



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 20-161

**Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education.**

## **Appearances:**

Law Office of Noelle Boostani, attorneys for petitioner, by Noelle Boostani, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, 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 parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at Allied Achievement: Achievement Unlocked (AU) for the 2019-20 school year. This appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

According to a February 19, 2019 neuropsychological evaluation report (February 2019 neuropsychological report), the student has a history of receiving special education services beginning with Early Intervention starting at around 20 months of age and continuing through the Committee on Preschool Special Education (CPSE) in a 12:1+1 special education classroom setting when he entered preschool (Parent Ex. C at pp. 3-4).<sup>1</sup> Upon entering elementary school, the student was in a general education classroom with a full-time paraprofessional, but due

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<sup>1</sup>The primary source of the student's history is obtained from the February 2019 neuropsychological evaluation report (Parent Ex. C).

to difficulty managing the large class size and adjusting to multiple paraprofessionals as a result of high turnover, the student was placed in an integrated co-teaching (ICT) class where he adjusted well and developed preferred friends; however, the student was at times notably anxious, depressed and emotionally volatile (id. at p. 4). According to the February 2019 neuropsychological report, in sixth grade, the student was increasingly struggling to integrate into the class and participate appropriately in lessons (id.).

According to the February 2019 neuropsychological report, the student presented with a full-scale IQ score that placed him well within the average range (Parent Ex. C at p. 11). Likewise, on formal assessment, the student's academic abilities reflected reading as a relative strength that supported learning, but the student struggled with expressive writing (id. at pp. 11, 18-19). Academic assessment found the student to be strong and confident with respect to mathematic fluency, concepts, applications, and computation but his skills were vulnerable due to executive functioning weaknesses, mood and motivation (id. at pp. 19-20).

With respect to the student's social/emotional functioning, the February 2019 neuropsychological report indicated that the student was struggling with understanding and adjusting to the social demands of school due to rigidity, low frustration tolerance, and poor emotional regulation (Parent Ex. C at p. 20). The February 2019 neuropsychological report indicated that the student presented with anxiety and depression which triggered emotional outbursts, exacerbated his rigidity and led to inappropriate or disruptive behavior in class (id. at p. 25).

The neuropsychological report concluded that the student's presentation was consistent with a diagnosis of Autism Spectrum Disorder (ASD) (Parent Ex. C at pp. 23, 25). The evaluator indicated that in addition to a diagnosis of ASD, the student presented with slow processing speed, distractibility, impulsivity, sensory needs, disorganization, and low frustration tolerance consistent with a diagnosis of Attention Deficit Hyperactivity Disorder—Combined Type, and that executive functioning issues impacted his word retrieval, language organization, and stamina for writing which significantly affected his written work output and caused him to resist and avoid schoolwork and homework. (id. at p. 25). The report concluded that this was consistent with Specific Language Disorder in Written Expression (id.). The student was reportedly under a psychiatrist's care for medical management of his anxiety, mood fluctuations, and agitation in addition to receiving individual therapy from a licensed social worker (id. at p. 1).

On February 27, 2019, the student's psychiatrist composed a letter noting his relationship with the student over the previous six months and identified the student's psychiatric diagnoses which included Autistic Spectrum Disorder (F84.0), Attention Deficit Hyperactivity Disorder, unspecified (F90.9), Generalized Anxiety Disorder (F41.1) and Developmental Disorder of Scholastic Skills (F81.9) (Parent Ex. D at p. 1). He indicated that the student's autism impacted every facet of the student's life and that his ability to function in the classroom and at home was impeded by his inability to focus, his inflexibility, his specific interests, and his difficulties with interpersonal effectiveness (id.). The February 2019 psychiatrist's letter presented a number of recommendations to address the student's academic and social/emotional needs, noting that the student's then current classroom setting was not able to provide the identified levels of support, and encouraged the Committee on Special Education (CSE) to look at ASD-specific schools, including district programs and state-approved non-public options (id. at pp. 1-2).

A CSE convened on March 1, 2019, to determine the student's continued eligibility for special education services and recommend a program to address the student's identified needs (Parent Ex. B at p. 16). The March 2019 IEP reflected the content of the February 2019 neuropsychological report and included the student's performance in English Language Arts, social studies, and mathematics (id. at pp. 2-4). The March 2019 present levels of performance indicated that the student had a mild hearing loss, and had, but did not use, an FM unit and received hearing services at school (id. at pp. 5, 7). According to the March 2019 IEP, the student received counseling services to address his social-emotional needs (id. at pp. 5-6). To address the student's management needs, the March 2019 CSE recommended a number of supports including: an FM unit; laptop; strategic preferential seating for optimal visual and hearing access to the teacher and classmates; gaining the student's attention prior to giving directions and instructions, facing the student and using full voice when giving instructions; providing a way for the student to ask enrichment questions without stopping the flow of the lesson; checking for understanding; repeating/rephrasing information as needed; using visuals to support the verbal instruction; repeating other student's answers/questions as needed; monitoring comprehension of key words; allowing time for auditory processing; encouraging one student to speak at a time; visual organizers or outlines; checklists; providing enrichment activities in mathematics; short breaks to drink water or for sensory exercises; job as a messenger/handing out papers; offering challenging texts within content areas; allowing presentations in areas of expertise/interest; and previewing of classroom assignments and homework assignments within grade level expectations (id. at p. 7). The CSE developed eight goals to address the student's needs and recommended a 12:1+1 special class for ELA, mathematics, social studies, and science (id. at pp. 9-12). The CSE also recommended related services including one 30-minute individual counseling session per week, one 30-minute group counseling session per week, and one 30-minute session of individual hearing education services per week (id. at p. 12). The CSE also recommended preferential seating, a computer and an FM unit as supplementary aids and services/program modifications/accommodations (id. at pp. 12-13). Subsequent to the March 2019 CSE meeting, the student was placed at the Summit School (Summit), a New York State approved nonpublic school (id. at p. 16; G).

By letter dated November 6, 2019, the Summit principal indicated that, in consultation with the student's mother, she was making a formal request that the CSE "open the case" regarding the student, noting that the student had been "totally unavailable for learning and often exhibit[ed] volatile outbursts throughout the school day" (Parent Ex. G). The principal noted that since the third week of school, the student had entered the school building, put his head on his desk and slept every day until 12:00 p.m., and upon waking refused to attend scheduled classes he felt were too structured or those he did not find interesting (id.). In class, the student was described as becoming disruptive and disrespectful to his peers and teachers for no apparent reason (id.). The student was noted to have threatened to punch a teacher, often threatened to harm peers, and refused to participate in his related services (id.).<sup>2</sup> Further, the principal indicated the school's staff held seven meetings to develop a behavior plan, reconfigure the student's schedule,

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<sup>2</sup> The November 2019 letter from the Summit principal described the student's concerning behaviors over the previous 10-day period including: refusal to leave the classroom when asked (12 instances) often resulting in the entire class being removed rather than the student; banging, screaming, and threatening bodily harm; refusal to attempt any required work; calling the teacher rude and inappropriate names during the lesson; misusing and/or destroying school property; and threatening to throw a baseball at a peer's face (Parent Ex. G).

adapt his academic expectations, and alter the content of lesson to match the student's interests (id.). The principal noted that the student refused to participate in the school's positive behavioral support system and had no interest in, and professed disdain for, working on target behaviors (id.). The letter also stated that the school had a team meeting with the family and had stayed in contact with the family and outside professionals who worked with the student (id.) The principal's letter concluded by indicating that the non-public school's services, supports, and academic remediation were not meeting any of the student's varied and intensive needs, and that the student may need a more "therapeutic/restrictive" setting, offering to work with the CSE and the student's family to determine what alternative school program would be in the student's best interest (id.).

