



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 21-024

Application of a STUDENT WITH A DISABILITY, by her parents, 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 Offices of Regina Skyer and Associates, L.L.P., attorneys for petitioners, by Lauren Eisler, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the Gillen Brewer School (Gillen Brewer) for a portion of the 2019-20 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case and the IHO's decision is presumed and will not be recited here. Briefly, the student's medical history is complex and at the time the parents requested a due process hearing, she exhibited deficits in social/emotional, fine and gross motor, speech and language, self-help, academic and adaptive skills (see Parent Ex. C). As a young child, the student received services through the Early Intervention Program and the Committee on Preschool Special Education of speech (feeding) therapy, occupational therapy (OT), and physical therapy (PT) (Parent Exs. C at p. 2; P at pp. 1-2).

On June 8, 2018 the CSE convened, determined that the student was eligible for special education and related services as a student with a speech or language impairment, and for the 2018-19 school year (kindergarten), recommended that she receive integrated co-teaching (ICT services), OT, PT, and speech-language therapy (Dist. Ex. 2 at pp. 14, 18).¹ According to the parent, the student struggled at school during fall and winter 2019, and on February 26, 2019 the CSE reconvened and recommended continuing related services and a change in placement to a 12:1+1 special class for English language arts (ELA) and math starting March 12, 2019 (Parent Ex. P at p. 2; Dist. Ex. 14 at p. 12).

The student began attending a 12:1+1 classroom in March 2019; however, she experienced significant anxiety and struggled within the school environment; therefore, on the advice of her physician she was withdrawn from the district school and began homeschooling in March 2019 (Tr. pp. 245-46; Parent Exs. C at p. 4; P at p. 3). The CSE reconvened on April 3, 2019, to add group paraprofessional services to the student's IEP (compare Dist. Ex. 14 at p. 12, with Dist. Ex. 18 at p. 12).²

In September 2019, the student attended a private parochial school as a "repeating kindergartener" and received related services of speech-language therapy, OT and PT outside of school; however, the student struggled at the private school and was asked to leave after attending for approximately two weeks (Parent Exs. C at p. 4; P at p. 4). Subsequently, the student was homeschooled again beginning in October 2019 (Parent Exs. C at p. 4; P at p. 4). By letter dated March 10, 2020, the parents notified the district of their intent to unilaterally place the student at Gillen Brewer and requested that the district either address their concerns or expedite funding for that placement (see Parent Ex. B). The student began attending Gillen Brewer at the end of March 2020 (Parent Ex. P at p. 5).

A. Due Process Complaint Notice

In a due process complaint notice dated April 9, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year on procedural and substantive grounds (see Parent Ex. A). The parents sought direct funding from the district for costs incurred in enrolling the student at Gillen Brewer for the 2019-20 school year and for transportation (id. at p. 5).

Specifically, the parents alleged that the district failed to make an appropriate placement recommendation leading to the student being homeschooled beginning in March 2019, and again in October 2019 (Parent Ex. A at pp. 2-3). The parents further contended that the district has not

¹ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 8 NYCRR 200.1 [zz] [11]).

² For the purposes of this decision, the April 2019 IEP will be cited to as the student's operative IEP for the 2019-20 school year (Dist. Ex. 18). Comparison of the February 2019 IEP with the April 2019 IEP showed that the only change the CSE made was to add the support of a group health paraprofessional (compare Dist. Ex. 14, with Dist. Ex. 18).

convened a CSE meeting since February 2019, and has not developed the student's program for the 2020-21 school year (id. at p. 4).³

B. Impartial Hearing Officer Decision

The IHO convened a prehearing conference with the parties on September 15, 2020 (Sept. 15, 2020 Tr. pp. 1-30).⁴ An impartial hearing convened on October 9, 2020 and concluded on October 29, 2020 after three days of proceedings (Tr. pp. 1-258). In a decision dated December 18, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year (IHO Decision at p. 10). The IHO also found that the parents' unilateral placement of the student at Gillen Brewer was inappropriate and denied the parents' request for tuition funding (id. at pp. 11-12).

