



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-105

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

Appearances:

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Mitchell L. Pashkin, Esq.

Law Office of Justin Shane, attorneys for respondents, by Justin B. Shane, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that the unilateral placement respondents (the parents) obtained for their son was appropriate and ordered it to reimburse the parents for their son's tuition costs at the Trinity-Pawling School (Trinity-Pawling) for the 2018-19 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

With regard to the student's educational history, the student has a history of difficulty falling asleep since early childhood, and he attended a public elementary school for kindergarten and first grade (Tr. p. 27; Parent Ex. C at pp. 2, 4). After completing first grade, he received a diagnosis of an attention deficit hyperactivity disorder (ADHD) at age seven (Tr. p. 27; Parent Ex. C at pp. 2, 4; see Parent Ex. H at p. 1). The parents removed the student from the public school and placed him in a "small mainstream" nonpublic elementary school with small classes where he "struggled" and experienced academic challenges with respect to attention, organization, and

executive functioning (Tr. pp. 27-28; see Parent Ex. H at pp. 1, 2). During fifth grade the district prepared a "formal IEP" that provided "learning accommodations" (Tr. p. 29).

In sixth grade, the student began attending another nonpublic school, York Preparatory School (York Prep) and its Jump Start program, as it "became clear" that the student "would need more of a special setting and education support" to remain in a general education program (see Tr. pp. 28-29). According to the parent, York Prep was a mainstream school that provided class sizes of less than 14 students, where approximately one third of the students received special education support, specifically the Jump Start program which addressed executive functioning skills (see Tr. pp. 28-30). Also, at that time the student began medication to address symptoms of ADHD (Tr. p. 30). A private clinical psychologist reported that since the student began attending York Prep and initiating medication treatment he "demonstrated improvement in his academic progress" and in his ability to "make use of the tracked, structured, and individualized educational approach at York Prep" (Parent Ex. H at pp. 1, 2, 13). However, the student "demonstrate[d] continued vulnerability" regarding anxiety and difficulty sleeping (id. at p. 2).

According to a social history, a July 30, 2015 IEP indicated that the student was eligible for special education as a student with an other health-impairment and the CSE recommended that he receive integrated co-teaching (ICT) services in English language arts (ELA) and math, and also special education teacher support services (SETSS) "not limited to Math and ELA" (Parent Ex. L at p. 1). No related services were recommended (id.). The parent stated that the student continued to attend York Prep during the 2015-16 school year (ninth grade), which "was going really well up until about the end" of the year (see Tr. p. 31).

Going into tenth grade (2016-17 school year), the student reported to the parent that the ADHD medication was causing him "a lot of anxiety" and he requested to discontinue it (Tr. p. 31; see Parent Exs. C at p. 2; J at p. 1). As the student's medication was adjusted, according to the parent tenth grade at York Prep was "problematic" in that the student was anxious and jumpy during the day, not sleeping at night, and "then going to school exhausted" (Tr. pp. 31-33).¹

The student continued at York Prep for the 2017-18 school year (eleventh grade) but had increasing difficulty with sleep issues and emotional withdrawal, and on April 6, 2018, the headmaster of York Prep informed the parents that he felt "it [wa]s best if [the student] complete[d] his senior year where he c[ould] have a final and fresh start" noting that he had struggled to stay awake in classes and meaningfully participate (Parent Ex. I; see Tr. pp. 34-38).² According to the headmaster, York Prep had "made many concessions around [the student's] attendance," and "exhausted what [wa]s possible at a traditional school" (Parent Ex. I). The parents discussed other placement options for the 2018-19 school year with the professionals who worked with the student

¹ The student began medication management for anxiety and depressed mood in July 2017 "with a moderate decrease in his anxiety level" (Parent Ex. J at p. 1).