By letter dated February 6, 2019, the same day as the non-public school's letter to the CSE, the parent notified the CSE that the student was told that he could no longer return to his classroom at Summit, and the alternative proposed by the school, of 1:1 instruction at the school's high school, would not work for the student because he has autism spectrum disorder and was "terrified" to go to an unfamiliar location where he did not know anyone and would be alone with one person all day (Parent Ex. F). The parent believed that such a change in program would be traumatic for the student and their entire family (id.). The parent indicated that the school was unable to provide 1:1 instruction in the lower school where the student attended and expressed the family's willingness to visit any schools the CSE identified as appropriate, but also reminded the CSE of the urgency of the matter given that the student was without a placement at that time (id.). Lastly, the parent indicated that if no school were identified, the family would enroll the student in a private school and seek tuition reimbursement noting they were looking at AU as a potential unilateral placement (id.).

The Summit November 2019 student progress report indicated that in literature, mathematics, science, social studies, social emotional performance, technology, and art, the student was not assigned a grade due to lack of attendance in the classroom and insufficient data to make a formal assessment (Parent Ex. H at pp. 2-7). The November 2019 progress report also indicated that the student's behavior needed improvement (id. ).

On January 2, 2020, the parent entered into an enrollment agreement with AU for the remainder of the 2019-20 school year (Parent Ex. S). After enrolling the student at AU, the parent served the district a due process complaint notice dated January 28, 2020, asserting that the district deprived the student of a free appropriate public education (FAPE) for the 2019-20 school by failing to provide the student with a procedurally compliant and substantively appropriate IEP (Parent Ex. A).<sup>3</sup>

### **A. Due Process Complaint Notice**

In a due process complaint notice dated January 28, 2020, the parent requested an impartial hearing, asserting that the district denied the student a free appropriate public education (FAPE) for the 2019-20 school year because it failed to provide a procedurally compliant and substantively appropriate IEP, and deprived the parents of meaningful participation in the student's educational

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<sup>3</sup> The enrollment contract is with Allied Achievement Education Advocacy Support, however throughout the hearing record the student's program is referred to as Achievement Unlocked (Parent Exs. J; L; P; S; T).

planning (Parent Ex. A at pp. 1-2). The parent asserted that the district did not offer the student a placement for the 2019-20 school year nor did the CSE conduct a vocational assessment to determine the student's post-secondary vocational interests as required (id. at pp. 4-5).

With respect to the IEP issued for the 2019-20 school year, the parent maintained that it was procedurally and substantively flawed because: the IEP did not contain an implementation date; the CSE was not duly constituted; the goals were too general, vague, and not specific to the student; there was no academic reasoning as to how the recommended program could meet the student's needs; the IEP failed to sufficiently identify all of the student's present levels of performance and include corresponding goals to address the student's identified needs; the CSE team failed to use meaningful assessments and/or failed to communicate assessment results in a meaningful manner; and the IEP failed to sufficiently identify the student's present levels of functional performance and the full range of his strengths and weaknesses in academics and social/emotional development (Parent Ex. A at p. 5). The parent also contended that: the IEP goals, academic performance, social/emotional performance, and management needs did not meet all of the student's unique academic or social/emotional needs; the recommended program would not provide the level of individualized and small group support needed by the student; the goals failed to indicate baseline and target grade levels of performance, the methods of measuring achievement lacked specificity and the goals were not reasonably calculated to confer educational benefit (id. at p. 6). Further, the parents alleged that: the goals were inadequate in scope and specificity and therefore immeasurable, the goals were not individualized, the management needs were not adequately addressed; the recommendation was contrary to the opinions of professionals familiar with the student; the recommended program did not offer adequate or appropriate instruction, supports, supervision or services to meet the student's unique needs in order for him to make educational progress; the CSE failed to consider a program tailored to the student's specific needs; the IEP did not provide for 1:1 instruction; and the frequency and duration of special education services as recommended were not appropriate for the student (id.). Lastly, the parent alleged that the IEP did not provide services to address the student's executive functioning needs; and the recommended class size was not appropriate, also noting that the indicated deficits in the IEP constituted a denial of FAPE (id. p. 7).

For relief, the parent requested that the IHO make a finding that the district failed to offer the student a FAPE for the 2019-20 school year, that AU was an appropriate placement, and that the equities favored awarding the parent full tuition fees incurred for the 2019-20 school year (Parent Ex. A at p. 7). The parent also requested that the IHO order appropriate assistive technology services and door-to-door transportation services in an air-conditioned vehicle with travel time limited to 60 minutes (id.).

## **B. Impartial Hearing Officer Decision**

An impartial hearing convened on July 28, 2020 with a prehearing conference and concluded on August 27, 2020 after four days of proceedings (Tr. pp. 1-69). With respect to the parent's assertion that the district failed to offer the student an appropriate IEP, the IHO determined that the district defaulted on its burden of proof regarding the provision of a FAPE for the school year at issue by failing to appear and present a defense to the parent's claims (IHO Decision at p. 6). The IHO indicated that she drew "an adverse inference against the [district] for failing to appear to refute the parent's allegations and concluded that the [district] failed to prove

it offered [the s]tudent a FAPE for the 2019-20 school year" (id.). However, the IHO went on to determine that the parent failed to demonstrate that AU was an appropriate unilateral placement for the student and that there was no requirement to address equitable considerations (id. at pp. 6-17).

Regarding the appropriateness of the unilateral placement, the IHO determined that based on the documentary and testimonial evidence, the parent failed to establish that AU was an appropriate placement for the student (IHO Decision at p. 8). Specifically, the IHO found that there was a lack of evidence presented to "demonstrate that the placement provided educational instruction specially designed to meet the unique needs of the [s]tudent and, was supported by such services as [were] necessary to permit the [student] to benefit from instruction" (id.). The IHO concluded that the parent failed to develop a record regarding the student's special education learning needs, as identified through the evaluative data in the documentary record, and through the testimony of the parent's witnesses (id. at p. 9). The IHO made reference to the January 2019 neuropsychological evaluation which contained "many recommendations, some of which have been implemented by AU, some have not," finding that there was no evidence presented or testimony provided as to whether the recommendations were "mutually exclusive," or whether the recommendations were "codependent in their implementation" in order to provide support for the student's unique needs (id.).<sup>4</sup>

The IHO put forth a number of issues where the parent failed to provide evidence that supported the appropriateness and reasonableness of her decision to place the student at AU for the 2020 winter/spring semester (IHO Decision at pp. 10-14). Specifically, with respect to the recommendation for "calm in the [s]tudent's day," the IHO found that a "unilateral placement is not appropriate simply because it removes a student from an anxiety provoking environment, as avoiding a need does not serve the same purpose or have the same effect as addressing it; rather, the placement must be tailored to address the student's specific needs to qualify for reimbursement under IDEA" (id. at p. 14). The IHO determined that there was no evidence presented regarding how AU sought to accomplish a calm atmosphere with the student and address his underlying issues (id.). The IHO indicated that there was no evidence presented concerning the initial decision to place the student at Summit (id.). Further, the IHO noted that the February 2019 neuropsychological evaluation report was used in determining the student's initial placement at an approved non-public school, but no evidence was presented to explain why the initial 2019-20 school placement at Summit failed (id.). Likewise, the IHO noted that there was a lack of evidence to indicate why the same evaluation was being used in support of the unilateral placement at AU, how the student's needs would be addressed differently at AU, or why the student was asked to leave the initial placement (id.).