The IHO found that for the 2019-20 school year, the district had not met its burden and had failed to provide the student with a FAPE because the program and services provided to the student were inadequate, namely because the recommended program did not properly address the student's emotional issues (IHO Decision at pp. 9-10). The IHO noted that the student's severe separation anxiety and emotional issues impacted her learning; therefore, the IEP should have addressed the student's psychological needs (id.). Next, the IHO cited the district psychologist's testimony that the student had behavioral difficulties, yet found that no behavioral assessment was conducted or counseling offered (id. at p. 9). Furthermore, the IHO found that the district psychologist's testimony indicated that determinations of class size were based on availability rather than on the student's needs and stated that "the [s]tudent's needs should have overridden any concerns regarding class-size availability" (id. at pp. 9-10). Finally, the IHO found that the denial of FAPE was not limited to the narrow window of time asserted by the district, rather that the student was denied a FAPE for the entire 2019-20 school year (IHO Decision at p. 10).

With regard to the parents' unilateral placement, the IHO found that Gillen Brewer was not appropriate because the school did not provide PT services to the student (IHO Decision at p. 11). The IHO noted that all of the student's previous IEPs had recommended separate PT and OT services (id.). The IHO further noted that the neuropsychologist described the need for separate services and had confirmed that there was a difference between OT and PT, specifically noting the issues classroom-integrated PT would address (id.). However, according to the IHO the neuropsychologist did not offer a "convincing explanation" why Gillen Brewer was an appropriate placement despite the lack of PT, and the program director's description of the overlap between OT and PT services "was also unconvincing" (id. at pp. 11-12). The IHO determined that PT services were "exceptionally important" for the student, and based on the lack of PT as a separate service, found that Gillen Brewer did not provide educational instruction specially designed to meet the unique needs of the student (id. at p. 12). Accordingly, the IHO determined that the

³ While the parents contend that the CSE did not meet after the February 2019 meeting, the hearing record showed that the CSE reconvened on April 3, 2019, which led to a revised IEP and set an annual review date to be held on or about April 3, 2020 (Parent Ex. A at p. 4; Dist. Exs. 16 at p. 1; 18 at pp. 1, 12).

⁴ References in this decision to the prehearing conference transcript will be indicated with the September 15, 2020 date to differentiate it from the transcripts from the hearing dates.

parents failed to prove that Gillen Brewer was appropriate and denied the parents' request for tuition funding (id.).

IV. Appeal for State-Level Review

On appeal the parents allege that the IHO erred in determining that Gillen Brewer was not an appropriate placement solely because it did not offer PT as a separate service to the student. The parents argue that the IHO should have found Gillen Brewer was an appropriate unilateral placement because it provided the student

with a small class of ten students and three teachers, with students of at least average intelligence and learning disabilities, with multisensory, research-based instruction using an Orton-Gillingham methodology targeted to remediate [the student's] skill deficits and areas of underachievement; with opportunity for individual (1:1), small group and whole-group lessons; with classroom modifications including graphic organizers, visual charts, and multisensory manipulatives; with social-emotional lessons taught by her licensed speech pathologist and licensed school counselor to work on her social skills; and occupational therapy to address her fine motor skills and self-regulation techniques, as well as gross motor skills to allow her to access the curriculum; within a small school and class of similarly functioning peers without behavioral issues

(Req. for Rev. at p. 6).

The parents contend that the "[the student] made demonstrable progress while at [Gillen Brewer] and this progress was consistently monitored and measured through classroom observations and assessments." The parents argue that IHO "did not consider the credible testimony" of the neuropsychologist that Gillen Brewer addressed the student's needs without PT services, and that the student would receive PT in a medical clinical setting outside of school. The parents also point to testimony by the student's mother that she was "attempting to secure physical therapy privately," but that those efforts were delayed by the pandemic. The parents assert that Gillen Brewer delivered "gross motor skill and strength development" in OT using a blended approach and that the private school was not required to maximize the student's potential by providing PT alone. The parents further argue that the IHO did not reach the issue of equitable considerations, but that there are no facts that would support denying the parents' request for tuition reimbursement on equitable grounds.

