while it can be assumed that there was some form of communication between the district and the parents to arrange for those assessments, there is nothing further in the hearing record to indicate what that communication might have been.

⁴ The timeline for arranging for placement in an approved in-state or out-of-state private school is that such programs must be arranged within 30 school days of the board's receipt of the recommendation of the committee (8 NYCRR 200.4[e][1]).

York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016]; A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 688 [E.D.N.Y. 2012], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]; Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 294, 300 [S.D.N.Y. 2010]; M.M. v. New York City Dept. of Educ. Region 9 (Dist. 2), 583 F. Supp. 2d 498, 501; [S.D.N.Y. 2008]; Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261, 279 [D. Conn. 2002]). On July 1, 2018, the parents sent the district a notice of their intention to place the student at Alpine Academy for the 12-month school year (Parent Ex. C). The district obtained the parents' consent for an evaluation on July 6, 2018 (Dist. Ex. 1). The hearing record indicated that the CSE convened on August 9, 2018 for an initial eligibility determination (Dist. Ex. 7 at p. 15). Finding the student eligible for special education and related services as a student with an emotional disturbance, the August 2018 CSE recommended a 10-month therapeutic day treatment program and referred the student to the CBST to locate a nonpublic school to implement the program (Dist. Exs. 7 at pp. 1, 11; 11). Based on the district's referral package, it appears that the district's CBST did not respond to the CSE's request for a nonpublic school placement until November 5, 2018, at which point the referral package was "[a]ccept[ed]" (Dist. Ex. 11 at p. 5). The hearing record is devoid of any additional information pertaining to consideration of a state approved non-public school.

In this instance, more than 60 days after the parents had made the initial referral for an evaluation, the parents sent the district a notice of their intention to place the student at Alpine for the 12-month school year (Parent Exs. C; U). The hearing record does not include evidence that, as of that time, the district had responded to the parents' initial referral for an evaluation. Additionally, the hearing record does not indicate that the district ever identified a nonpublic school to implement the student's program recommended at the August 2018 CSE meeting. Accordingly, the hearing record supports a finding that at the time the parents were making their placement decision for the student, the district was required to have already conducted the initial evaluation of the student and the district's delay in responding to the referral for an initial evaluation subsequently affected the student's right to a FAPE (see Application of the Dep't of Educ., Appeal No. 08-058 [district failed to offer the student a FAPE because it did not offer a school site in which the IEP could be implemented]).

B. Unilateral Placement

I turn next to the parties' dispute over whether Alpine was an appropriate unilateral placement. For the reasons set forth below, the evidence in the hearing record supports the conclusion that Alpine provided the student with instruction specially designed to meet her unique needs and the IHO's finding that Alpine was reasonably calculated at the time of the placement decision.

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. The Student's Needs

While the student's needs are not in dispute in this matter, a description thereof provides context for the discussion regarding whether the parents' unilateral placement of the student at Alpine for the 2018-19 school year was appropriate.

The August 2018 IEP present levels of performance reflected the results of a January 2018 neuropsychological evaluation, which indicated that the student's general ability on a measure of intellectual functioning fell within the high average range; noting that her verbal skills were strong

for her age, verbal knowledge and reasoning skills were well developed, her listening comprehension skills were satisfactory, and her verbal memory skills were excellent for her age (Dist. Ex. 7 at p. 1). The IEP reflected a report that the student's nonverbal skills were typical for her age, her visual-spatial organization and pattern analysis were very well developed and her visual-spatial perception and quantitative reasoning skills were typical for her age (id.).

With regard to the student's reading skills, the August 2018 IEP indicated that her single word reading skills were strong for her age, and when reading longer passages aloud, she read with adequate accuracy scoring in the average range (Dist. Ex. 7 at pp. 1-2). In reading fluency, the student's oral reading rate and silent reading rate fell within the superior range, the student excelled in making meaning from text, and her reading comprehension was strong for her age (id. at p. 2). In writing, the August 2018 IEP reflected that the student demonstrated strong writing skills and noted that she was a strong speller with skills in the high average range, but her ability to combine sentences fell within the average range (id.). With regard to writing construction, the student demonstrated "very superior" skills by using varied words, sentences, and paragraphs and she demonstrated well developed skills by writing in an interesting, logical, and organized fashion (id.). The IEP noted that the student used the entire time to write her essay and that she ran out of time for a conclusion, which the evaluator opined may indicate a struggle with time management when writing (id.). According to the teacher's report included in the August 2018 IEP, the student exhibited strong decoding skills and reading comprehension; however, she tended to read at a fast pace which likely led to some errors (id.). The teacher opined that the student's history of panic attacks, suicidal ideation, and self-injurious behaviors combined with her variable attendance affected her overall reading performance (id. at pp. 2-3). In writing, the teacher reported that the student had strong spelling, grammar, and syntax skills, specifically noting that her grammar and syntax skills were above grade level (id. at p 3). The teacher opined that the student's attendance and work completion were challenging due to her symptoms of anxiety and depression (id.).