² According to a social history, the student received passing grades in English and Algebra II during the first through third quarters of the 2017-18 school year at York Prep, and received grades of 55, and 59, respectively, during the fourth quarter (Parent Ex. L at p. 1). Additionally, during the course of the year the student had a total of 21 absences and was late 56 times (id.).

and on April 17, 2018, signed an enrollment contract with Trinity-Pawling for the student to attend "as a grade 12 boarding student for the school year 2018-19" (Tr. pp. 38-40; Parent Ex. F).^{3, 4}

In spring and summer 2018, the student's psychiatrist and physician reported that the student had received diagnoses of generalized anxiety disorder, social anxiety disorder, unspecified mood disorder, ADHD combined type, cannabis abuse, avoidance/restrictive food intake disorder, and other sleep disorders (sleep-wake disorder, with circadian rhythm phase delay) (see Parent Exs. B at p. 1; J at p. 1). According to the physician, "[a]ll of these disorders ha[d] resulted in difficulty functioning up to [the student's] academic potential" and both the psychiatrist and physician recommended that the student attend a boarding school with small classes and a high teacher to student ratio, a highly structured and supervised schedule, and a predictable sleep schedule with monitoring for cannabis use (see Parent Exs. B at p. 2; J at p. 2).

In a letter dated July 3, 2018, the parents requested that the district reschedule an evaluation appointment, submitted a report from the student's "most recent private testing" and a letter from his psychiatrist, and notified the district that the student would no longer be attending York Prep (Dist. Ex. 2). The parents indicated that "the last time an IEP review was held was for the 2015-2016 school year," and given that the student "had yet to be scheduled for an IEP review for the 2018-2019 school year," they "had no choice but to secure an appropriate placement with additional academic and social support" for the student (id.). Further, the parents informed the district that they had "signed a contract and provided a deposit with Trinity-Pawling," and in the event the district failed to offer the student an appropriate program for the 2018-19 school year, intended to seek tuition reimbursement from the district for that unilateral placement (id.).

On July 27, 2018 the district conducted a level 1 vocational interview with both the parent and student, a social history, and an educational evaluation of the student, which revealed average cognitive and academic achievement skills (Parent Ex. L; Dist. Exs. 5; 8; 9). A CSE convened on August 6, 2018 for an annual review and to develop the student's IEP for the 2018-19 school year (see Parent Ex. M; Dist. Exs. 1; 7). Finding the student eligible for special education and related services as a student with an other health-impairment, the CSE recommended that the student receive five periods per week each of integrated co-teaching (ICT) services in ELA, math, social studies, and science together with two 45-minute sessions per week of individual counseling (Parent Ex. M; Dist. Ex. 1 at pp. 1, 16).⁵ By letter dated August 21, 2018, the parents notified the district that they disagreed with the program and placement recommendations developed at the August 2018 CSE meeting, and that they had unilaterally placed the student at Trinity-Pawling for the 2018-19 school year and would seek public funding for that placement (Parent Ex. D).

³ It is unclear from the evidence in the hearing record if the student repeated eleventh grade or entered Trinity-Pawling as a twelfth grade student during the 2018-19 school year (compare Parent Ex. F at p. 1, with Parent Ex. C at p. 1, and Dist. Ex. 7 at p. 4).

⁴ The Commissioner of Education has not approved Trinity-Pawling as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁵ The student's eligibility for special education and related services as a student with an other health-impairment is not in dispute (34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

On August 27, 2018 a neurologist conducted a review of the student's sleep difficulties (Parent Ex. C). The neurologist reported that "[i]t seem[ed] that anxiety play[ed] a major role in [the student's] insomnia" and also that "practicing poor sleep hygiene was the perpetuating factor in continuing having problems" (id. at p. 4).

The student began attending Trinity-Pawling in September 2018 (see Tr. pp. 58, 60).