The IHO found that the parent did not "flesh out" what was meant when the principal at the student's program indicated that the "services, supports and academic remediation available at Summit [was] not meeting any of [the student's] varied and intensive needs. It is agreed that he may need a more therapeutic/restrictive setting" (IHO Decision at p. 15). The IHO indicated that

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<sup>4</sup> The January 2019 neuropsychological evaluation referenced in the IHO decision is the same document referenced herein as the February 2019 neuropsychological evaluation report (IHO Decision at p. 9; Parent Ex. C). The evaluation was conducted on January 10, 16, and 29, 2020 and the report was dated February 19, 2020 (id.).

the parent's witness, the psychologist who conducted the neuropsychological evaluation, only provided a general response when questioned about how AU met the student's specific needs (id. at pp. 15-16). Additionally, the IHO noted that the parent's second witness, the assistant director at AU, gave "conclusory testimony that the [s]tudent benefited from his small, functionally grouped class, low student-to-teacher ratio, and his 1:1 intervention supports with an academic provider, occupational therapist ('OT'), in the [s]tudent's particular areas of need" (id. at p. 16). However, the IHO indicated that the parent's exhibits O and P showed that the student had not received OT at the school and there was no specific testimony or evidence regarding the student's progress at AU or a method for measuring progress (id.). The IHO found that the parent presented no synthesis between the unilateral placement and the evaluation of the student's needs through witness testimony or evidence (id.).

Lastly, the IHO found that the testimony and evidence failed to establish that for the 2019-20 school year, AU provided the student with educational instruction that was specifically designed to meet the student's unique special education needs, supported by such services that were necessary to permit the student to benefit from instruction during the 16 weeks of remote learning due to the Covid-19 pandemic (IHO Decision at p. 17). The IHO concluded that the evidence and testimony established that the 2019-20 program was simply transferred to an online format (id.).

In consideration of the aforementioned findings, the IHO determined that the parent had failed to sustain her burden that she was entitled to full funding for tuition and fees at AU for the 2019-20 school year and therefore the parent did not meet the second prong of the three separate Burlington/Carter criteria necessary for tuition reimbursement (IHO Decision at p. 17). As such, the IHO determined that it was unnecessary to proceed further to make a determination regarding equitable factors and denied any reimbursement for tuition or related costs for the 2019-20 school year (id.).

#### **IV. Appeal for State-Level Review**

The parent appeals asserting that: the IHO failed to issue findings consistent with the facts and claims (relative to FAPE) raised and argued by the parent and undefended by the district; the IHO imposed an improper standard and burden of proof upon the parent regarding the appropriateness of the parent's unilateral placement; and the IHO erred as a matter of law and discretion by finding that the unilateral placement's remote learning services were inappropriate. Additionally, the parent maintains that the IHO findings and conclusions were based on material misrepresentations and omissions of the evidence in the record; the IHO's conclusions regarding the specialization of the unilateral placement's program was against the weight of evidence in the record; the IHO's conclusion regarding the educational benefits of the unilateral placement's program was against the weight of evidence in the record; and the IHO failed to issue a finding on equitable considerations or order declaratory and equitable relief.<sup>5</sup> Finally, the parent claims that the IHO's appointment was delayed, depriving the parent of due process. The parent requests that the SRO reverse those portions of the IHO's decision which

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<sup>5</sup> During the proceedings, the parent argued that enrolling the student at AU was not a unilateral placement but rather a mid-year placement after the student was ejected from Summit, the district school placement (Tr. p. 27).

found that the parent failed to prove the appropriateness of the unilateral placement, and issue an order directing the district to reimburse the parent for the cost of the student's attendance at AU for the relevant portion of the school year at issue.<sup>6</sup>

In an answer, the district does not cross-appeal the IHO's determination that it failed to offer the student a FAPE for the 2019-20 school year.<sup>7</sup> The district asserts that the parent did not meet her burden of proof to show that AU was an appropriate placement for the student and requests that the SRO uphold the IHO's determinations. The district also asserts that the parent's other arguments are irrelevant; that there is no need for the SRO to make individual findings on each of the allegations relating to FAPE, there was no need for the IHO to continue the inquiry into the equities, and that the parent alleged no specific prejudice to the student as a result of the alleged delay in the appointment of the IHO and the SRO should reject this assertion.

In a reply, the parent reasserts the facts and claims as pled in the request for review and raises the claim that the doctrine of judicial estoppel should be applied to bar the district from raising a defense to the parent's reimbursement claims where the district appeared at the impartial hearing and obtained an adjournment of the proceeding, over the parent's objection, on the grounds that the merits of the case warranted a settlement. The parent further asserts that where the district argues for the first time on appeal that AU was not appropriate, the SRO should find that the district's "inconsistent positioning coupled with the advantage that it previously obtained bars the [district]'s claims as pled in its [a]nswer." The parent also maintains that the district should be barred from raising defenses to the parent's claims on appeal that it waived during the impartial hearing, as it would deprive the parent of her due process right to defend her claims in a fact finding proceeding. Therefore, the parent contends that the SRO should deny review of any and all district defenses raised on appeal that are contrary to the positions it raised and argued during the impartial hearing, or that it waived during the impartial hearing.

## **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]).

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<sup>6</sup> On appeal the parent does not seek review of the IHO's determination that the district failed to provide a FAPE for the school year at issue for its failure to appear at the impartial hearing.

<sup>7</sup> As the district does not cross-appeal from the IHO's determination that it failed to offer the student a FAPE for the 2019-20 school year, that determination has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]); 279.8[c][4]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, the only relief sought in this proceeding is payment for the cost of the student's tuition and related services at AU for the 2019-20 school year.

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 Endrew 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]).

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. FAPE**

In her decision, the IHO found that the district denied the student a FAPE for the 2019-20 school year based upon the district's failure to appear at the impartial hearing. Specifically, the IHO found that the district "defaulted on its burden of proof regarding its provision of a FAPE . . . by failing to appear" and, therefore "failed to meet its burden" that it had developed an appropriate IEP for the student for the 2019-20 school year (IHO Decision at p. 6). Although this ruling is favorable to the parent, on appeal she contends that there were additional grounds upon which the IHO should have found a denial of FAPE based on the allegations contained in the due process complaint notice and evidence presented by the parent at the impartial hearing. However, the IDEA and State Regulations provide that only a party who has been "aggrieved" by the decision of an IHO may appeal an IHO's decision to an SRO (20 U.S.C. § 1415[g][1]; 8 NYCRR 200.5[k][l]; see J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at \*9—\*10 [S.D.N.Y. Nov. 27, 2012 see also Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "[t]he administrative appeal process is available only to a party which is 'aggrieved'

by an IHO's determination"). Here, the IHO's decision resolved the issue of the district's denial of FAPE to the student entirely in the parent's favor (IHO Decision at p. 6). Therefore, the parent is not entitled to appeal this portion of the IHO's decision (see D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 588 [S.D.N.Y. 2012] [holding that the parent obtained all the relief she sought and therefore was not aggrieved and had no right to cross-appeal any portion of the IHO decision, including unaddressed issues]). Accordingly, as the parent is not aggrieved by the IHO's finding that the district denied the student a FAPE, a determination that the district does not cross-appeal, this finding will not be further addressed in this decision and is now final and binding on the parties.

## **B. Unilateral Placement**

As the parent was not aggrieved by the IHO's determination that the district denied the student a FAPE for the 2019-20 school year, and the district does not cross-appeal the IHO's FAPE finding, the issues remaining on appeal are whether the IHO erred in determining that AU was not an appropriate unilateral placement for the student for the 2019-20 school year and if equitable considerations support the parent's request for reimbursement.