According the August 2018 IEP, the student demonstrated weakness in mathematics, an area in which she was "significantly weaker than expected given her cognitive profile" (Dist. Ex. 7 at p. 2). Additionally, the IEP indicated that the student's mathematical skills fell within the low average to low end of the average range, specifically describing that her performance in understanding math concepts was age appropriate, and that her ability to solve word problems concerning general math concepts, monetary calculations, measurement, and percentages was in the low end of the average range (id.). Further, the August 2018 IEP reflected that the student had difficulty meeting age expectations in numerical operations and performed in the low average range (id.). The IEP stated that the student was competent in completing basic arithmetic operations but struggled with more complex operations such as long division and multi-digit multiplication problems, scoring in the low average range for both (id.). Also, the August 2018 IEP reported that the student had difficulty solving numerical equations and manipulating negative numbers (id.). In math fluency, the August 2018 IEP indicated that the student's performance was weak for her age, and stated that she exhibited difficulty solving addition and multiplication problems with speed, which suggested her retrieval of math facts was slow (id.). According to the IEP, the student's struggles with recalling math facts with speed and automaticity "likely hinder[ed] her math performance across the board" (id.). The IEP noted that the student's ability to work quickly to solve subtraction problems was adequate (id.).

Additionally, the August IEP reflected teacher reports that the student had below average math computation skills, noting that she was competent in completing basic arithmetic operations, but struggled with more complex operations such as long division and multi-digit multiplication (Dist. Ex. 7 at p. 3). The August 2018 IEP further reflected that the student met criteria for a specific learning disorder with impairment in mathematics (id.). The IEP indicated that the student had average problem-solving skills; however, the IEP also indicated that the student's symptoms of depression and anxiety prevented her from attending regularly and completing coursework (id.). According to the IEP, extensive absences made it difficult for the student to complete assignments and understand what was happening in class and prevented her from earning credit (id.). Finally, according to the August 2018 IEP present levels of academic performance the student expressed that she struggled with self-motivation, time management, and math and science (id.).

Turning to the student's social/emotional needs, according to the January 2018 private neuropsychological evaluation report, projective measures indicated that the student had difficulty coping effectively with negative emotions and may have experienced significant feelings of paralysis related to grief and trauma due to the traumatic event she experienced while at the therapeutic independent school (Parent Ex. B at p. 21). The evaluator also opined that "it [was] also important to note that her affective instability, impulsive risk-taking behavior, interpersonal instability, and history of self-harm place[d] her at risk for the development of a personality disorder" (id.). Furthermore, the evaluator indicated that the student's significant feelings of anxiety and depression interfered with her ability to cope effectively with challenges at school and were "undermining her capacity to participate in school or therapy sessions" (id.). According to the evaluator, "it [was] critical that [the student's] depression and anxiety be treated by intensive therapeutic intervention to help restore an appropriate level of adaptive functioning and engagement with her education" and the evaluator recommended a therapeutic residential setting for the student due to her lack of success with partial hospitalization and therapeutic high school programs (id.). Additionally, the district's July 2018 psychological update report indicated that the student had been receiving individual counseling services since the seventh or eighth grade and began seeing a psychiatrist in 2017 (Dist. Ex. 3 at p. 3). The IEP further reflected the therapist's report that the student was "currently in a state of crisis," she displayed low levels of suicidal ideation, was increasingly socially withdrawn, her mood was highly changeable, and she was absent minded (id. at p. 2).