In a letter dated October 15, 2018, the parents informed the district that they had visited the public school the district had assigned the student to attend for the 2018-19 school year and spoke with the director of special education (Parent Ex. E). The parents reported that the director shared with them that the school did not offer ICT services in all eleventh and twelfth grade classes, therefore, the parents concluded that the assigned school was not able to implement the student's IEP (id.). Additionally, the parents reiterated their intent to seek tuition reimbursement from the district for the student's placement at Trinity-Pawling if an appropriate public school program and placement was not offered (id.).

The student attended Trinity-Pawling through December 12, 2018 (see Tr. p. 63; Parent Ex. A at p. 7).

A. Due Process Complaint Notice

In a due process complaint notice dated February 4, 2020 the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year (see Parent Ex. A). The parents alleged numerous procedural and substantive violations regarding the conduct of the August 2018 CSE, the resultant IEP, and the public school the district assigned the student to attend for the 2018-19 school year (id. at pp. 3-6). The parents asserted that the student's unilateral placement at Trinity-Pawling was appropriate, and that equitable considerations favored their request for reimbursement (id. at p. 7). As relief, the parents requested that the district reimburse them for tuition and boarding for Trinity-Pawling from September 1, 2018 through December 12, 2018, "including reimbursement of monies paid to date and any payments made in the future" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on December 3, 2020 (Tr. pp. 1-84). In a decision dated April 1, 2021, the IHO determined that the district failed to offer the student FAPE for the 2018-19 school year (IHO Decision at pp. 11, 12, 13, 16, 21). The IHO found that, by offering the document into evidence, the district admitted that the August 2018 IEP reflected the student's needs (see id. at p. 19). After reiterating some descriptions of the student's performance from the August 2018 IEP, the IHO discussed how Trinity-Pawling addressed the student's needs relating to his "sleep problems," and that the school provided "individualized programs tailored to students who have dyslexia, other language-based learning differences and executive functioning challenges" (id. at pp. 19-20). As such, the IHO determined that Trinity-Pawling met "the 'reasonable' standard for a finding that it was an appropriate placement for the student from September 1, 2018 through December 12, 2018" (id. at p. 20). Additionally, the IHO found that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (id.). As relief, the

IHO ordered the district to either reimburse the parents or directly pay for the cost of the student's tuition at Trinity-Pawling from September 1, 2018 through December 12, 2018 (*id.* at p. 21).⁶

IV. Appeal for State-Level Review

On appeal, the district asserts that the IHO erred in finding that Trinity-Pawling was an appropriate unilateral placement. Specifically, the district argues that the parents did not meet their burden to show Trinity-Pawling was appropriate, in that the "[p]arents did not submit any reports, documents, assessments, programs, or objectives from the unilateral placement beyond a generic program description," and no one from Trinity-Pawling testified. As such, the district contends that the hearing record is "wholly devoid of any information as to how [Trinity-Pawling] specifically designed instruction to meet [the student's] special education needs." Next, the district alleges that the hearing record contains "affirmative statements regarding deficiencies with Trinity[-]Pawling School's program for [the student]" including that it is a "mainstream setting with supports," and the school did not have its own set of goals for the student but rather, according to the parent's belief, was following the student's IEP. Additionally, the district argues that the parent's testimony regarding Trinity-Pawling's executive skills program did not show that it amounted to specially designed instruction because it lacked the required specificity regarding the "nature, content, or scope of the actual instruction Trinity[-]Pawling School was providing to teach [the student] how to overcome his executive functioning issues based on the deficits that were causing these issues." Further, the district asserts that the parents failed to present evidence regarding "whether, how, or to what degree" the counseling the student received at Trinity-Pawling addressed the student's needs related to his anxiety, depression, and sleep disorder. Finally, the district argues that the parents did not have standing to seek the amount of tuition reimbursed by their insurance, because the parents did not request an extension of time to enter evidence into the hearing record on this issue. Therefore, even if Trinity-Pawling is found to be appropriate, the district asserts equitable considerations require the denial of any tuition reimbursement.