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**

In this instance, although the accuracy of the student's needs—as identified in certain evaluations and assessments in the hearing record—are not directly in dispute on appeal, a discussion thereof provides necessary illumination of the primary issue on appeal; namely, whether the student's unilateral placement at AU was appropriate. Moreover, the parent correctly notes that the IHO erred by determining that the parent failed to develop the hearing record regarding the student's special education learning needs either through evaluative documentary evidence or testimony presented at the impartial hearing (IHO Decision at p. 8). Rather, under the circumstances of this case—where the district did not present a case on the issue of FAPE at the impartial hearing and elected not to submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs into the hearing record—the district has effectively abandoned any opportunity to assert at either the impartial hearing or on appeal its position regarding the student's special education needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs. Accordingly, to the extent evaluation reports or assessments submitted by the parent as evidence of the appropriateness of AU were not sufficiently comprehensive in the IHO's view for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent as the IHO erroneously determined (A.D. v. Bd. of Educ., 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]; see also Application of the Dep't of Educ., Appeal No. 20-131; Application of the Dep't of Educ., Appeal No. 18-125; Application of a Student with a Disability, Appeal No. 180-049; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027).

Accordingly, the question of whether AU was an appropriate unilateral placement is principally determined by whether the program provided "educational instruction specially designed to meet the unique needs of the [student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365). As discussed below, the evidence in the hearing record submitted by the parent in this case was sufficient, particularly given the district's failure to present an opposing view, to identify both the student's unique individual needs and to satisfy the parent's burden to establish the appropriateness of the student's unilateral placement at AU for the 2019-20 school year.

According to a July 2020 psychiatrist's letter, the student was diagnosed with ASD, Attention Deficit Hyperactivity Disorder, unspecified, Generalized Anxiety Disorder, and Developmental Disorder of Scholastic Skills (Parent Ex. E at p. 1). The psychiatrist's letter indicated that the student's neuro-biological condition impacted every facet of his life and his ability to function in the classroom was impeded by his inability to focus, his inflexibility, his specific interests, and his difficulties with interpersonal effectiveness (id.). The psychiatrist noted that the student's diagnoses were compounded by his communication-based learning disabilities that continued to affect his ability to communicate even when he was able to focus and noted that the student struggled to explain his feelings (id.).

The psychiatrist's letter indicated that the student required appropriate academic support and scaffolding to succeed and develop scholastically and noted the student's inability to tolerate a typical classroom environment (Parent Ex. E at p. 1). To address the student's needs, the psychiatrist indicated that the student needed a very small group setting of no more than six students and at least two adults to maintain his focus, work on transitions, and improve his interpersonal effectiveness (id.). According to the psychiatrist, an appropriate program for the student is one that provides 1:1 teaching and customized interventions on an ad hoc basis, the ability to take individualized breaks during the day, classroom directions and assignments tailored to his specific needs and explained slowly and clearly (id. at pp. 1-2). The psychiatrist also indicated that the student needed to be able to ask questions and receive responses beyond what would be typically expected for a student of his chronological age and access to autism-specific skill coaching and behavioral therapies (id. at p. 2). Additionally, the psychiatrist's letter indicated the student required social work and/or mental health counselor services during the day to help him develop coping skills and self-regulate in real-time (id.). The psychiatrist encouraged the CSE to look at state-approved non-public school options that can provide a 6:2 classroom ratio and 1:1 teaching (id.).

According to the February 2019 neuropsychological report, the student's performance yielded a full-scale IQ score of 107 placing him in the average range of overall intellectual functioning (Parent Ex. C at p. 11).<sup>8</sup> Academic achievement assessment reflected that the student's reading skills were advanced and presented an excellent medium for learning but noted

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<sup>8</sup> The February 2019 neuropsychological report indicated that the student's full scale IQ score was 107 (68<sup>th</sup> percentile) placing him in the average range of overall intellectual functioning, 116 (86<sup>th</sup> percentile) with respect to verbal reasoning skills reflecting performance in the high average range, non-verbal reasoning skills yielded a standard score of 97 (42<sup>nd</sup> percentile) and visual spatial reasoning skills of 108 (70<sup>th</sup> percentile) also in the average range (Parent Ex. C at p. 11). The student's WMI standard score of 100 (50<sup>th</sup> percentile) and PSI standard score of 95 (37<sup>th</sup> percentile) both reflected performance in the average range (id.).

that the student's interest and motivation presented a significant obstacle to participation and work production (id.).<sup>9</sup> The February 2019 neuropsychological report indicated that despite the student's highly developed reading that supported his learning, his skills were vulnerable to interest, inattention, and impulsivity, therefore his reading skills did not translate into his written work (id. at pp. 18, 24). The evaluator noted that difficulty with written work, generating ideas slowly, being easily sidetracked by his interests, and losing track of his thoughts, made it difficult for the student to get his ideas down on paper (id. at p. 24). Difficulty getting started and organizing his ideas also hindered the amount of work the student was able to produce (id.). According to the evaluator, the student presented with low stamina for writing by hand despite adequate pencil control and coordination on drawing tasks (id. at pp. 18-19). The student's handwriting was legible but "sloppy" with letters fluctuating in size and spacing which increased toward the end of the sentence (id. at p. 19). The February 2010 neuropsychological report noted that creating original content was more challenging for the student who demonstrated difficulty following task rules, a function of his struggle to produce ideas and get them on the page quickly enough, preferring to write sentences his own way (id.). This writing approach prevented the student from responding appropriately to directives and demonstrating his strong language skills (id.). More challenging for the student was producing an original essay because the student struggled with word retrieval, language organization, and low stamina which significantly impacted the student's ability to express his ideas and knowledge in writing (id.).<sup>10</sup> The student's mathematic skills were described as "developing nicely, but [were] highly vulnerable to executive functioning weaknesses, as well as his mood and motivation" (id. at p. 20).<sup>11</sup> The February 2019 neuropsychological report noted the student's excellent verbal reasoning

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<sup>9</sup> According to the February 2019 neuropsychological report, the student's academic performance with respect to reading indicated his reading skills were considered an area of relative strength that supported learning (Parent Ex. C at p. 18). The student was reported to have an extensive sight word vocabulary (letter and word recognition 98<sup>th</sup> percentile, grade equivalency greater than 12.10; word recognition fluency 99.7<sup>th</sup> percentile, grade equivalent greater than 12.10) (id.). The student's decoding fluency fell in the 90<sup>th</sup> percentile (grade equivalent greater than 12.10) and his ability to spell complicated words fell in the 91<sup>st</sup> percentile range with a grade equivalent of 11.4 (id.). The February neuropsychological report indicated that while the student's decoding skills were well established, his cognitive impulsivity and distractibility affected his consistency particularly when tired or disinterested (nonsense word decoding 61<sup>st</sup> percentile, grade equivalent 7.5) (id.). The evaluator noted that the student was able to read text quickly and accurately (silent reading fluency 88<sup>th</sup> percentile, grade equivalent 11.8) and interpreted and absorbed meaning from the text at an extremely high level (reading comprehension 86<sup>th</sup> percentile, grade equivalent 8.6), but his participation and compliance with reading for school was highly dependent on his mood and motivation (id.).