In an answer, the district asserts that the IHO correctly concluded that Gillen Brewer was inappropriate because it did not adequately address the student's gross motor needs through PT services. As a result, the district asserts the IHO's decision denying tuition reimbursement should be upheld and requests the undersigned dismiss the parents' appeal with prejudice.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir.

2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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]).⁵

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. Unilateral Placement

As the district has not cross-appealed from the IHO's determination that it failed to offer the student a FAPE for the 2019-20 school year, that issue has become final and binding upon the

⁵ The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).

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

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

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Specially Designed Instruction

With regard to the parties' dispute over whether Gillen Brewer was inappropriate because it failed to provide separate PT services to the student, review of the hearing record showed that Gillen Brewer was appropriate to meet the student's identified needs.

The failure to provide a student with a related service in order to benefit from instruction is potentially problematic for parents who are trying to prove that a unilateral placement appropriately addresses a student's special education needs. To be sure, "parents need not show that a private placement furnishes every special service necessary to maximize their child's potential" (Frank G., 459 F.3d at 365), and thus the failure to provide a related service is not always fatal (see G.R. v. N.Y.C. Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009] [holding that the parent was not required to establish that the unilateral private placement offered speech and language therapy in order to prevail. Rather, when the unilateral private placement and the student's deficiencies are examined in their totalities, it was clear that the program was well designed to serve the student's needs]). But parents must show that the unilateral placement provides sufficient services to adequately address a student's special education needs (L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [denying reimbursement where the evidence was generally sparse as to whether the unilateral placement addressed the student's unique needs with respect to his cognitive functions, social and emotional issues, and fine and gross motor skills]). Ultimately, 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 105, 112), and the appropriateness of a unilateral placement turns on whether it was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 1001; Frank G., 459 F.3d at 364 (quoting Rowley, 458 U.S. at 207)).

The recommendations for related services in the April 2019 IEP are not a disputed issue in this matter; however, a brief summary of the student's identified needs is necessary in order to determine the appropriateness of Gillen Brewer.

Review of the November 2019 neuropsychological evaluation report showed that the student's overall performance on measures of cognitive ability fell within the low average range, noting that she demonstrated specific weaknesses in expressive language, articulation, word finding, and the ability to repeat contextual information on the sentence level and for short narratives (Parent Ex. C at p. 11). Additionally, the evaluator reported that the student's concept formation skills were "significantly reduced," her receptive language skills were "vulnerable," she had difficulty "with sequential processing of instructions, and independently understanding and following multi-step directions" (id.). Furthermore, the evaluator indicated that the student's "auditory working memory and attention capacity [was] significantly reduced, further compromising the learning process," and noted that the student exhibited "poor performance on tasks of memory and learning for contextual information as well as multi-modal (visual and verbal information) information presented over multiple learning trials" (id.). In academics, the evaluator reported that the student performed significantly below age and grade expectations in reading, mathematics, spelling and written expression (id.).

With regard to the student's social/emotional skills, the evaluator described the student as a "shy girl who c[ould] be well-related with adults when she [was] comfortable" (Parent Ex. C at p. 10). Additionally, the evaluator reported that the student was "experiencing significant levels of anxiety that [were] common for young children with chronic illness" and noted that when asked questions about school, the student indicated that she did not want to go to school and that "she was 'scared'" (id.). Furthermore, the evaluator opined that "[f]urther hindering [the student's] functioning [were] symptoms of separation anxiety including persistent reluctance and refusal to go to school, along with excessive distress when separated from her parents" (id. at p. 12).

A January 2020 neurological consultation report indicated that the student had neurological and neurodevelopmental disabilities, specifically noting difficulties in motor, language, memory, behavioral and cognitive skills (see Parent Ex. D at p. 3). The evaluator opined that the student's disabilities were permanent and that this "pattern of disability" would worsen over time "as developmentally silent parts of the brain mature and their injuries [would] [] become more evident" (id.).