In an answer, the parents deny the allegations in the district's request for review and argue that the IHO's determinations that Trinity-Pawling was an appropriate unilateral placement and that equitable considerations favor the parents should be upheld. In the alternative, the parents request that if the undersigned "determines that tuition funding to [Trinity-Pawling] is not an appropriate remedy in this instance, the SRO should remand this matter back to the IHO for further fact-finding concerning other relief that may be appropriate to remedy the denial of FAPE, such as compensatory damages." The parents further assert that the fact they received some tuition reimbursement through insurance is not grounds for denying relief on an equitable basis, and request that the undersigned dismiss the district's request for review.

⁶ The IHO also ordered that "if appropriate" the district should conduct a reevaluation of the student in all areas of suspected disabilities not evaluated within the past two years, convene a CSE meeting upon the completion of the student's evaluations to consider the results and any other relevant information, and develop a "new" IEP for the 2021-22 school year (IHO Decision at p. 21 [emphasis in the original]). Additionally, the IHO determined that "any of the other relief sought by the [p]arent[s] not addressed by this decision [was] found to be either agreed upon by the parties, withdrawn by the [p]arent[s], outside the scope of the IHO's authority or unsupported by the record" (*id.*).

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]).⁷

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).

⁷ 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).

VI. Discussion – Unilateral Placement

Here, neither party has appealed the IHO's finding that the district denied the student a FAPE for the 2018-19 school year. As such, this finding has become final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[j][5][v]; 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]).

Turning next to the unilateral placement, on appeal the district argues that the IHO erred in granting reimbursement because parents failed to meet their burden to show that Trinity-Pawling provided the student with specially designed instruction to meet his needs. For the reasons discussed below, review of the evidence in the hearing record supports the district's position.

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).

Although the student's special education needs are not in dispute on appeal, a discussion thereof provides context for the issue to be resolved, specifically, whether there is sufficient evidence in the hearing record to support the IHO's determination that Trinity-Pawling provided an appropriate program to address those needs.

In May 2018 the student's psychiatrist reported that the student had received diagnoses of generalized anxiety disorder, social anxiety disorder, unspecified mood disorder, ADHD combined type, cannabis abuse, avoidance/restrictive food intake disorder, and other sleep disorders (sleep-wake disorder, with circadian rhythm phase delay) (see Parent Ex. J at p. 1). According to the psychiatrist, the student's "symptoms of anxiety, distractibility, impulsivity, and sleep phase delay" made it difficult for him to function in school at the level of his academic potential (id.). She reported that the student was often late to school because he was "alert until the middle of the night and [could] not bring himself to get up in the morning"; further, the student's use of cannabis as a sleep aid compounded the problem of daytime sleepiness (id.). Additionally, the student's anxiety led to avoidant behavior, and his distractibility, impulsivity, and weak executive functioning also contributed to severe procrastination (id.). The psychiatrist recommended that the student attend a "mainstream boarding school with small classes, a high faculty to student ratio, and a formal academic support program for students who have chronically underperformed in school due to factors such as ADHD, weak executive functioning, and anxiety" (id. at p. 2). Also recommended were a structured program of supervised study to instill proper study habits and decrease procrastination, the expectation of a "lights out" schedule to curtail the student's pattern of going to bed late and oversleeping in the morning, dorm staff that monitored for cannabis use, and an academic support program staffed by learning specialists with knowledge of disorders such as ADHD and weak executive functioning (id.).⁸

On July 27, 2018 the district conducted an educational evaluation of the student (Dist. Ex. 8). Administration of the Wechsler Adult Intelligence Scale, Fourth Edition, to the student yielded a verbal comprehension index standard score in the high average range, and perceptual reasoning, working memory, and processing speed indices standard scores in the average range (id. 8 at pp. 3, 4-5). The student's academic achievement was measured by administration of the Wechsler Individual Achievement Test, Third Edition, which yielded reading, math, and writing composite and subtest scores in the average range (id. at pp. 4, 5). A July 27, 2018 social history described