The August 2018 IEP present levels of social development reflected reports from the teacher that the student met the criteria for major depressive disorder, generalized anxiety disorder, and attention deficit hyperactivity disorder, inattentive type (Dist. Ex. 7 at p. 4). The teacher opined that the symptoms of those diagnoses made it difficult for the student to attend school, self-regulate, organize her assignments, and complete work (id.). Additionally, the teacher reported that the student's executive functioning skills were quite variable and in general an area of weakness, further explaining that the student struggled to regulate her timing and content of verbal responses, often interrupting or making inappropriate comments at inopportune times (id.). The social development needs identified in the August 2018 IEP indicated that prior to attending the therapeutic independent school, the student attended a large arts high school, which she reported as being too overwhelming (id.). The IEP explained that the student began to withdraw socially and began skipping school and noted that she was increasingly anxious about test taking (id.). The student was hospitalized for worsening anxiety, panic attacks, and school refusal (id.). While

attending the therapeutic independent school, the student was unable to maintain regular attendance, when present at school she requested to visit the counseling center regularly, and her difficulties were further exacerbated by a traumatic event that occurred midyear (id.). Although the IEP noted that the student had begun to form meaningful relationships with students and staff, she often presented with both mood and physical symptoms of sadness, lethargy, tension, panic and fear related to emotional distress (id.). The IEP further described that the student experienced negative thoughts about her school and home environments, and had difficulty coping with negative emotions even with coaching and support (id.).

With regard to the student's physical development, the August 2018 IEP reflected that, according to the January 2018 neuropsychological evaluation report, the evaluator concluded that her findings were consistent with diagnoses of major depressive disorder, recurrent, moderate, generalized anxiety disorder, attention deficit disorder - predominantly inattentive type, and specific learning disorder, with impairment in mathematics (Dist. Ex. 7 at p. 4). According to the IEP, the parents described the student as "charming, erudite, and cerebral, and perhaps giving a false impression of maturity," and further described her as an "exceptional artist" (id.).⁵ Finally, the parents reported that the student was strong willed and resistant to boundaries, and they expressed concern about her "tendency towards deceitfulness" (id.).

2. Alpine

According to the hearing record Alpine is a year-round, residential treatment center for girls in grades 7 to 12 (Tr. pp. 197, 209; Parent Ex. N at pp. 3-4). Additionally, Alpine's residential model is described as focusing on psycho-educational skill development and clinical support delivered in a family-like setting which replicates real life (Parent Ex. M at p. 3). The psycho-educational skills development is taught through the "Teaching-Family Model," which "provides the foundation for the level system, therapeutic curriculum and philosophy of everything in place at Alpine Academy" (id. at p. 4). The student's clinical mental health counselor for the 2018-19 school year (counselor) explained that Alpine uses a family teaching model, which has aspects of social learning theory, and uses aspects of cognitive behavioral therapy (CBT) and dialectical behavioral therapy (DBT) which are evidence-based therapeutic modalities (Tr. pp. 192-95, 197-98, 200-01).⁶

The counselor explained that Alpine has seven residential houses with either 10 or 11 students per home, that are staffed with two family teachers and associate family teachers, who are trained in the therapeutic model (Tr. pp. 223-24, 226-27). The counselor explained that family teachers are essentially house parents, and they go through extensive training in the family teaching model, which is "very behavioral based" (Tr. pp. 225-26, 263-64). The counselor described that the family teachers choose the students' roommates, and specifically noted that they try to pair up

⁵ This information appears to be taken verbatim from the July 2018 psychological update report but is not referenced as such in the August 2018 IEP (compare Dist. Ex. 3 at p. 2 with Dist. Ex. 7 at p. 4).

⁶ The counselor explained that CBT "is basically helping people to understand how their thinking impacts their emotions, which then impact[s] their behaviors"; whereas DBT is "more of a skill-based therapeutic modality that introduces individuals to different specific skills in...emotional regulation, distress tolerance, mindfulness, and interpersonal effectiveness" (Tr. pp. 192-93).

individuals who can "sort of help each other navigate the program and encourage each other in a positive way" (Tr. p. 225).