With regard to the student's gross motor skills, an undated PT student progress report from the student's kindergarten year indicated that the student had made minimal improvement in balance and coordination (Dist. Ex. 9 at p. 1).⁶ The physical therapist noted that the student had regressed since the beginning of the school year due to transitions in the classroom setting and described that the student often cried, wanted her mom, and wanted to go home (id.).⁷ Additionally, the physical therapist indicated that the student could ascend stairs in a step-over-step pattern and descend stairs in a step-to-step pattern (id.). The student could perform a single leg stance with either leg for four to five seconds and could hop in place three to four times (id.). The physical therapist reported that the student could kick a soccer ball forward towards a target five to seven feet away, but only swung her lower leg and lacked trunk rotation (id.). Furthermore, the student could throw a ball, but was fearful when the ball was thrown at her, which the physical therapist opined would make gym or play with peers difficult (id.). Finally, the physical therapist indicated that the student was unable to perform jumping jacks coordinating both arms and legs together but could perform with either legs or arms, and that she was unable to cross midline when performing windmills (id.).

According to an undated OT student progress report from the student's kindergarten year, her in-hand manipulation skills were slowly emerging, she grossly colored in pictures using too much crayon pressure, used an inefficient thumb down pattern for cutting, and snipped instead of using an efficient open/close pattern (Dist. Ex. 10 at p. 1). The occupational therapist indicated that the student benefitted from highlighted lines as a visual for cutting (id.). The student's graphomotor skills showed decreased motor control for tracing and handwriting, she used an inefficient bottom to top letter formation, struggled with formation of some letters including reversals of "z", and she continued to work on written organization (sizing, line orientation and

⁶According to the hearing record, the student attended kindergarten during the 2018-19 school year (Parent Ex. C at pp. 1, 2-4; Dist. Ex. 23). The PT progress report was prepared when the student was five years, six months old, which was in February 2019 (compare Dist. Ex. 9 at p. 1, with Dist. Ex. 11).

⁷ The student transitioned from receiving ICT services in a classroom setting into a 12:1:1 special class setting in February or March 2019 (see Dist. Exs. 11; 18 at pp. 11-12).

spacing) (id.). Finally, the occupational therapist reported that the student was quiet, and that she often cried, wanted her mom and wanted to go home, and noted that more recently she had a difficult time transitioning between activities and between classes (id.).

A February 2019 speech-language progress report indicated that the student had made progress in her receptive and expressive language skills, related well with her peers and engaged in all activities (Dist. Ex. 11 at p. 1). The speech-language pathologist reported that the student had recently been struggling with transitioning between classes and that at those times she "crie[d], shut down and refuse[d] to do work" (id.). Additionally, the speech-language pathologist noted that the student had improved her receptive language abilities by increasing her vocabulary and conceptual development to understand age-appropriate language concepts presented during social and academic activities (id.). Expressively, the student continued to have difficulty expressing wants and needs effectively, answering questions and retelling a story (id.).

Comparison of the April 2019 IEP with the student's OT and speech-language progress reports showed that the present levels of performance were developed from the progress reports (compare Dist. Ex. 18 at pp. 2-3 with Dist. Exs. 10 at p. 1; 11 at p. 1). Regarding the student's physical development, the April 2019 IEP does not contain present levels of performance in PT, rather the IEP indicated that the student "enjoy[ed] and [could] participate in physical activities (gym & recess) with supervision," and that the injuries she sustained at birth "require PT and OT in school" (see Dist. Ex. 18 at pp. 2-3).