<sup>10</sup> The March 2019 IEP included the evaluative information from the February 2019 neuropsychological report as well as some inconsistent information from the student's teachers (compare Parent Ex. B at pp. 3-4, with Parent Ex. C at pp. 18-19). In contrast to the February 2019 neuropsychological report, the March 2019 IEP indicated that the student's independent writing met grade-level expectations, the student was able to collect research from multiple sources and synthesize the information into a multi-paragraph piece (compare Parent Ex. B at p. 4, with Parent Ex. C at p. 19). The March 2019 IEP also indicated that the student accepted feedback on his writing and willingly expanded his responses when provided targeted feedback although the IEP did indicate that he benefited from writing support, modified graphic organizers and regular one-to-one conferencing (Parent Ex. B at p. 4). However, the IEP noted the student received scaffolded assignments in mathematics but if the topic included writing or extensive work it would not be completed fully and thoroughly (id.). The IEP did note that writing was not a preferred task therefore goals were written to address that area of need (id.).

<sup>11</sup> The March 2019 IEP indicated that the student was "above range" in mathematics but performed inconsistently

skills supported by strong language and reading skills, allowed the student to communicate his knowledge and ideas, define words, describe relationships and articulate his unique perspective, as well as understand and learn from complicated text (id. at p. 23).

According to the February 2019 neuropsychological report, the student's receptive language, listening skills, and verbal memory were well developed, and non-verbal reasoning skills and visual spatial abilities fell in the average range. (Parent Ex. C at p. 23) However, the neuropsychological report indicated that despite the student's vast amount of knowledge, his executive functioning weaknesses were increasingly impacting his school experience and impeding his academic development (id. at p. 24). The evaluator noted the student's weaker and variable processing speed created a discrepancy between his cognitive capacity and his ability to demonstrate his knowledge with efficiency and fluency (id.). The evaluator noted that the student's word retrieval and language organization, particularly in context of complex sentences, was slow and inefficient which made it hard for the student to organize his ideas and effectively articulate his point or sustain conversation with peers resulting in student frustration (id.). The evaluator noted the student's strong mathematics skills but indicated that the student's visual memory weakness required the support of a multisensory approach (id.). Additionally, it was noted that the student's fine motor difficulties impacted his writing skills and his visual processing speed was slow and inefficient which impeded learning and understanding in a purely visual medium slowing down the student's work pace and promoting distractibility and inflexibility (id.). Further, the student's short attention span, interest, motivation, and verbal impulsivity mediated the student's level of engagement (id.). The student's low stamina for work, difficulty with organization of materials and time management, affected his ability to function in his class and further promotes resistance to work and participation (id.).

According to the February 2019 neuropsychological report, the student's inflexibility perpetuated procrastination, anguish, and a slow work pace (Parent Ex. C at pp. 24-25). Despite strong mathematics skills, executive functioning issues resulted in accuracy and efficiency of problem solving vulnerable to slow processing speed, impulsivity, weak visual memory and anxiety, therefore the student needed time to learn new concepts and internalize the teachers' methods of problem solving rather than his own, requiring teacher attention to manage his frustrations (id. at p. 25). The student's executive functioning weaknesses, including slow processing speed, weak retrieval, cognitive impulsivity, rigidity, and inattention, impacted the student's academic development (id.).

With respect to social/emotional functioning, the February 2019 neuropsychological report indicated that the student struggled with understanding and adjusting to the social demands of school due to his rigidity, low frustration tolerance, and poor emotional regulation (Parent Ex. C at p. 20). These behaviors were reported to make it difficult for him to comply with classroom rules and routines and promoted argumentative, defiant, and disruptive behavior (id.). The evaluator noted that the student found it difficult to engage in tasks that did not interest him or that he did not deem useful and that as a result, the student refused to do schoolwork, homework, or

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and "struggled to be []focused in class due to being knowledgeable about such content" (Parent Ex. B at p. 4). According to the IEP, the student could get easily frustrated when he received a mathematical task that required writing and was not to his liking (id.).

participate in lessons unless he liked the teacher, subject matter, or could operate on his own terms (id.). The evaluator indicated that the student had difficulty identifying and reading nuanced social cues and tended to interpret ambiguous interactions in a negative manner, struggling to connect with peers to develop meaningful friendships (id.). The student was described as sensitive and easily upset when too many demands were put on him, which triggered acting out behaviors like emotional outbursts, disrupting the teachers' property or the classroom, and had recently promoted self-injurious behaviors (id.).

The February 2019 neuropsychological report indicated that the student presented with anxiety and depression which triggered emotional outbursts and exacerbated rigidity, contributing to inappropriate or disruptive behavior in class (Parent Ex. C at p. 25).<sup>12</sup> According to the evaluator, the student's struggles with rigidity, dysregulation, perspective taking and social understanding, relating to peers, participating in collaborative or reciprocal interactions, cooperating with social expectations, repetitive behaviors, and a restricted area of interests were consistent with a diagnosis of ASD (id. pp. 23, 25). In addition to a diagnosis of ASD, the evaluator noted that the student presented with slow processing speed, distractibility, impulsivity, sensory needs, disorganization, and low frustration tolerance consistent with Attention Deficit Hyperactivity Disorder—Combined Type, as well as executive functioning issues which impacted his word retrieval, language organization, and stamina for writing and resulting in resistance to and avoidance of schoolwork and homework. (id.). The evaluator also concluded that the student's struggle with writing production was consistent with Specific Language Disorder in Written Expression (id.).

According to the February 2019 neuropsychological report, the student had difficulty connecting with peers and responding appropriately to social demands noting that his inflexibility hindered his ability to form relationships (Parent Ex. C at p. 25). The evaluator indicated that the student struggled to integrate into the sixth grade school setting, he had trouble understanding and conforming to the social expectations of his role as a student which led to disruptive and oppositional behavior, resistance to work completion, and mood fluctuations that triggered emotional outbursts (id. at p. 23).<sup>13</sup> Additionally, his need to be in charge, his interest

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<sup>12</sup> The February 2019 neuropsychological report indicated that the student's dysregulation in the classroom led to head banging, erasing the teacher's lesson on the board, and "swiping" the teacher's belongings off his desk (Parent Ex. C at p. 25). The evaluator opined that "[t]hese highly disruptive behaviors, coupled with [the student's] endorsements of clinically significant levels of anxiety, feelings of inadequacy that lead to self-harming behaviors are very concerning and may lead to long term psychiatric difficulties" (id.). However, the evaluator noted that during the evaluation the student demonstrated that he was capable of being calm and cooperative and he was able to tolerate a high level of demand in the context of flexible structure with one-on-one attention in a quiet, calm setting (id.). The evaluator also noted that this was also clear in the classroom when the teacher gave the student undivided attention which resulted in the student returning to a calm state and able to engage in learning (id.).

<sup>13</sup> The March 2019 IEP indicated that the student's counselor expressed that the student was social at school, during class, lunch, and free time noting that he socialized with his peers in appropriate ways (Parent Ex. B at p. 5). According to his teachers, the student could be very social, and he had friends in class (id.). The March 2019 IEP noted that the student was learning how to disagree with his peers in an appropriate manner, but may "shut down" when faced with a non-preferred task that could result in refusing to complete assignments, going under his desk, hiding in the closet, banging on the desk and becoming defiant towards teachers (id. at pp. 5-6).

driven behavior, and low frustration tolerance created a level of unpredictability that was difficult for others to tolerate (*id.* at p. 25). The evaluator noted that anxiety and depression triggered emotional outbursts and exacerbated rigidity which contributed to inappropriate or disruptive behavior in class and dysregulation in the classroom led to highly disruptive behaviors (*id.* at p. 25). The evaluator indicated that the student's rigidity was the most pronounced and interfering quality that made it difficult for him to acclimate to the demands of the environment (*id.* at p. 26). The February 2019 neuropsychological report indicated that that student's struggles with executive functioning, social delays, and unique academic needs were making it difficult for him to function and adjust to social expectations required of a student resulting in disruptive, defiant, and acting out behaviors that put himself and others at risk (*id.*).