⁸ The student's physician generally reiterated the psychiatrist's diagnoses, conclusions, and recommendations in a letter to the district dated August 10, 2018 (compare Parent Ex. B, with Parent Ex. J).

the student as social, approachable, and that he enjoyed amicable relationships with all age groups (Parent Ex. L at p. 2). Time management, handing in assignments and getting to school on time were identified as challenges or areas in need of improvement (*id.*). In a level 1 vocational interview conducted with the parent on July 27, 2018, the parent opined that the student would attend college after graduation and that his insomnia was a medical condition that would affect his ability to do so (Dist. Ex. 5 at pp. 1, 2).

On August 27, 2018 a neurologist reviewed the student's history of sleep difficulties, including that "[h]e could not fall asleep at night and was sleepy during the day," he was late for school, and fell asleep in class (Parent Ex. C at p. 1). The neurologist reported that "[i]t seem[ed] that anxiety play[ed] a major role in [the student's] insomnia" and also that "practicing poor sleep hygiene was the perpetuating factor in continuing having problems" (*id.* at p. 4). To address the student's sleep problems, the neurologist recommended that the student continue to see a psychiatrist and receive pharmacotherapy for anxiety and mood disorder, use relaxation techniques, avoid caffeine in the evening and using electronics before bedtime, keep a structured sleep and wake schedule, and consider a sleep study once a regular sleep schedule was achieved (*id.*).

Prior to his admission to the school, the parents and the student visited Trinity-Pawling twice, at which time they toured and met with a teacher from the Center for Achievement, who the parent understood to be a certified special education teacher (Tr. pp. 44-45, 47, 73). After relaying the student's difficulties with his sleep schedule and "all the issues he was having," the teacher reported to the parent that "executive skills and advocacy" was "what [Trinity-Pawling] did" and that staff would "get [the student] on a schedule" (Tr. pp. 48-49). The parent testified that the teacher and the student "seemed to hit it off" and discussed what occurred at the school's Center for Achievement, which the parent opined was "very familiar to [the student] having been through Jump Start" (Tr. p. 51). During the second visit to the school, the Center for Achievement teacher did not indicate to the parent that Trinity-Pawling "would not be able to manage [the student's] various issues that he was presenting with" rather, she stated that she and the teacher believed the school was a "good fit" (Tr. pp. 51-52). Additionally, at that time, the student was "feeling good" about "having some independence in the residential setting" (Tr. pp. 52-53). During the application process the parents submitted the student's "full transcript" and "all of the doctor evaluations that we had," including the April 2016 private clinical psychologist's report (Tr. p. 55; see Parent Ex. H).

Regarding the appropriateness of Trinity-Pawling, as noted above, to qualify for reimbursement under the IDEA, a parent must demonstrate that the unilateral placement provided educational instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]). The hearing record shows that the student attended Trinity-Pawling on a residential basis and that according to the parent, the school provided "a regular

course schedule" of ELA, math, science, and history (Tr. pp. 43-44, 52-53; Parent Ex. F at p. 1).⁹ The parent stated it was her understanding that Trinity-Pawling allowed the student extra time for testing, which was "in his IEP" although she acknowledged that was not an accommodation that the student "had to use heavily" (Tr. pp. 46-47). Trinity-Pawling offered "two types of counseling and therapy" according to the parent; a teacher who was assigned an advisory group who met with the student individually, and a group that met weekly to help "with the sense of community and any social issues" (Tr. pp. 49-50, 72). Additionally, the parent testified that "there was also a therapist provided through the school that [the student] could meet with weekly" (Tr. p. 50). The parent stated that "[t]he therapy was individual" and the counseling was provided in both in a group and individual sessions (Tr. p. 50). Further, the parent testified that "[d]orm counselors were more about the social aspects of the residents getting along and acting as a community" (Tr. p. 50).