With regard to the student's social/emotional skills, the April 2019 IEP present level of social development indicated that the student was a shy anxious child, "who once relaxed could relate to adults and peers" (Dist. Ex. 18 at p. 3). Additionally, the IEP noted that the student had "detachment issues," school could be a source of frustration and fear for her at times, and that her separation anxiety had diminished some since being placed in a smaller classroom setting (id.). The IEP indicated that the student needed to be able to express her needs (id.). Finally, the April 2019 IEP reported that the student "suffer[ed] greatly from separation anxiety and hate[d] to leave her mother and family" and indicated that it was best to be sensitive to that source of anxiety and to soothe her (id. at p. 2). Furthermore, the IEP suggested that the student be taught self-soothing methods such as deep breathing or drawing in a journal (id.).

Turning to the student's program at the unilateral placement, according to the program description included in the hearing record, Gillen Brewer is an intensive 12 month "family-oriented, developmental, therapeutic program designed to meet the diverse needs of children with language-based and non-verbal language disabilities" (Parent Ex. G at p. 1). Additionally, Gillen Brewer provides a 10:1+2 school age program designed for students who require a high level of support, and provides therapeutic services including OT, speech-language therapy, and counseling (id.). The elementary program director (director) at Gillen Brewer testified that they offer a 12-month full-time special education program for students with special needs including autism, language-based disabilities, motor deficits and delays, and emotional challenges for ages 2.8 to 11 (Parent Ex. O at p. 1).

The student began at Gillen Brewer in late March 2020 and was assigned to a 10:1+2 classroom with homogenous peers (Tr. pp. 190-92; Parent Ex. P at p. 5).⁸ The June 2020 end of year report indicated that the student's program included "synchronous, real-time remote academic lessons and related services in addition to thoughtfully individualized asynchronous activities" (Parent Ex. M at p. 1; see Parent Ex. J). With regard to language arts, the director testified that the student required a small group for direct instruction (two to four students) to provide support "in learning and strengthening her phonemic awareness, her decoding skills, her ability to encode and write on paper" (Tr. pp. 205-06). The director explained that because of the student's deficits, literacy was taught in 30-minute to one-hour increments in a small group of two for two periods (Parent Ex. O at p. 3). She further explained that the lessons addressed phonics, connecting letters to sounds, blending sounds, decoding, encoding and reading comprehension (id.). The director indicated that the class also used Preventing Academic Failure (PAF), which she described as an "Orton Gillingham research-based methodology" (id.). The director specified that from March 2020 through June 2020, the student worked on early literacy skills such as identifying letters and corresponding sounds, struggled with foundational phonics, decoding and comprehension skills, presented with inconsistent skills day-to-day, and displayed significantly splintered skills (id.).

Also with regard to language arts, the June 2020 end of year report indicated that the student received literacy instruction in both whole and small group settings utilizing: small academic groupings, frequent check-ins for comprehension and attention, explicit instruction and directions, incorporation of activities and visuals that were of interest to her, repeated practice, and continuous review of previously taught concepts (Parent Ex. M at p. 3). The teacher indicated that the student exhibited splintered skills that varied from day to day, and she received individualized decoding and reading comprehension instruction during "book club" (id.). In phonics, the student worked on phonemic and phonological awareness skills and lessons focused on: identifying, counting, segmenting, and blending individual sounds in CVC words, solidifying letter-sound correspondence, basic sight word recognition and recall, and spelling (id.). The teacher reported that the student's challenges with phonological awareness skills impacted her fluency and noted that she was working on decoding single words, short phrases and small sentences "in a slow, sequenced, and systematic manner" (id.). In writing, the report indicated that the student worked on identifying fragments in a paragraph, differentiating between sentence types, generating examples of sentence types after listening to a story, echoing a question when given a response, and expanding sentences using The Writing Revolution methodology (id.). According to the teacher, all skills were modeled, taught, and practiced orally prior to writing, and she used graphic organizers and visuals to support language development (id.).