According to the counselor, a motivational system and a point system were used throughout the campus (Tr. pp. 206-09). The counselor described that in the point system the students were rated throughout the day on the specific skills, by their teacher, therapist or residential teacher, on a scale of one (struggling), two (needs improvement), three (average) or four (exceeding average) (Tr. p. 208). At the end of the day the students sat down with residential staff and totaled up their points to determine if they earned privileges, such as watching a movie, playing a game, listening to music or being given an opportunity to go off campus (Tr. pp. 208-09, 269). The counselor further explained that Alpine used three "levels" that were associated with how much supervision a student required, status, and privileges, specifically noting that at the first level, also known as "daily," students were very closely monitored and must stay within sight of staff as all times, they asked for permission for basic things like using the restroom or to go to a different part of the house, and they had the fewest amount of privileges on level one (Tr. pp. 300-301).

The second level or "weekly" allowed students longer periods of time between totaling up their points and privileges, which were provided on a weekly basis (Tr. p. 301). The third level was called "achievement," and students at this level moved away from the formal points system and more natural, logical consequences and rewards were implemented for behaviors (Tr. p. 301).

The counselor described that a classroom at Alpine typically consisted of up to 12 students with one teacher and explained that some of the teachers were certified in secondary education and some had special education certification; all were specially trained in Alpine's therapeutic model (Tr. pp. 198-99). Additionally, she explained that two employees, who were considered behavioral specialists and had also received training in the Alpine model, were stationed outside the classroom to assist students who may be struggling and needed additional support (Tr. p. 199). She further described that if a student needed to take a break, they could leave the classroom and talk to one of the behavioral specialists who would work with the student and get them back to class (Tr. p. 312). The counselor described that during the eight-hour school day the students attended five classes, one of which was a therapy period, and that after school they participated in a 90-minute group therapy session two to three times per week (Tr. pp. 206-07).

With regard to the district's assertion that Alpine did not have psychologists on staff, the hearing record supports the IHO's determination "that intensive counseling [was] provided by appropriately trained individuals and in accordance with a recognized therapeutic model" (see IHO Decision at p. 10). Specifically, the counselor testified that there were 10 mental health counselors on staff during the 2018-19 school year (Tr. p. 309). The counselor further testified that as a mental health counselor, she provided weekly, individual, family, and group therapy; coordinated with residential and academic staff on a daily or weekly basis; consulted on different students; communicated with educational consultants and other referral sources; and helped families find additional placements after leaving Alpine (Tr. p. 195). According to the counselor, she met with the student once per week for individual therapy sessions during the school day for 60 to 75 minutes and once per week for family sessions, which were conducted via a video conferencing program (Tr. pp. 211, 214). Additionally, the counselor stated that the student would attend two to three group sessions per week, consisting of six to eight peers and stated that she would conduct one to two of the student's group sessions during the week (Tr. pp. 211-12). The other group

sessions were conducted by a different mental health counselor on staff (Tr. pp. 212-13). The counselor testified that Alpine also provides psychiatric services, and explained that the student met with a psychiatrist through a video program to assess a "quick snapshot of how the student is doing" related to basic needs, appetite, sleeping, and mood, in conjunction with medication; however, the psychiatrist did not provide actual therapy sessions (Tr. pp. 308-09).

The hearing record contained the student's treatment review summary reports dated August 2018 through May 2019 (see Parent Ex. L). These reports indicated that the student's overall treatment goals targeted improving self-esteem and overall self-efficacy and increasing her ability to regulate upsetting mood states thereby increasing health coping skills and overall mood stability (id. at pp. 1, 6, 11, 16, 21, 26, 30, 33, 37). The reports indicated that the treatment goals for the family were to improve "sense of connectedness," evidenced by increasing open, honest, and respectful behavior; and to learn and implement effective forms of communication (id.). The treatment reports identified the specific learning theory concepts to be used to address the goals, such as continuous or intermittent reinforcement, and "response cost" when anti-social behavior was observed, and also activities that were motivating to the student and that she enjoyed, such as art, reading, spending time alone, having intellectual conversations with others, and being provided with opportunities to share her opinions in an appropriate way (id. at pp. 4, 9-10, 14-15, 19-20, 24, 28-29, 32, 36, 40, 44).