The parent testified that she believed Trinity-Pawling was an appropriate placement for the student for the 2018-19 school year because it "seemed to be very close to York [Prep]" in that it was a mainstream setting "but it had a lot of educational support" (Tr. p. 43). Specifically, the parent testified that Trinity-Pawling "had a Center for Achievement, which was an executive skills program, which very much felt like Jump Start" (Tr. p. 43).¹⁰ A description of the Center for Achievement included in the hearing record reflects that it was a "designated space where every student [could] easily access support in all aspects of academics" and all students were encouraged to visit (Parent Ex. N at p. 1). The Center offered "drop-in hours" for students to work with "faculty, peer tutors, and learning specialists" on topics ranging from basic technology to in-depth writing support (*id.*). The description reflected that the Center for Achievement "offer[ed] individualized, vigorous programs to strengthen a student's academic growth" which were tailored to students with "dyslexia or other language-based learning differences" and "students with executive function challenges" (*id.* at p. 2). The executive skills program was described as a "one-year, college preparatory course for students who need additional support with planning and organizing, initiation, working memory, problem-solving, and self-monitoring," adding that "small classes allow[ed] teachers to develop individualized strategies based on each student's specific needs" (*id.* at p. 4). Progress was "based on a student's ability to work independently and to self-advocate under a wide range of circumstances" (*id.*).

The parent testified that staff at the Center for Achievement "work with the IEPs" and "to the best of" her knowledge, followed what the IEP recommended (Tr. p. 71). Additionally, the parent stated that "the small class size was aligned with the IEP goals" (*id.*).¹¹ The parent testified

⁹ The parent testified that she possessed a copy of the student's schedule; however, a copy of the schedule was not admitted into evidence (compare Tr. pp. 67-68, with Parent Exs. A-O, and Dist. Exs. 1-2; 5; 7-10).

¹⁰ The parent testified that there was a separate fee for the executive skills program (Tr. p. 75).

¹¹ In the unilateral placement context, small class size is often construed as the sort of support from which any student would receive benefit and, without more, is insufficient to establish that a placement offered instruction specially designed to meet the student's needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]; J.B. v. Bd. of Educ. of City Sch. Dist. of the City of New York, 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001] [finding that "[w]hile placement in small classes would provide [the student], or any other child,

that through the Center for Achievement, the student had "a contact daily, plus one-on-one sessions to go through his work" (Tr. pp. 44-45). The student's teacher at the Center for Achievement's role was regarding "the executive function" i.e. using a planner, scheduling out work, and helping the student with assignments when he needed help (Tr. p. 46). According to the parent, the student's teacher for the Center for Achievement would also be an advocate for the student with his other teachers, if he fell behind, which was to her "very similar to the way York [Prep]'s Jump Start program operated" in that both programs helped students with their work, but also advocated with teachers (Tr. pp. 45, 46). She acknowledged that while "things were not working out at York [Prep], it felt like having that executive skills support would be key" (Tr. p. 43).

Additionally, the parent testified that Trinity-Pawling had "nursing on site and the nurses would keep track of [the student's] medication," which to her "felt like that was [a] higher level [of] support" than what the student had been receiving (Tr. p. 43). Further, the parent stated that there "was also more counseling sessions," concluding that "all of those things made it feel like it would be a very similar program to what [the student] had [at York Prep], but in a residential setting" (*id.*). She continued that in talking to the student's pediatrician and the psychiatrist, she hoped that a residential setting would require the student "to be on a more rigid schedule," which "might straighten out the sleep issue" that had "sort of become a very big deal" during eleventh grade (Tr. pp. 43-44, 54).