In math, the director indicated that the teacher worked with the student in 30-minute increments in a small group of two to five students focusing on: fluency with numbers one to 20, adding and subtracting, comprehending numbers in word problems and number sense skills (Parent Ex. O at p. 3). She further explained that the student needed support in math using manipulatives and place value, using a hands-on approach and moving from a concrete to a more pictorial approach (Tr. p. 206). The director emphasized that small group instruction was really important

⁸ At the time the student began receiving instruction from Gillen Brewer, the school had transitioned to an "At-Home Learning Program" provided remotely due to the COVID -19 pandemic (Tr. p. 192; see Parent Exs. H; J; M at p. 1).

for the student in order to keep her attention and focus and to be able to answer questions, and to help her feel comfortable to share what she knows (*id.*). According to the June 2020 end of the year report, during math instruction the teacher noted that the student learned best with individualized, multisensory instruction with repeated practice and review to ensure that she was focused, and wait time (Parent Ex. M at p. 3). The teacher reported that the student was being instructed using a first-grade curriculum and lessons had included a "mix of functional math skills as well as solidifying number sense and operations for numbers zero to 20" (*id.*). The teacher also indicated that the student had participated in functional math lessons such as reading a calendar, writing the date, knowing the days of the week, months of the year, telling time to the hour on analog and digital clocks, comparing and measuring lengths to nonstandard units using a start line (*id.* at p. 4).

Finally, the director testified that the student had daily opportunities for 1:1 support throughout the school day to provide extra support where she was struggling and needed additional attention (Parent Ex. O at p. 4).

Turning next to related services, the June 2020 end of the year report indicated that "to support [the student's] therapeutic needs, the school provide[d] face-to-face therapy sessions and supplemental activities and exercises to increase generalization of skills," noting that students "submit[ted] completed work for assessment purposed" (Parent Ex. M at p. 1). According to the student's schedule, she participated in daily "At Home Movement" sessions with suggested "OT assignments;" one "live" session per week each of OT, counseling, and speech-language therapy; three sessions per week of time for the student to "[c]omplete therapy assignments from Google Classroom;" and one "live" session each per week of OT group and "Social Group" (Parent Ex. J).

The neuropsychologist who completed the November 2019 neuropsychological evaluation testified that the student's social/emotional skills as measured by clinical interview and an assessment "scored as clinically significant for anxiety, and significant difficulty navigating social situations and understanding the impact of her own behavior," and opined that the student's anxiety negatively impacted her social and academic skills, specifically indicating reading, writing, math and engagement with school (school refusal) (Parent Ex. N at p. 3). The neuropsychologist indicated that the student "require[d] therapeutic interventions in school to facilitate meaningful access to academic and social/emotional curricula, and recommended that the student attend "a highly-structured, self-contained, nurturing special education environment" with students of "average intellectual skills whose academics [were] inhibited by language delays" (*id.*). She further testified that the student "required well-integrated related services including speech/language, occupational, and physical therapy, ideally provided in collaboration with her school or at school" (*id.*).

The director testified that addressing the student's anxiety "was a significant part" of her program and she stated that the class used "zones of regulation" which she described as a program used to identify emotions, understand that people have different emotions, and teach strategies to use to get back to a stable or positive emotion (Tr. p. 197; Parent O at p. 2). The director testified that the student attended a social group led by a speech-language pathologist and a school counselor, which provided the student with an opportunity to work on social skills and learn to interact within a group (Parent Ex. O at p. 3). The June 2020 end of year report reflected that the student participated in counseling sessions focused on building rapport and increasing her comfort

level related to her new school (Parent Ex. M at p. 1). The psychologist reported that the student had been an eager and active participant in all activities, and she had been able to identify and express basic feelings such as mad, sad, scared and happy (id. at p. 2). Finally, the psychologist reported that the student became distracted at times and could talk about an interest that was off topic; however, she was easily redirected back to the activity (id.).