Each monthly treatment review summary report provided a "clinical review" section that described the student's social/emotional functioning at that time, areas of progress, and areas of continued need (Parent Ex. L at pp. 1-2, 6-7, 11-12, 16-17, 21, 26-27, 30-31, 33-34, 37-38, 41). The clinical reviews contained in the reports indicated that the student had made progress in improving her "ability to 'bounce back' after an emotional lull;" building and maintaining relationships with peers more than in the past due to her tendency to gravitate toward adults; improving her ability to receive constructive feedback without becoming defensive; realizing that the goal to completing the program was to find internal meaning for herself, leading to a "newfound level of motivation;" shifting from an "external locus of control" to an "internal locus of control" by making more of an effort to find personal meaning in her treatment; and demonstrating increased accountability, responsibility and vulnerability to peers and staff (id. at pp. 21, 26, 30, 33).

The monthly treatment review summary reports also contained a "residential review" section, after which specific goals with targeted skills were identified (see Parent Ex. L at pp. 2-4, 7-9, 12-14, 17-19, 22-24, 27-28, 31-32, 34-36, 39-40, 43-44). Specifically, the August 2018 treatment review summary report listed two goals: to acquire skills leading to mutually beneficial and nurturing relationships with caregivers and acquire skills leading to impulse control, which were broken down into the skills needed to master the goals (id. at pp. 43-44). By November 2018, the goal to acquire skills leading to impulse control was removed, and in January 2019, that goal was added back and a goal to "[a]cquire pro-social thinking, attitudes and beliefs" was added (see id. at pp. 23-24, 31-32). As with the clinical review summaries, the residential review summaries also identified areas of progress and areas of continued need (id. at pp. 2, 7, 12, 17, 22, 27, 31, 34, 38, 42).

The residential review summaries indicated that in August 2018 the student had been quite negative and only connected with peers with negative emotions; however, by September 2018 the

student had shown "some impressive initiative in changing her attitude and really getting to work at Alpine" (Parent Ex. L at pp. 37-38). By October 2018 the student had progressed to the "weekly" level of the motivation system, and as of November 2018 the student was reportedly very motivated to do well at Alpine and was accountable for her impact on why she was in treatment (id. at pp. 30-31, 33-34). By December 2018, the residential review summary reported that the student had "done a great job acknowledging the behaviors and patterns that [had] brought her to Alpine," had "made drastic improvement in her ability to self-reflect and allow her circumstances to be one of opportunity rather than punishment," had "been open and honest with her emotions," and had "made improvement in her ability to problem solve rather than reaching out to others first," which had helped her become more independent and had eliminated some of her negative self-talk (id. at pp. 26-27). According to the January 2019 residential review summary, the student had "worked really hard on accepting consequences and feedback," and had "started to understand that negative consequences don't reflect her value as a person but instead her learning," and she had "advanced her skills of disagreeing appropriately with peers" (id. at pp. 21-22). In February 2019, the residential review summary reflected that the student had "made significant progress in self affirmation," and she had begun to "help herself maintain her emotions and not let her motivation system define her value" (id. at pp. 16-17). The March 2019 residential review summary reported that the student had "made significant progress in her parent/child relationships," that she was "using her self-affirmation skills more," and she was "more open to being pushed" (id. at pp. 11-12). In April 2019, the residential review summary indicated that the student had done "a great job showing resilience and dedication through her focus system" and that she had "really applied herself to her assignments and maintained stability throughout" (id. at pp. 6-7). Additionally, by May 2019, the residential review summary indicated that the student had "stepped into more of a leader role in the home" and noted that she was developing deeper relationships with peers in the house (id. at pp. 1-2).

The April 2019 clinical review summary report indicated that the student had admitted to being dishonest over the course of three home visits and had been engaging in unhealthy past behaviors related to substances; as a result she was placed on a "focus system" and lost her graduation date (Parent Ex. L at pp. 6-7). The report described the focus system as comprised of "multiple therapeutic assignments" that were "specific to [the student's] need" (id. at p. 6). The counselor also explained that the focus system was implemented when a student had displayed significant behavioral concerns, for example if a student used recreational drugs while on a home visit (Tr. pp. 267-68; see Parent Ex. L at p. 6). She further described that the focus system was a time for the student to be "very introspective" and to work on therapeutic assignments focused on the behavior they were struggling with (Tr. p. 268). According to the April 2019 clinical review summary report, the student appeared to have "gain[ed] motivation from this system being put in place" and was "demonstrating increased accountability, responsibility and vulnerability to her peers and staff" (Parent Ex. L at p. 6). The May 2019 clinical review summary indicated that the results of administration of the "youth outcome questionnaire" (YOQ) to the student showed that she was either lacking insight into the nature of her challenges, or was trying to present as though she was doing better than she actually was, and noted both were consistent with clinical observations (id. at pp. 1-2; see Tr. p. 274). The counselor clarified that by May 2019, the student had made significant progress in being able to attend to her basic needs; however she had "ups and downs" with specific clinical issues such as being completely open and honest, which was not

atypical at that point in the student's treatment (Tr. pp. 320-21).⁷ The counselor stated that home visits were the "strongest indicators of how [students are] able to generalize the skills that they're learning at Alpine into [] the home environment" (Tr. p. 315). She opined that the student had benefitted from the home visits during the 2018-19 school year, and showed that she was able to implement a lot of the skills she had learned, particularly when it came to interactions with her family and learning basic skills associated with effective communication (*id.*).

Despite experiencing some difficulties in spring 2019 as described above, and although not dispositive, the evidence in the hearing record shows that overall the student made social/emotional progress while at Alpine. The student's counselor opined that when the student began at Alpine in July 2018, she struggled with "some pretty significant psychological issues," such as major depression and severe anxiety (Tr. p. 201). According to the counselor, the student also "had a lot of unresolved grief, suicidal ideation, lots of existential questioning" and some executive functioning issues as well (*id.*). The counselor continued that all of those issues combined made it difficult for the student to focus in class "and even show up to class because she was just so severely depressed," and noted that she lacked motivation and the ability to concentrate (Tr. pp. 201-02).

However, the counselor testified that while the student "had ups and downs" during the 2018-19 school year, "overall she was able to demonstrate the ability to regulate her emotions," increase her motivation so that she could show up and participate in class, and develop a skill set to address some of her learning and emotional challenges (Tr. p. 209). The counselor added that the student was able to learn how to get along better with peers and her family, "which also contributed to her overall wellbeing" and mood improvement (*id.*). The counselor noted that the student had moved from "daily" to "weekly" within the first two to three months at Alpine and she reached "achievement" during the fall of 2019 after applying for that level twice (Tr. pp. 303-04). Furthermore, the counselor described that the student had benefitted from the family teaching methodology, specifically noting the student's ability to get up each day, take care of her hygiene, exercise regularly, sleep better, and be very attentive in school (Tr. pp. 313-14). Additionally, the counselor opined that the student seemed to be "maximizing her potential" and there had been "a definite mood improvement overall" (Tr. p. 314). Finally, the counselor opined that Alpine was appropriate to meet the student's needs for the 2018-19 school year (Tr. p. 209).

Turning to the specific issues on appeal, the district argues that Alpine failed to tailor the student's program to address her anxiety and depression; however, as discussed in detail above, the evidence in the hearing record showed that the student's program at Alpine considered as a whole was adequate to meet her identified needs. While the written goals in the 2018-19 treatment review summary reports targeted self-esteem, self-efficacy, coping skills, and mood stability, I note that all of those skills were related to and had assisted the student in improving symptom

⁷ The 2018-19 clinical review summary reports included the results of the YOQ, administered to the student monthly, which the counselor described as a questionnaire that provided a scaled score representing the student's reporting of their own symptoms (Tr. pp. 274-75, 276-77; Parent Ex. L at pp. 2, 7, 12, 17, 21, 34). The counselor testified that the YOQ was a subjective measure and that students could underreport their symptoms which would reflect in a lower score; however, it helped the clinician gain information on whether a student was endorsing any serious concerning behaviors such as suicidality, obsessive thinking, restricting food, etc., that could be brought into a therapy session (Tr. pp. 274-77).

management of her depression and anxiety (see Parent Ex. L at pp. 1, 6, 11, 16, 21, 26, 30, 33). Moreover, when considered together, the statements contained the 2018-19 treatment review summary reports show that the student both made progress and had some periods of regression, yet with each month her current emotional status was gauged and treatment was adjusted to deal with what the student was feeling, improving in, or struggling with at that time (see e.g. Parent Ex. L at pp. 1-2, 6-7, 11-12, 16-17, 21, 26-27, 30-31). Notably, being able to get out of bed to attend classes, take care of personal hygiene, and participate in learning inside and outside of academic classes showed improvement in the student's depression and anxiety symptoms, as the lack of those skills resulted in her inability to attend or participate in her program at the therapeutic independent school prior to attending Alpine (compare Tr. pp. 313-14 and Parent Exs. H; K, with Tr. pp. 368-69, Parent Ex. B at pp. 2-3, and Dist. Ex. 3 at p. 2).