To address the student's academic and social/emotional needs, the February 2019 neuropsychological report put forth several recommendations (Parent Ex. C at pp. 26-27). The evaluator indicated that the student required a small, calm, structured 1:1 setting to provide greater ability to manage his attention, regulate his emotions, and increase flexibility regarding expectations (*id.* at p. 26). It was recommended that the student needed an educational setting with teachers who understood how to work with students with autism and strongly recommended placement in an alternative setting as soon as logistically possible (*id.*).<sup>14</sup> The evaluator recommended ongoing treatment with a psychiatrist to address the student's symptoms of inattention, distractibility, and executive functioning weaknesses, as well as symptoms of anxiety, depression, and extreme dysregulation (*id.*). Executive functioning and writing tutoring were recommended to assist the student with his struggles related to the impact of executive functioning weaknesses on writing development, and 1:1 individual support for organizational weaknesses with a focus on management of time and materials, work completion, frustration tolerance, keeping up with long term assignments and fostering self-management of assignments and his backpack, to support independence with his work over time (*id.*). The evaluator recommended support for the student to overcome his resistance to using assistive technology for writing—a significant area of concern and stress—and a social skills small group to improve social interactions (*id.* at pp. 26-27). Extended time was recommended to help the student to express and organize his ideas due to his slow processing speed, with extended time in a quiet setting for in-class and standardized testing (*id.* at p. 27). To address the student's distractibility, the evaluator recommended movement breaks throughout the day and regular cardiovascular activity to support better executive functioning and overall well-being (*id.*). The evaluator recommended community activities as a learning environment to develop social collaboration skills, expand his areas of interest, and manage his frustration, as well as exposure to positive role models and self-advocacy to develop the student's self-awareness and positive self-esteem (*id.*).

In addition to her formal recommendations as presented in the February 2019 neuropsychological report, the psychologist testified that the student needed a small environment

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<sup>14</sup> The February 2019 neuropsychological report recommended the alternative setting as soon as logistically possible due to the student's increasing frequency of episodes of dysregulation self-harm opining that the student's self-harm was a "highly concerning expression of frustration," noting that the student was "clearly unable to manage the size of the classroom, the demand being put on him, and the degree of sensory stimulation he must process each day" (Parent Ex. C at p. 26).

that was very individualized to his strengths and needs, and the program needed to be structured, predictable, yet flexible at the same time (Tr. p. 58). Further, the psychologist stated that the student needed a small classroom that could accommodate the student's struggles with regulation and social understanding (id.).

## **2. Specially Designed Instruction**

With respect to the special education instruction and supports the student received at AU, the AU program description indicated that its "neurodiversity positive" educational environment is designed explicitly to meet the needs of those students across academic, socioemotional, and behavioral domains combining evidence-based best practice methodology, a high staff to student ratio and a culture of collaboration to create a space where the students simultaneously feel both challenged and supported (Parent Ex. J at p. 1). The program description indicates that AU provides an academically challenging education using best practices, perseverance, and transparency focused on the social and emotional growth necessary for students to navigate and thrive in the world (Parent Ex. I at p. 1). Further, the program description states that the center-based instruction program is designed to meet each student at their individual level of need, while making sure to push them towards their highest potential academically, behaviorally, and socially (id.). The AU program description states that its near 1:1 ratio ensures each student receives individualized attention and "in the moment" academic and behavioral support throughout the instructional day with the students' diverse needs being highly differentiated within every class period (id.).

According to the affidavit of the assistant director at AU, the school is for students who need an academically challenging education with a focus on social and emotional growth (Parent Ex. U at p. 2). The assistant director also stated that all lead teachers were certified in special education and the school provides tailored programs that includes therapeutic and 1:1 intervention as needed (id.). The AU assistant director's affidavit references the program's enrichment courses that integrated the instruction of additional life skills such as executive functioning, self-regulation, and self-advocacy skills at AU using peer reviewed and researched based methodologies combined with positive behavioral intervention strategies to aid the students in their development of those skills (id.).

The AU program description indicates that the curriculum includes core subjects that align with the New York State Common Core and learning standards for content areas as well as providing enrichment courses with each subject taught by a specialist in that field who strives to push students toward their highest academic capabilities for learning (Parent Exs. I at p. 1, J at p. 3). AU also includes access to related services such as counseling, speech-language therapy, and occupational therapy (Parent Ex. J at p. 3). The program is reported to ensure students meet and exceed the educational standards for their grade level and plans explicit instruction centered on executive functioning, organization, and socioemotional skills (Parent Ex. I at p. 1). The AU program descriptions states that the school provides differentiated education by meeting every student at their precise level of need, and provide whatever scaffolding and support is necessary for their growth (Parent Ex. J at p. 2). The program at AU uses daily report cards to track academic and behavioral data through each day which allows identification of significant trends over time in both domains (Parent Ex. I at p. 1). The daily report cards data provides students with feedback every day on how they are doing as well as enabling

communication with parents regarding the students' strengths and areas of need within each content area (id.). Further, the AU program description indicates that consistent data tracking allows for the implementation of effective strategies to ensure growth among the students (id.).

The AU program description also indicates that the school uses positive behavioral reinforcement systems to provide external scaffolding for students regarding their behavior both individually and as a group (Parent Ex. I at p. 2). This is accomplished through a token economy in which the students can earn "reasonable requests" for good behavior throughout the day and then use the tokens to purchase predefined privileges (id.). The program uses a helpful/hurtful meter to measure when the students as a group have been helpful to one another providing in the moment feedback to students about how they are doing and extrinsic motivation in the process of eventually teaching the students about intrinsic rewards (id.).

The AU program description professes that what sets them apart from other programs is the small class size and high staff ratios which ensure that each student receives individual attention and in-the-moment academic and behavioral support throughout the instructional day (Parent Ex. J at p. 3). By tracking students' academic and behavioral performance throughout the day, the AU program description states that they are able to identify significant trends over time in both domains, allowing the staff to implement scaffolding, teach strategies, and design individual interventions to develop and maintain student achievement and growth (id.). The program description also states that AU emphasizes building self-regulation skills and features multiple 1:1 areas that serve as a safe space for students who need to deescalate, and sensory tools for students to regulate and balance (id.). Due to the nature of the students' intertwined behavioral and sensory challenges, according to the program description, the school fosters a school-wide culture of tolerance, acceptance, and self-advocacy that explicitly reinforces students for engaging in problem solving and requesting reasonable accommodations (id.). Lastly, the AU program description indicates that they integrate sensory and behavioral support into every lesson environment at an individualized level, ensuring that students learn to implement coping strategies effectively in practical situations (id.).

AU began remote learning on March 13, 2020 due to the COVID-19 pandemic (Parent Ex. L at p. 1). The remote learning program description indicated that it was designed to ensure continuity, routine, and synchronous learning (id.). The remote learning program recreated each student's unique schedule with their regular teachers, service providers, and support staff, according to the program description (id.). Laptop computers were provided where needed, surveys determined that all students had internet access, and 90% of the students could print documents as stated in the program description (id.). The program description also indicated that as of March 15, 2020, all classes were conducted live with students and teachers meeting online via Zoom, and the student's had Google calendars to help organize their day, and each class had an agenda, links to needed documents, and was taught by the same team as it was during the regular school year (id.). Additional support staff in some classes provided extra help as need and students were provided with feedback during class time regarding their work (id.). Attendance was tracked on the daily report card document that also provided information about the student's academic and behavior performance, the same as it was during the traditional school year (id.). According to the remote learning description, the students and parents had access to the teachers' Calendly links to provide additional support when needed or to ensure there were times to interact at a "friendly level" (id.). AU utilized a message system (Slack) which allowed parents to communicate with

the staff on their child's team including teachers, support staff, and services providers and staff continued to engage in regular meetings to maintain up to date trainings, discuss student cases, and share best practices (id.). The remaining portion of the remote learning description regarding curriculum, daily report cards and positive behavioral reinforcement systems was similar to that as described in the traditional program description (compare Parent Ex. L at p. 2, with Parent Ex. I at pp. 1-2).

The student began attending AU in January 2020 with a schedule that included courses in mathematics, ELA, science, and social studies as core subjects (Parent Exs. O at pp. 1-7; U at p. 2). In addition to the core courses the student took enrichment courses in myths, legends, and riddles, coding, and engineering, together with counseling services and occupational therapy (Parent Exs. O at pp. 7-10; P at pp. 7-8; U at p. 3). The assistant director of AU testified via affidavit that the student was placed in a class with a maximum of six students, one lead teacher, and one specialized support provider (Parent Ex. U at pp. 2-3).<sup>15</sup> The classes were reportedly functionally grouped based on age and grade/skill level and incorporated positive peer modeling (id. at p. 3). The student's schedule included core academics subjects in the first half of the day followed by a "focus" course and two enrichment courses that incorporated the instruction of life skills, such as movement, and executive functioning skills (id.).<sup>16</sup> The student's program focused on self-advocacy—an area of particular need of the student—as many of his noncompliant and/or defiant behaviors stemmed from his inability to express himself without frustration (id.). This self-advocacy was facilitated by all the student's teachers and providers (id.). The assistant director indicated the student benefited from a visual schedule of his day on a clip board and the 1:1 interventions that were provided as needed to address periods of dysregulation or noncompliance, or to support particular accommodations (id.).

The program at AU provided the student with accommodations in his areas of need such as answering orally rather than in writing when appropriate or using other forms of expression such as drawing (Parent Ex. U at p. 4). According to the assistant director, the AU program integrated into all the students' curriculums, the education and instruction of social thinking, which the student needed and benefited from with respect to his autism diagnosis (id.).

The winter progress report indicated that the student received 1:1 instruction in mathematics to facilitate his participation and he was provided with support for self-advocacy for his learning style (Parent Ex. O at pp. 1-2). The spring 2020 progress report indicated that in mathematics the student was able to receive 1:1 instruction during most school days and noted that adjustments were made in the student's required work when issues such as refusing to participate in web-based activities occurred and he was given extra worksheets to complete (Parent Ex. P at pp. 1-2). In ELA, the winter progress report indicated that the student was often provided with an alternate reading assignment as he was not interested in the class assignment and the spring progress report reflected the provision of 1:1 support from the staff (Parent Exs. O at p. 3; P at p. 3). The ELA teacher indicated that small manageable goals were the most helpful thing

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<sup>15</sup> The assistant director of AU testified that the specialized support provider was trained in Lindamood Bell reading instruction methodology, which targets one of the student's areas of need (Parent Ex. U at p. 3).

<sup>16</sup> The assistant director stated that a focus course was a course where the student chose a project from one of his academic subjects of choice and then worked on the project over the semester (Parent Ex. U at p. 3).

for the student, so projects were broken down into their component parts to relieve the student of feelings of frustration or being overwhelmed (Parent Ex. O at p. 4). In science, the student's teacher noted that the student required modifications to start producing work and that they were working with the student to find preferable assignments on issues that were still related to science and educational in nature (*id.* at p. 5). The spring progress report indicated that the student was provided with 1:1 support for scribing and verbally explaining ideas which was the most productive intervention in science (Parent Ex. P at p. 5). The student reportedly was frequently an active participant in social studies—in preferred topics of interest—but struggled to engage in topics that were of lesser interest becoming distracting to other students, according to the winter progress report (Parent Ex. O at p. 6). The teacher provided 1:1 support which was effective in curbing his distracting behavior and maintaining his attention throughout the class (*id.*).

The winter/spring teacher report indicated that the student required a highly structured school environment that allowed for opportunities for him to learn to make proactive choices and advocate for his needs (Parent Ex. Q at p. 8; Tr. pp. 34-35, 66). The teacher report noted that the student needed regular breaks both independently and with a supportive staff member to work through feelings about life events in or out of school in order to be able to attend to his work (Parent Ex. Q at p. 8). The teacher indicated that staff support and breaks helped the student navigate the school day, communicate his needs, and determine what help or accommodations he required to complete a given assignment (*id.*). The student was provided with reasonable choices with respect to how he demonstrated his knowledge and how he accessed instruction, which the program was able to accommodate due to the low student to teacher ratio (approximately 1:2) (*id.*). The winter/spring teacher report also indicated that the 1:2 teacher student ratio allowed for specialized instruction and flexibility that the student needed to develop his academic and social/emotional skills noting that the student worked best with 1:1 support (*id.*).<sup>17</sup>

The student's progress reports indicated that the student participated in individual and group counseling services (Parent Exs. O at pp. 9-10; P at pp. 7-8). Individual counseling targeted the skills needed in recognizing emotions in both self and others, expressing emotions appropriately through respectful and thoughtful communication and taking other's thoughts and feelings into consideration (Parent Ex. O at p. 9). Group counseling centered around fostering social skills through shared interests and scaffolded group activities specifically targeting reciprocal interactions; understanding and reading verbal and non-verbal cues; and strengthening problem solving skills and flexibility (*id.*). The winter progress report indicated that the student was scheduled to receive OT one session per week individually, but the student was an unwilling participant in pull out therapy. (*id.*). However, the spring report indicated that he was able to cooperate and have thoughtful discussions during push-in sessions particularly where scaffolding was provided and flexibility was targeted (Parent Ex. P at p. 7).

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<sup>17</sup> The winter/spring teacher report noted that the class size never exceeded seven students in total (Parent Ex. Q at p. 8; Tr. pp. 34-35, 66).

The psychologist who conducted the February 2019 neuropsychological evaluation testified that she was familiar with AU as she had worked with a number of students who attended AU (Tr. p. 59). Based on her understanding of the student's needs, and her familiarity with the program provided at AU, the psychologist testified that the program at AU was the type of program designed to meet the student's needs (Tr. pp. 60-61). She indicated that AU was a very small, accommodating school, that was very individualized to the student's needs (Tr. p. 60). She testified that AU worked with very bright student and they had a very well-developed understanding of autism and executive functioning struggles (Tr. p. 60). The psychologist also stated that AU had specific strategies and accommodations to support students, like the student in this case, who struggle to regulate themselves in a large classroom, as well as have difficulty with transitions and remaining calm to get through the work (Tr. p. 60).

In her decision, the IHO erred by focusing on the recommendations contained in the February 2019 neuropsychological report and whether the parent had demonstrated that AU had either implemented those recommendations or explained why AU deviated from complying with the report's perceived mandates in full. While the February 2019 neuropsychological report is useful as a tool to gain insight into the student's needs, particularly given the dearth of any evidentiary input from the district during the impartial hearing, the report merely contains suggested recommendations related to the student's needs and does not establish a standard that must be adhered to in order for the parent to prevail on her tuition reimbursement claim. Likewise, the IHO erred by finding that the parent did not adequately demonstrate the deficiencies of Summit or provide adequate evidence concerning the circumstances of the student's departure from that placement. As with the student's needs, any evidentiary shortcomings concerning the district placement are attributable to the district's failure to participate in the impartial hearing and should not be used against the parent in her effort to obtain tuition reimbursement.

Accordingly, in order to receive tuition reimbursement for AU, the parent "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). Evidence in the hearing record demonstrates that to support the student's needs, AU provided a small class size of six students with one lead teacher, a specialized support provider, and positive peer models. The student's schedule provided core subject areas including mathematics, ELA, science, and social studies focusing on academic skill development. The program provided 1:1 support to address the student's needs with respect to academics—particularly regarding the student's challenges with writing—as well as frustration, and dysregulation.

To address the student's needs with respect to maintaining interest, and motivation, the program included a selection of enrichment courses where the student could choose courses that speak to his interests and strengths. Also, with regard to the student's need for flexibility, the AU program offered reasonable choices and accommodations. Breaks, scaffolding, flexibility, and accommodations were provided to help the student remain focused and to reduce frustration. The student's day began with a homeroom period designed to help him prepare for the day and the program used a daily report card to track academic and behavioral data through each day which allowed the teachers to identify significant trends over time in both domains (Parent Ex. I at p. 1). The daily report cards data provided students with feedback every day on how they were doing as well as enabling communication with parents regarding the students' strengths and areas of need

within each content area (*id.*). The hearing record indicates that the student's teachers facilitated self-advocacy skills throughout the day to support the student's communication ability to reduce frustration, as well as noncompliant and defiant behaviors. Additionally, the student received OT services to address his needs with respect to writing and self-regulation. The AU program also provided group and individual counseling services to address the student's social emotional needs. Although AU was compelled to move to remote learning as a result of the Covid-19 pandemic, evidence in the record demonstrates that most of the special education services and supports provided to the student were provided in an online format to the extent it was possible to do so, and the student participated in class, accessed the curriculum, worked on his social-emotional and self-regulatory needs and also continued to make some progress after the remote program modifications went into effect. As a result, the parent has met her burden by demonstrating that AU provided the student with appropriate specialized instruction to address his unique individual needs.

### **3. Progress**

The parent also contends that evidence in the hearing record demonstrates that the student made progress while at AU including during the school's transfer to remote learning. While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some 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"]).

The 2020 winter progress report indicated that the student demonstrated variable participation in ELA class but as he spent more time at AU, he became more comfortable sharing his concerns and worked through problems more quickly (Parent Ex. O at pp. 3-4). In ELA, the student was inconsistent and often unwilling to discuss alternatives to assignments (Parent Ex. P at p. 3). However, the student was able to request to work 1:1 with a staff member he felt comfortable writing with and engaged in productive brainstorming and planning sessions in a breakout room (*id.*). The spring semester report indicated that the student mastered all the mathematics skills introduced during that marking period and he participated in class discussions when he felt confident in his abilities (*id.*). The spring progress report also indicated that the student was an active participant in counseling noting the student made progress with respect to his ability to understand others' perspectives and displayed empathy when presented with an alternative point of view (*id.* at p. 7). It was also reported that the student made strides toward regulating his tone and collaborated with staff to find helpful alternatives (*id.*). The spring 2020 progress report indicated that in counseling, the student demonstrated success in using co-regulation in moments of frustration mirroring back the frustration, empathizing with volume and facial expressions, and maintaining a calm and soft tone through the conversation (*id.* at pp. 7-8). In occupational therapy, the student was observed to participate more willingly in classroom tasks and had demonstrated his ability to be more consistent and flexible with classroom assignments and take in others' viewpoints during dialogue (*id.* at p. 7). The student's social studies teacher indicated in the spring progress report that the student exhibited increased engagement with classroom concepts and asked questions when he did not understand the information (*id.* at p. 6). The teacher also noted that the student was more readily engaged in non-preferred topics

during the semester while working with peers particularly during independent activities (*id.*). The student's science teacher noted that over the semester the student's demeanor improved and his conversations became less angry and frustrated and more congenial, although completing minimal work (*id.* at p. 5). According to the student academic performance report, his teacher indicated that during remote learning—from the middle of March to the end of the school year—the student struggled with emotional issues that took precedence over academic gains (Parent Ex. Q at p. 8).

The assistant director indicated that the student successfully attended the AU program both on-premise and remotely and testified that the student developed improved self-regulation skills and was better able to identify and express his frustrations while reducing his periods of emotional dysregulation (Parent Ex. U at p. 4). Further, the student reportedly better attended and participated in his courses (*id.*). With respect to remote learning, the assistant director stated that initially the student struggled to adjust to the program but with targeted services and interventions, he adapted and improved in his ability to attend and learn remotely (*id.*).<sup>18</sup>

Accordingly, the hearing record indicates that even in the short period of time the student attended AU—one semester—and despite interfering social/emotional issues, the student received benefit from the program provided. The student reportedly demonstrated an increase in the ability to share his concerns and was then able to work through problems more quickly, he mastered all the mathematics skills presented, and by the spring time he showed an increase in participation, empathy, and seeing others' points of view. The student was also observed to have increased his engagement in non-preferred topics and presented with an improved demeanor.

As a result, based on the totality of the evidence presented in the hearing record, the parent met her burden of demonstrating that AU provided the student with specially designed instruction which addressed the student's unique individual needs and allowed him to make some educational progress. As a result, the IHO's determination denying her request for tuition reimbursement must be reversed.

### **C. Equitable Considerations**

The parent also asserts that equitable considerations weigh in her favor with respect to her claim for tuition reimbursement.

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 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; 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

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<sup>18</sup> Remote learning was required due to executive order for New York State resulting from the COVID-19 pandemic (Parent Ex. U at p. 4).

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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten 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., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The hearing record reflects that the district was notified of the issues surrounding the student's removal from the district placement and the need to reconvene the CSE to find an alternate placement for the student in November 2019 (Parent Ex. G). At the same time, the parent notified the district of her intention to place the student at AU if the district did not provide a suitable placement (Parent Ex. F). There is no indication from the hearing record that the parent impeded the CSE or failed to cooperate with the district at any stage of the CSE process. Accordingly, as the hearing record supports a conclusion that the parent acted in a cooperative manner with the CSE and provided the district with timely notice of her intention to unilaterally place the student at AU, equitable factors weigh in favor of awarding the parent full tuition reimbursement for the student's attendance at AU during the 2019-20 school year.

## **VII. Conclusion**

Based on the foregoing, I find that under the totality of the circumstances, the student's placement at AU provided him with appropriate specialized instruction to address his unique individual needs and was reasonably calculated to provide him with educational benefit (Gagliardo, 489 F.3d at 112, 115; Frank G., 459 F.3d at 364; see M.S., 231 F.3d at 104). I further find that, upon consideration of equitable factors, reimbursement for the cost of the student's tuition at AU during the 2019-20 school year is warranted.

I have considered the parties' remaining contentions and find that I need not address them in light of my determination herein.

**THE APPEAL IS SUSTAINED TO THE EXTEND INDICATED**

**IT IS ORDERED** that the portion of the IHO decision dated September 9, 2020, which found that AU was not an appropriate unilateral placement is reversed;

**IT IS FURTHER ORDERED** that, upon proof of payment, the district shall reimburse the parents for the cost of the school's tuition at AU from January 2, 2020 to the end of the 2019-20 school year in June 2020.

**Dated:**            **Albany, New York**  
                         **November 30, 2020**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**