Next, the June 2020 end of year report indicated that the student's speech-language therapy sessions focused on "building rapport" with her speech-language pathologist "while gathering information across language domains through informal assessments and observations" (Parent Ex. M at p. 2). According to the report, the student demonstrated an understanding of location concepts, followed simple one-step directions, and answered concrete wh- questions (id.). Expressively, the speech-language pathologist reported that the student used a wide range of vocabulary to describe objects, although her spoken language often lacked organization (id.). The speech-language pathologist indicated that they had established a rapport through game play and conversation questions, and reported that several articulation errors had been noted in conversation which would be "further assessed moving forward" (id.). The speech-language pathologist further reported that future sessions would continue to support the student's ability to highlight details to answer more abstract questions to support comprehension, and target organizing personal narratives through introduction of narrative word visuals and/or a graphic organizer (id.).

The director testified that the student participated in a small group led by an occupational therapist which worked on fine motor and self-regulation techniques (Parent Ex. O at p. 3). According to the June 2020 end of year report, the student was receiving OT to address her fine motor delays, and the report described that sessions focused on building rapport and observing her motor skills (Parent Ex. M at p. 2). The occupational therapist indicated that the student presented with hand weakness, noting her use of immature grasping patterns and hyperextension of the thumb (id.). Additionally, the student demonstrated good accuracy coloring inside the lines of a picture and was working on improving her graphomotor skills (e.g., handwriting legibility, sizing, line regard) (id.). Finally, the occupational therapist indicated OT sessions would continue to address the student's upper body strength, grasping patterns, and dexterity (id.).

Turning to the crux of the appeal, the director testified that Gillen Brewer did not provide PT services (Tr. pp. 202-03). However, she explained that the occupational therapists addressed both fine and gross motor within OT and that the two therapy gyms in the building addressed PT "within an occupational therapy umbrella" (Tr. pp. 203).⁹ Specifically, the director testified that the occupational therapists at Gillen Brewer worked on and developed goals for both fine and gross motor control and development (Tr. p. 205). The director further testified that the student's OT goals included addressing the student's upper body strength, which she opined would be a crossover between PT and OT (Tr. pp. 207-08). The neuropsychologist agreed that OT and PT were different services, and the student did have PT needs due to her medical issues; however, she

⁹ The director acknowledged that the student was not able to access the gyms at Gillen Brewer during the timeframe in dispute (Tr. p. 207).

opined that Gillen Brewer was appropriate because the student was otherwise going to get PT, and the school offered many of the other services (see Tr. pp. 220-21, 224-25; Parent Ex. N at p. 4).¹⁰

The most recent information about the student's gross motor skills indicated that she could ascend and descend stairs, perform a single leg stance with both legs, hop in place, walk over a hurdle, throw a playground ball, and kick a soccer ball (Dist. Ex. 9 at p. 1).¹¹ While the IHO was not wrong in his determination that the student had gross motor needs and would benefit from PT, the evidence detailed above does not support the IHO's determination that Gillen Brewer was inappropriate solely because it did not provide PT services (IHO Decision at pp. 11-12). Rather, the evidence in the hearing record shows that the student has a complex medical history which resulted in her also having global needs in academic, fine motor, and speech-language skills, which Gillen Brewer amply addressed. Moreover, the evidence showed that the student's social/emotional needs greatly impact on her ability to access and learn from curriculum, and the parties do not dispute that Gillen Brewer addressed those needs (see Parent Exs. C at pp. 11-12; M at p. 1-2). As such, the totality of the evidence in the hearing record shows that Gillen Brewer provided the student with special education programming that was reasonably calculated to enable the student to make progress appropriate in light of her circumstances.

2. Progress

In this case, the IHO did not assess relevant evidence regarding the student's progress at Gillen Brewer. 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 June 2020 end of year report demonstrated that even though the student only attended Gillen Brewer for approximately three months (March 2020 through June 2020), the student made notable progress across all domains (see Parent Ex. M). Specifically, the end of year report showed that the student was a "friendly, talkative, and cheerful student" who enjoyed sharing information

¹⁰ The neuropsychologist testified that the parent had requested referrals for PT providers, and the parent testified that PT was going to be provided by an outside agency, but it was delayed due to the pandemic (Tr. pp. 224, 233). Although the IHO described some of the testimony regarding the lack of PT services in particular as glib and evasive, the IHO failed to address any other aspects of the unilateral placement such as the 10:1+2 special class, OT, speech-language therapy, counseling, and 1:1 support, or explain why the student was unlikely to make appropriate educational progress in light of her circumstances in the absence of PT services once taking into account the other services provided by Gillen Brewer.