With regard to the district's contention that Alpine lacked a formal education plan to address the student's needs, the counselor testified that during an eight-hour school day, students attended four classes and one therapy period (Tr. p. 206). Teachers awarded positive or negative points depending on how students performed in that particular class, and as described above, behavioral specialists were outside the classroom doors to assist struggling students if they needed a break (Tr. pp. 206, 312).

It appears that in the area of academics the student did very well with the program Alpine provided. Specifically, the hearing record contained a report card for the 2018-19 school year which shows that the student attained grades ranging from B+ to A in all of her subjects throughout the school year (Parent Ex. K). I note that she attained a B+ in only one class, English 1010; all other class grades ranged from A- to A (*id.*). Her GPA ranged from 3.94 to 4.05 with a final cumulative GPA of 3.98 (*id.*). In math, the student's greatest area of academic weakness, she achieved grades of "A" in her geometry foundations course throughout the school year (*id.*; see Parent Ex. B at p. 20).

Finally, I turn to the district's arguments regarding 12-month services. In the due process complaint notice, one of the allegations was that the district did not offer the student a FAPE because the CSE did not recommend a 12-month residential placement (Parent Ex. A at pp. 5-6). Having determined that the district did not offer the student a FAPE, the IHO declined to address 12-month services with respect to FAPE and instead addressed the student's need for 12-month services as part of the determination as to whether Alpine was an appropriate placement (IHO Decision at pp. 7, 11). More specifically, the IHO found that "a 12 month program was appropriate for this student in view of the nature of her disabilities and . . . anticipable regression absent a 12 month program" (*id.* at p. 11). The district appeals from this finding, but addresses it as a FAPE issue rather than as a finding related to the appropriateness of Alpine (Req. for Rev. ¶13). More specifically, the district points to State regulation which provides that students shall be considered for 12-month services "in accordance with their need to prevent substantial regression" (8 NYCRR 200.1[eee], 200.6[k][1]; see 8 NYCRR 200.1[aaa]).⁸ However, as the IHO only addressed this

⁸ Generally, a student is eligible for a 12-month school year service or program "when the period of review or reteaching required to recoup the skill or knowledge level attained by the end of the prior school year is beyond the time ordinarily reserved for that purpose at the beginning of the school year" ("Extended School Year Programs and Services Questions and Answers," VESID Mem. [Feb. 2006], available at <http://www.p12.nysed.gov/specialed/applications/ESY/2014-QA.pdf>). Typically, the "period of review or

issue with respect to the appropriateness of the parent's unilateral placement that is how it is addressed here and it is well settled that the legal standards by which unilateral placements are judged expressly allow for flexibility and consideration of the totality of the circumstances rather than rigidly proscribed criteria (see Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65 ["No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits . . . [and] . . . 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").⁹

Although there is very limited evidence in the hearing record regarding any regression the student may have experienced; there is some evidence that shows the student would benefit from the support of a 12-month program considering how the nature of the student's disability impacted her ability to attend school and therefore to progress to the next grade level prior to her attendance at Alpine (Tr. pp. 148, 156; see Dist. Exs. 6; 7 at pp. 2-4; 8). In addition, the evaluator who conducted the private neuropsychological evaluation of the student recommended "a 24-hour, residential school placement with a structured and supportive milieu setting" due to the student's lack of adaptive skills and risks she posed to her health and safety (Parent Ex. B at p. 22). Furthermore, considering that at the time the parents made their decision to place the student at Alpine, they had limited options, the parents' decision to place the student at Alpine for the 2018-19 school year, including the summer portion of the school year, was reasonable.

3. Reimbursement of Transportation Expenses

In their due process complaint notice, the parents sought compensation from the district for the "costs of round-trip transportation and hotel stays four times a year." The IHO ordered the district to reimburse the parents for expenses for transportation in connection with the student's attendance at Alpine "in accordance with applicable policies for parent and student transportation to residential placements," also stating that "[t]he district may require documentary evidence as to the expenses for which reimbursement is sought." The district asserts that the IHO erred in awarding transportation expenses because the award was not sufficiently supported by the evidence, specifically that the student's mother never testified that she incurred any travel expenses "much less that Exhibit J reflected the costs incurred." The district requests that the transportation reimbursement award be overturned, or alternatively "at the minimum," that the award be limited to "the four roundtrip travel expenses requested in the [due process complaint notice]."¹⁰

reteaching ranges between 20 and 40 school days," and in determining a student's eligibility for a 12-month school year program, "a review period of eight weeks or more would indicate that substantial regression has occurred" (id.).

⁹ Nevertheless, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]). However, the district has not presented this argument either on appeal nor as part of its post-hearing brief to the IHO (see IHO Ex. III), and accordingly, it is not considered.

¹⁰ The district also requests that any award of transportation be limited to the period after October 8, 2019 as that is the date the district believes it was required to have identified a school placement for the student (Req. for Rev.

State regulations authorize expenditures related to suitable transportation of the student "from the student's home to the school at the commencement of the school year, from the school to the student's home at the conclusion of the school year, and no more than three additional trips to and from school for students enrolled in a 10-month program, or four additional trips to and from school for students enrolled in receiving a 12-month special service and/or program, except as additional trips may need to be provided for the periods during which residential care is not provided to the students attending such school" (8 NYCRR 200.12[a]). The Office of Special Education Programs (OSEP) of the United States Department of Education has also opined that the reimbursement of a child's parents for other transportation expenditures not involving transporting the child to and from school, such as to attend conferences at the school, must be determined on a case-by-case basis (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Letter to Dorman, 211 IDELR 70 [OSEP 1978]). OSEP guidance indicates that parental trips to and from school which contribute to the achievement of the student's IEP annual goals are included within the federal definition of the term "related services" to be provided at no cost to the parents as part of the student's FAPE (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]; see also Luke P. v. Thompson R2-J Sch., 46 IDELR 70 [N.D. Ill. Nov. 25, 2003] [expenses must relate to genuine educational concerns in order to justify reimbursement]; Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir. 1994] ["the language and the spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]).

Accordingly, having determined that the parents are entitled to reimbursement for tuition at Alpine, it follows that the parents should also be able to recoup the reasonable expenses for transporting the student to and from Alpine and for visits necessary for the student's program. In this matter, with respect to the parents' claims to be reimbursed for travel to and from Alpine, although the hearing record includes references by parents' counsel to getting together final and updated travel documentation, and admission of Parent Exhibit J, described as "travel expenses with proof of payment, 5/20/18 through 6/20/19," into evidence (Tr. pp. 13-14, 18-19, 25, 62; Parent Ex. J), there is no parent testimony regarding any travel expenses incurred or whether such costs were reasonable (Tr. pp. 1-395). Further, the documentation included as part of Parent Exhibit J does not contain sufficient detail to ascribe it to reimbursable travel expenses for the student to attend Alpine without some supporting testimony (see Parent Ex. J). In particular, while much of credit card statements and invoices appear to be for car rental and airline tickets for the parents, there is no indication that those trips were part of the student's individualized program and were necessary in "contributing to the achievement of the student's IEP annual goals," and thus potentially reimbursable as a related service (Letter to Anonymous, 213 IDELR 164 [OSEP 1988]). Nevertheless, the IHO addressed this concern by ordering "expenses for transportation in connection with the student's attendance at the School in accordance with applicable policies for parent and student transportation to residential placements" and further directed that the district "may require documentary evidence as to the expenses for which reimbursement is sought" (IHO Decision at p. 13). Accordingly, while it may have been better practice for the IHO to have addressed each of the parents' requests for transportation expenses separately rather than pushing the responsibility for determining

¶22). However, as discussed above, the district's argument as to the timing of the district's obligations is without merit. Accordingly, this point will not be further discussed.

if those expenses fit within district policy onto the district, the district's appeal does not present a sufficient basis for overturning the IHO's decision and the parents have not appealed from it.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's findings that the district failed to offer the student a FAPE and that Alpine was an appropriate unilateral placement for the student for the 2018-19 school year, the necessary inquiry is at an end. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 2, 2020**

**STEVEN KROLAK
STATE REVIEW OFFICER**