The parent testified that during the first few weeks of school at Trinity-Pawling, the student socialized and "made a lot of friends" (Tr. p. 58). She received reports that the student was staying on schedule, getting to class, and was meeting regularly with his advisor and therapist (*see* Tr. pp. 58-59).¹² The parent testified that initially the student was keeping up with his medications because the nursing center texted him to take them and "really did not allow him to miss medication" (Tr. pp. 59-60). According to the parent, the student "was holding it together" for the first weeks, but then expressed to the parents that he did not think he could continue, due to the lack of sleep during the night and the anxiety he felt about having to get up (Tr. p. 60). She continued that "after we got a few weeks in," the student was "not functioning in the classes" and reported "he was suffering from lack of sleep and the anxiety was getting overwhelming" (*id.*). The parents met with faculty in September 2018 because the student reported that he wanted to leave the school (Tr. pp. 61-62). According to the parent, at the first meeting the team said they would "work with [the student]" and that although he didn't have to be "perfect" he needed to "get to class on time and turn in his work" (Tr. pp. 61-62). In October 2018, the parent began getting reports from the Center for Achievement teacher that staff was having trouble getting the student out of bed, at which time the parents met again with staff because they were "supporting him, but they just [didn't] know how . . . to proceed" (Tr. pp. 60-62). A third meeting occurred in November 2018, at which time staff reported that when the student participated, he was a great part of the community; however, "if he [was] not going to participate and they [could not] get him out of bed, it [was] not . . . going to work out" (Tr. pp. 62-63). According to the parent, the third meeting was "basically just a final notice to [the student] and to [the parents] that he [was] welcome to stay

with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or require that parents be compensated for optimal private placements."]).

¹² The parent testified that the Center for Achievement issued weekly reports, and the teacher communicated with the parent "more informally over text" (Tr. p. 59).

there," but he needed "to get out of bed in the morning and function" (Tr. p. 63). At the time of the third meeting, the student was only "[p]artially" completing his academic work and by the end of November 2018, the student was not complying with getting out of bed in the morning (Tr. p. 63). As such, the student did not return to Trinity-Pawling for the spring semester (Tr. p. 63).

Although it is clear that the parents had the best intentions for the student at the start of the 2018-19 school year and believed that Trinity-Pawling would be an appropriate placement for him, as the district asserts, the hearing record does not include evidence regarding the specially designed instruction Trinity-Pawling may have employed to address the student's anxiety, which contributed to his sleep difficulties and lack of participation in school functions. When asked if she knew what specific issues were addressed with the student during counseling sessions—including what, if any, interventions were introduced to improve the student's ability to cope with his anxiety symptoms—the parent testified that she did not, as the counselors did not speak to her about their conversations with the student, nor did she recall how long the sessions lasted (Tr. pp. 71, 78). The student was initially successful getting up in the morning as the Center for Achievement teacher "woke him up directly" but Trinity-Pawling did not identify what changed or why the student's ability to get out of bed and attend school decreased over the course of the fall 2018 semester, and the hearing record lacks information—other than having meetings with the team and parents—regarding what interventions the school used to address those concerns (see Tr. p. 80). Further, although the parent testified that Trinity-Pawling made some "adjustments" to its instructional or counseling plan as a result of the fall 2018 meetings with the parents, the parent did not know what "motivational incentives or strategies" the Center for Achievement teacher had in place to work with the student to improve his ability to get up in the morning (Tr. pp. 73-74).

The hearing record also lacks information regarding the specially designed instruction the student may have received to address his executive functioning deficits. While the student may have participated in some executive function remediation through the Center for Achievement, aside from the somewhat vague testimony from the parent, the hearing record is completely devoid of information how those services address the student's needs. For example, although the parent testified that she had a copy of the student's schedule, which may possibly have shown a schedule of specialized services intended by Trinity-Pawling,¹³ the schedule was not admitted into evidence, and neither were any of the reports she purportedly received from Trinity-Pawling (compare Tr. pp. 67-70, 77, with Parent Exs. A-O, and Dist. Exs. 1-2; 5; 7-10).¹⁴ The student had daily, scheduled time with the Center for Achievement teacher, but the parent did not recall the length of time they met each day (Tr. pp. 76-77). Although the parents indicated that the Center for Achievement program was similar to the York Prep Jump Start program in that they both addressed

¹³ If Trinity-Pawling did have a schedule of special education services for the student, it would also be important to show that the student was actually receiving the services and not sleeping through them.

¹⁴ According to the parent, the reports were about whether the student was getting his assignments in on time, how he performed on tests, whether he was struggling to get to class, how he was progressing in his specific classes, and how he was socializing (Tr. pp. 78, 79). When asked if the reports identified anything Trinity-Pawling staff was working on to enable the student to progress and need less executive function support, the parent replied "No" (Tr. p. 79).

executive function skills, the evidence in the hearing record shows that the student required more support than that type of program offered (see Tr. pp. 43, 45, 46; Parent Ex. I).

The Second Circuit has acknowledged that "a resource that benefits an entire student population can constitute special education in certain circumstances"; however, a generally available resource (such as the residential setting) must be specially tailored to a particular disabled student's needs in order to contribute to a finding based on the "totality of the circumstances" that a unilateral placement is appropriate (W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 149 [2d Cir. 2019] [finding that, even though the residential unilateral placement at issue may have been "an excellent placement" for the student, the record supported the conclusion that it "was not methodologically or therapeutically structured in the way requirement for reimbursement under the IDEA"], cert denied, 140 S. Ct. 934 [2020]). Here, the evidence in the hearing record does not support the IHO's finding that the parents met their burden to prove that Trinity-Pawling provided the student with instruction specially designed to meet his anxiety and executive functioning needs.

Having found that the parents did not meet their burden to show that the unilateral placement of the student at Trinity-Pawling for the 2018-19 was appropriate, a final note is necessary to address the parents' request that this matter be remanded to determine a compensatory education award. Initially, at least some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). However, in this instance, even if compensatory education was an appropriate alternative remedy given the determination that the unilateral placement was not appropriate, the parents have made this alternative request for relief for the first time on appeal. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Here, the parents did not make any request to the IHO, either in their due process complaint notice, during the impartial hearing, or in their post-hearing brief, for an award of compensatory educational services in the event the IHO denied their request for tuition reimbursement (see generally Tr. pp. 1-97; Parent Exs. A; O).¹⁵ Accordingly, the parent may not seek relief in a new form for the first time on appeal

¹⁵ Even at the closing brief stage of the impartial hearing—which is the eleventh hour of that process—it becomes deeply problematic at that point to raise the issue for the first time because the evidentiary phase of the hearing has concluded and the participants usually have not engaged in the fact specific inquiry and record development needed to support an appropriate compensatory education remedy (see Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to

(see, e.g., A.K. v Westhampton Beach School Dist., 2019 WL 4736969, at *12 [E.D.N.Y. Sept. 27, 2019] [finding that, where a parent did not request compensatory education in the due process complaint notice, it was not properly before the IHO or the SRO]; M.R. v. So. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011] [finding that the parents did not timely raise compensatory education during the impartial hearing by belatedly adding the request to their post-hearing brief to the IHO]).

VII. Conclusion

Although I am sympathetic to the parents' good faith attempt to find an appropriate placement for their son, tuition reimbursement for a unilateral placement is only available where the private school objectively and demonstrably provides the student with specialized instruction designed to address his unique needs. Here, however, the parents did not establish the appropriateness of Trinity-Pawling for the 2018-19 school year and, therefore, the IHO erred by granting the parents tuition reimbursement. Given this determination, I need not reach the district's challenge regarding equitable considerations.

I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 1, 2021, is modified by reversing those portions that found Trinity-Pawling to be an appropriate unilateral placement and ordered the district to reimburse the parents for the costs of the student's tuition at Trinity-Pawling for the 2018-19 school year.

Dated: **Albany, New York**
 June 10, 2021

JUSTYN P. BATES
STATE REVIEW OFFICER

provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place").