¹¹ Although not dispositive, the April 2019 IEP did not contain detailed information about the student's gross motor skills (and they were not in dispute), but the annual goals in the IEP—to ascend and descend stairs using reciprocal stepping while "keeping pace with her peers" and catching/throwing a playground ball with a peer "in order to participate in recess/PE activities"—do not reflect that the student's gross motor needs were so acute that the absence of PT services at Gillen Brewer rendered the student's entire program inappropriate (see Dist. Ex. 18 at pp. 2-3, 8-9). While the IHO described PT services as "exceptionally important for the [s]tudent" (IHO Decision at p. 12), the IHO did not explain why the student would be unlikely to make progress at Gillen Brewer in the absence of PT services specifically.

about herself and activities she enjoyed (*id.* at p. 1). Additionally, the psychologist reported that "more recently" the student had been more independent in her interactions with the psychologist, that during sessions she was able to identify and express basic feelings (mad, sad, scared, happy), and that she was an eager and active participant in all activities presented (*id.* at p. 2). In speech-language therapy the student demonstrated improvement in her reciprocity during a conversation about a topic of high interest and that with verbal prompts she was able to expand her inferences about a picture (*id.*). In motor development and OT, the therapist noted that the student demonstrated good accuracy coloring inside the lines of a picture and that she was working on improving her graphomotor skills (*id.* at pp. 2-3). In language arts, the teacher indicated that the student's "ability to use her fingers to count and identify the beginning and middle sounds in a CVC word" had improved since April and that even though she was not yet demonstrating learned skills independently, she enjoyed participating in lesson with her classmates (*id.* at p. 3). In math, the teacher reported that the student had begun to recognize numbers to 40 on ten frames and was eager to share the amount of counters on given ten frames with the group (*id.* at pp. 3-4). Additionally, the teacher reported that the student appeared excited and eager to participate in functional math lessons with her peers (*id.* at p. 4). Finally, the director testified that the student had shown "measurable progress" and met some of her related services goals although she continued to struggle with social/emotional issues, speech-language, and fine and gross motor skills (Parent Ex. O at p. 4). Accordingly, the hearing record indicates that even in the short period of time the student attended Gillen Brewer, she made progress in the program provided, which factors in favor of a finding that the private school was appropriate.

As a final note, the parents asserted before the IHO that they paid \$1,000 toward the costs of Gillen Brewer, they were unable to afford the remainder of the tuition costs despite being obligated to pay them, they cooperated with the CSE, and provided a timely notice of unilateral placement (Parent Exs. I; P at p. 6; Parent Post-Hr'g Br. at p. 17). Neither the district nor the IHO challenged the parents' evidence or further addressed these issues (see generally IHO Decision; District Post-Hr'g Br.). On appeal, the parents again assert that there was "no evidence of any inequitable conduct" on their part that would preclude or limit tuition reimbursement. I agree with the parents' assertion that there is no basis in the evidence that would support a reduction or denial of their reimbursement request for Gillen Brewer from March 27, 2020 through June 19, 2020.

VII. Conclusion

The totality of the evidence presented in the hearing record shows that Gillen Brewer provided the student with specially designed instruction which addressed her unique individual needs, allowing her to make some educational progress. As a result, the IHO's determination denying the parents' request for the costs of the student's tuition at Gillen Brewer must be reversed.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision dated December 18, 2020 is modified by reversing that portion which found that the unilateral placement of the student at Gillen Brewer was not appropriate; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the tuition costs they paid to Gillen Brewer and directly fund the remainder of the costs of the student's tuition at Gillen Brewer from March 27, 2020 through June 19, 2020.

Dated: **Albany, New York**
 March 17, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER