



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-110

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

### **Appearances:**

Law Office of Courtney L. Haas, LLC, attorneys for petitioner, by Courtney Haas, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian Davenport, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for reimbursement from respondent (the district) for her daughter's tuition costs at the Cooke School and Institute (Cooke) for the 2020-21 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 facts and procedural history of the case is presumed and will not be recited in detail here. Briefly, in spring 2019, a private neuropsychological evaluation of the student was conducted; at that time her overall intellectual functioning was determined to be in the extremely low range, and she exhibited "substantial deficits in social skills, functional communication, and adaptive behavior," as well as "severe cognitive/physiological, academic and language-related deficits, attentional fluctuations, executive deficits and inconsistent mental energy needed for optimal learning" (IHO Ex. I at pp. 18-20; see Dist. Ex. 3 at pp. 1-5). The parent

unilaterally placed the student at Cooke for the 2019-20 school year (Parent Ex. I at p. 2; see Parent Ex. E).<sup>1</sup>

The CSE did not convene to develop the student's IEP prior to the start of the 2020-21 school year, as such, the parent re-enrolled the student at Cooke for the 2020-21 school year (see Tr. pp. 19-20; Parent Exs. B; I at p. 2). In a due process complaint notice dated June 16, 2020, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A). The CSE convened on October 22, 2020, to formulate the student's IEP for the remainder of the 2020-21 school year (see generally Dist. Ex. 3).<sup>2</sup>

An impartial hearing convened on November 13, 2020 and concluded on March 11, 2021 after three days of proceedings (Tr. pp. 1-117). In an email dated March 30, 2021, the IHO informed the parties that, although neuropsychological, speech-language, and OT evaluations had been mentioned during the impartial hearing, none of the reports from those evaluations had been admitted into evidence (see IHO Ex. II at p. 4). The IHO requested those documents in order for her to "understand the student's needs" (id.). The parent sent the IHO a June 3, 2019 neuropsychological evaluation report, which the IHO entered into the hearing record as an IHO exhibit (IHO Exs. I; II at p. 2).

In a decision dated April 7, 2021, the IHO determined that the district conceded it failed to offer the student FAPE for the 2020-21 school year (IHO Decision at p. 8). The IHO next determined that Cooke was not an appropriate unilateral placement; specifically, that the evidence from Cooke personnel was "rife with contradictions and inaccuracies," such that it was "difficult to credit the specifics of what [was] in the evidence offered by the [p]arents" and that there was "no clear information as to how the [s]tudent's instruction [was] provided" (id. at pp. 8-9). After reiterating the results of the neuropsychological evaluation, the IHO concluded that the student had "significant difficulty with the mechanics of reading" but that there was "no evidence that th[ose] levels ha[d] increased" or that Cooke provided the student with "systematic and explicit phonics and orthographic instruction" per the neuropsychologist's recommendation (id. at pp. 9-10). Further, the IHO determined that there was "no clear evidence of progress in the [s]tudent's reading" and that "[t]he teacher's informal assessment d[id] not support a finding of progress" (id. at p. 10). For those reasons, the IHO concluded that the student's program at Cooke was not appropriate and denied the parent's request for tuition reimbursement (id.).

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

The parent appeals. The gravamen of the parties' dispute on appeal is whether the IHO erred in determining that the student's program at Cooke, specifically with regard to

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<sup>1</sup> The Commissioner of Education has not approved Cooke as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> The October 2020 CSE determined that the student was eligible for special education and related services as a student with an intellectual disability, which is not in dispute on appeal (see 8 NYCRR 200.1[zz][7]).

reading/phonics instruction, was not appropriate to address her needs.<sup>3</sup> Additionally, the parent appeals the IHO's findings that the humanities teacher was not appropriately qualified due to her lack of certification, that the student did not make meaningful progress in reading at Cooke, and the IHO's characterization of the evidence as "unclear and contradictory."

In an answer, the district denies the allegations in the parent's request for review, and requests that the parent's appeal be dismissed with prejudice and that the IHO's decision denying the parent's request for tuition funding at Cooke be affirmed.

## 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

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<sup>3</sup> During the impartial hearing the parent learned that she had prevailed in a prior due process hearing regarding tuition reimbursement for Cooke for the 2019-20 school year (see Tr. p. 86). The parent submitted the January 21, 2021 IHO decision specific to the 2019-20 school year as an attachment to the request for review in this matter (Req. for Review Attachment).

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]).<sup>4</sup>

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.

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<sup>4</sup> 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).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

## **VI. Discussion**

### **A. FAPE**

The district has not cross-appealed the IHO's determination that it failed to offer the student a FAPE for the 2020-21 school year. Therefore, that determination has become final and binding on the parties and shall not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Accordingly, the next issue to be determined is whether the IHO erred in finding that Cooke was not an appropriate unilateral placement for the student.

### **B. 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. The Student's Needs**

Although not in dispute on appeal, a discussion of the student's special education needs is necessary to evaluate the appropriateness of the parent's unilateral placement of the student at Cooke for the 2020-21 school year.<sup>5</sup>

The October 22, 2020 IEP included May 2018 evaluation results that indicated the student's full scale IQ was 64 (1st percentile), her nonverbal IQ was 69 (2nd percentile), and her verbal IQ was 62 (1st percentile) (Dist. Ex. 3 at pp. 1, 17). Academic achievement test results included in the IEP were in the extremely low to low average range: she obtained an early reading skills standard score of 72 (3rd percentile), a numerical operations standard score of 78 (7th percentile) and a spelling standard score of 81 (10th percentile) (*id.*). Reports from Cooke and the parent included in the IEP indicated that the student was a sixth grader who was functioning far below grade level (*id.*). The IEP noted that in reading, the student would be focusing on comprehension of higher level texts during the 2020-21 school year (*id.*). According to the parent, the student knew the sounds, but she did not understand what she was reading (*id.* at pp. 1-2). The Cooke

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<sup>5</sup> The parent has not alleged that the present levels of performance in the October 2020 IEP did not accurately describe the student's needs as of the date of the CSE meeting, even though that meeting occurred after the school year started and the due process complaint had been filed. As the document summarized the student's needs leading up to and as of the beginning of the disputed school year, I find that it is a sufficiently reliable and appropriate source of information regarding the student's needs for the purposes of evaluating whether the parent's unilateral placement—Cooke—addressed those needs during the 2020-21 school year, especially since there is no indication that the student's needs changed significantly from the time the due process complaint was filed and the present levels of performance were completed.

representative reported that a large focus of the student's program was on comprehension, everything was broken down, she used graphic organizers a lot, and she was working to extract explicit details from the text and to make predictions (id. at p. 2). Reportedly the student's reading skills were "more like a pre-k level" (id.).

For writing, the IEP reflected reports that the student wrote in complete sentences using pre-writing strategies, capital letters and punctuation and was working on strategies to be able to write a short letter and access the Google drive for support (Dist. Ex. 3 at p. 2). Graphic organizers were beneficial to her and the student was able to write a multi-sentence paragraph (id.). Reportedly, in 2018 the student's writing skills were at a second grade level (id.).

According to the IEP, the Cooke representative reported that the student's math skills were about at a mid-second grade level (Dist. Ex. 3 at p. 2). The student was working on skills such as number sense and operations, determining odd and even numbers, and determining differences in number sentences (id.). The student also worked on basic math skills and basic money skills such as identifying coins and the dollar sign (id.).

The October 2020 IEP indicated that the student had been receiving counseling, the focus of which was on improving play skills, being able to express her needs to others, as well as understanding the skills that needed to be addressed (Dist. Ex. 3 at p. 2). The IEP included reports from the parent that the student was social and it was easy for her to relate to other kids (id.). The student knew how to share and how to spend time with friends (id.). The parent noticed that "if someone d[id] something to [the student]" she "crie[d] silently on her own" (id. at pp. 2, 4).

Further, the October 2020 IEP indicated that the student received speech-language therapy in school, and according to a speech-language therapy progress report, she demonstrated difficulty with higher-level receptive and expressive language skills (Dist. Ex. 3 at p. 2). Specifically, the student had difficulty answering specific wh-questions in response to a passage containing novel information and telling a narrative in an organized and sequential manner (id.). To address receptive and expressive language skills, Cooke provided activities that were presented visually and auditorily, during which time the student answered wh-questions with information provided in short chunks (id.). She was working toward answering questions following the presentation of larger amounts of information and summarizing the information (id.). Throughout those activities, the student was exposed to new vocabulary and she was verbally prompted to self-advocate when a word was new (id.). The student repeated definitions for novel words and was working toward using them in a sentence (id.). Following a model, the student self-advocated when expectations were clear, or information was confusing (id.). The student needed minimal verbal support to help her organize a personal narrative and add the appropriate amount of details (id.). Transition words provided by the clinician greatly increase the student's ability to tell a personal narrative in step-by-step manner (id.).

Additionally, the October 2020 IEP indicated that the student participated in a social skills class led by the Cooke speech-language pathologist and school psychologist (Dist. Ex. 3 at p. 2). The class explicitly targeted social skills that the student then functionally practiced, including initiating a conversation, using eye contact and appropriate personal space, maintaining the topic, using appropriate turn taking, making a compromise, being polite and using manners, and interpreting body language (id.). The student participated in role-plays related to those areas and



used video modeling to reflect on her role-play scenario (id.). The IEP included that after March 11, 2020, the student received speech-language therapy through the remote learning model (id.). During the remote learning program, speech-language therapy occurred through asynchronous assignments twice weekly and live synchronous Zoom sessions one to two times per week (id.). Specific receptive language skills targeted included answering wh-questions in response to a reading passage or video (id.). Specific expressive language skills targeted included increasing her narrative organization, as well as increasing adjective vocabulary in order to add meaningful details to her language (id.). Live sessions targeted pragmatic skills, specifically repairing communication breakdowns and self-advocacy, as well as the student working to increase her adjective vocabulary and descriptive language (id. at p. 3).

With regard to the student's social development present levels of performance, the October 2020 IEP indicated that, according to a counseling progress report, the student worked on skills such as recognizing how different emotions looked in oneself and others, labeling those emotions, recognizing how different emotions felt in one's body, connecting it to personal experiences, and using different tools to be in a more calm and comfortable state (Dist. Ex. 3 at p. 4). With minimal verbal prompting, the student engaged in the activities, and copied and labeled the faces from pictures (i.e., calm, angry, excited, scared) (id.). She provided examples of situation when she felt those emotions, such as being angry when her brother bothered her and being excited to play in recess (id.). With minimal verbal prompting, the student identified various strategies that helped one feel more calm and comfortable (i.e., taking five slow and deep breaths, taking a drink of water, hand dots, and counting to ten slowly) (id.). During the first semester, the student engaged in activities, independently produced appropriate questions and comments to maintain conversations, and showed appropriate body language during conversations (id.). The student consistently volunteered to model the correct way of doing things (i.e., asking a person to speak louder when she could not hear them) (id.).

The October 2020 IEP indicated that in small group social/emotional counseling, the student practiced cooperative skills (i.e., turn taking, waiting, and compromising in conversation and in games) (Dist. Ex. 3 at p. 4). She also worked on staying on topic and following up with connections and conversation, and was able to do so with visual and verbal prompts (id.). The student worked on labeling different feelings during social situations (i.e., feeling tired, angry, and frustrated), appropriately expressing them, and understanding others' feelings and situations (id.). The "smaller group" situation allowed the student to practice talking to peers about preferred topics and building more meaningful relationships (id.). The student led conversations through varying topics, and ensured all peers were included in the conversation (id.). According to the IEP, prior to March 11, 2020, the student received counseling services as described; after that date counseling services were remotely provided twice weekly through asynchronous assignments and live synchronous Zoom sessions one to two times per week (id.). Asynchronous assignments targeted the skill areas of labeling and matching feelings, practicing emotional coping skills (i.e., mindfulness, thinking positively, deep breathing, asking for help), and fostering social connections (id.). Live sessions targeted turn taking, following directions, conversation skills, and social connectivity (id.). In live Zoom sessions, the student demonstrated increased self-advocacy skills, as well as independence in following the rules and engaging in activities and conversations with both peers and staff (id.).

With regard to the student's physical development present levels, the October 2020 IEP indicated that according to an occupational therapy (OT) progress report, the student was a kind and friendly student who arrived to therapy sessions motivated to begin and actively participated in lessons and activities (Dist. Ex. 3 at p. 5). During therapy sessions the student planned group activities with peers, suggested ideas for activities independently, and set up activities and/or equipment with support for safety awareness and sequencing (id.). For more complex activities, she utilized the "Get Ready, Do, Done" model to organize and plan (id.). When problems occurred, the student brainstormed solutions with verbal cues for initiation (id.). With regard to "Instrumental Activities for Daily Living" (IADL) skills, the student built her knowledge of personal information (id.; see Parent Ex. K at p. 14). At the time of the October 2020 IEP, the student stated her address, apartment, city, state, and zip code and printed those parts of her address with visual and verbal cues (Dist. Ex. 3 at p. 5). The student participated in a variety of therapy activities including finding hazards in photos, role-playing safety scenarios, and practicing advocating for herself in simulated situations (id.). She also demonstrated improvement in identifying kitchen hazards and solving safety scenarios (e.g., falling at recess) (id.).

According to the October 2020 IEP, the student worked on improving visual perceptual skills in order to discriminate between left and right sides of the body and often identified her right and left correctly (Dist. Ex. 3 at p. 5). She still required visual cues, such as placing a sticker on her hand, to help her distinguish between left and right sides of the body within a functional activity (id.). The student built functional handwriting skills with a proofreading checklist to promote proper spatial awareness, punctuation, and capital letters (id.). She required minimal verbal cues to identify errors in sentences, made the correction, and demonstrated improvements in "line regard and spacing with reduced verbal cueing" (id.). The IEP noted that OT would continue to address visual perceptual, handwriting and IADL skills to promote the student's success within the school environment and functional independence (id.).<sup>6</sup> Further, the IEP indicated that during the first part of the second semester, the student demonstrated progress in demonstrating left/right discrimination, using a proofreading checklist to edit her work, writing her address from memory, and planning and executing a therapeutic activity (id.). More specifically, the student worked with peers to select an activity, plan the activity with the "Get Ready, Do, Done" chart, and execute the activity with fading verbal prompts for problem-solving and sequencing (id.). She also wrote her address from memory with verbal cues for spelling and order information (id.). During the remote learning program, OT was provided through asynchronous assignments/lessons twice per week and a live Zoom session once per week (id.). Asynchronous assignments targeted activities of daily living (ADL), IADL, functional writing, fine motor, visual motor integration, sensory processing and regulation, sensorimotor, and executive functioning skills (id.).<sup>7</sup> Live sessions targeted sensory motor skills and regulation (id.). Also with regard to the student's physical development, the parent reported the student was in good physical health, that her vision and hearing were fine, and that the student wore a brace for scoliosis that did not interfere with her participation in physical activities (id.).

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<sup>6</sup> IADLs were defined as skills that help an individual to live independently in a community, including such skills as completing household chores, shopping, preparing meals, and safety awareness (Parent Ex. K at p. 14).

<sup>7</sup> ADLs were defined as basic self-care tasks such as washing hands, brushing one's teeth, and eating (Parent Ex. K at p. 14).

The October 2020 IEP included a list of management needs for the student (Dist. Ex. 3 at p. 6). Specifically, the student required 1:1 support, repetition of material, small group instruction, modified directions, directions broken down, visual aids for reference, preferential seating (towards the front of the classroom), checklists/reminders to help her organize (bathroom check before beginning work, turning in homework), reminders to use the bathroom, and scheduled breaks (id.). The October 2020 IEP indicated the student displayed weaknesses in cognitive, academic, and language skills that affected her ability to participate in the general education curriculum and she needed modifications of the pacing and presentation of information and materials (id.). The IEP further indicated that the student needed special transportation, and due to her significant delays in academic, cognitive and communication skills she would participate in the State alternate assessment (id. at pp. 15-16, 18).

## **2. Cooke**

### **a. Generally**

The assistant head of the Cooke Lower and Middle School (administrator) described Cooke as an independent non-profit school for students with a broad range of developmental disabilities (Parent Ex. H at pp. 1-2).<sup>8</sup> The students at the school had a variety of special education disability classifications from the district and typically exhibited language-based learning disabilities, academic deficits, and/or deficits in adaptive daily living skills (id. at p. 2). Cooke provided small special classes with a "low student-to-teacher ratio," and "intensive" OT, speech-language therapy, physical therapy (PT), and counseling services (id.). With respect to "small classes," the administrator testified that one of the primary means through which Cooke addressed students' learning and social/emotional needs was through a small class size consisting of 12 students led by two teachers working collaboratively with speech-language pathologists, occupational therapists, counselors, and paraprofessionals, which allowed for daily small group skill instruction (id.). Cooke had a school psychologist on staff for every two classes in its middle school, including the student's class (id.). The school psychologist provided individual and group counseling and developed behavior intervention plans (BIPs) for students who required them (id.). The administrator stated that speech-language therapy was provided individually, in small groups (two to four students) and by pushing into the classrooms to provide language support while working on lessons (id.). OT was often provided in a sensory gym that had equipment including a climbing/rock wall, fitness equipment, equipment for providing deep pressure and sensory input (weighted blankets), and other toys and games in the room to develop students' fine motor and visual coordination (id. at p. 3).

The humanities teacher testified that the Cooke program served children ages 5 through 14 with mild to moderate cognitive disabilities that severely affected their acquisition of academic, adaptive life, and social/emotional skills (Parent Ex. J at pp. 1, 3). According to the humanities teacher, the curriculum took into consideration "The Common Core," with varying levels of support and modifications to ensure quality individualized learning for each student (id. at p. 3). The humanities teacher's affidavit indicated that objectives of the Cooke program were to foster

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<sup>8</sup> According to the administrator, Cooke is accredited by the New York State Association of Independent Schools (Parent Ex. H at p. 2).

its students' social, emotional, academic, and language development; to develop its students' self-confidence so that they could use their inherent abilities to make appropriate decisions; to develop students' problem-solving skills in order to promote independence in school and the community; to develop students' daily living and self-monitoring skills so that they could engage in a healthy lifestyle; to foster acceptance of children with special needs within the larger community, and to develop parent partnerships to establish and achieve student goals (id.).

According to the humanities teacher, Cooke's Lower/Middle School program focused on developing competencies in each of the following areas: academic skills, critical thinking and problem solving, social skills, emotional health, physical education and movement, and the arts and technology (Parent Ex. J at p. 3). The sixth grade curriculum included humanities (social studies, reading, and writing), mathematics, science, technology, speech-language therapy, OT, drama and art therapies, life skills class, social/emotional development (counseling), music, yoga, and movement (id.). The humanities teacher testified that each classroom at Cooke was staffed with a head teacher, at least one classroom paraprofessional, and at least one assistant teacher (id.). In the middle school, the humanities classes had assistant teachers and clinicians who provided scheduled activities within classrooms to bridge the clinical and academic goals while supporting the general classroom activities (id.). In order to address its students' needs, all middle school teachers and related service providers participated in a weekly meeting where they engaged in professional development and discussed student cases (id.). In addition, all staff participated in a weekly meeting to address individual students' needs and maintain cross curricular planning (id.).

Review of the student's in-person class schedule as of October 13, 2020 shows that the student was scheduled to receive 10 periods of humanities and five periods of math instruction per week, as well as instruction in science, technology, art, music, and yoga (Parent Ex. C).<sup>9</sup> The humanities teacher testified that during the 2020-21 school year the student's cohort included a head teacher, two assistant teachers, three classroom paraprofessionals for all students, and a speech-language therapist who pushed into the class approximately four times per week for half of a period to work with small groups (Parent Ex. J at p. 4). As the humanities teacher and head teacher of her "pod," the humanities head teacher testified that she knew the student since she started 6th grade in the fall 2020, that the teacher has "two cohorts of students (4 pods), each pod consists of 7-8 students and a cohort consists of 14-16 students, ranging from ages 11 to 14" (Parent Ex. J at p. 3). The head teacher testified that she "instructs all pods/cohorts in the areas of reading, writing, and social studies" (id.). The hearing record included the student's February 5, 2021 semester 1 Cooke progress report that included descriptions of the curriculum for class areas of humanities (reading, writing, social studies), math, science, technology, speech-language therapy, social/emotional development, OT, creative arts, music, and yoga (see generally Parent Ex. K). The same report included a scale with defined levels of achievement proficiency and narrative information specific to the student's performance (id. at pp. 3, 6, 10, 12, 14).<sup>10</sup> The humanities

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<sup>9</sup> The student's in-person schedule also included periods for activities such as homeroom, enrichment, town meeting, middle school community, lunch, and recess (Parent Ex. C).

<sup>10</sup> The February 2021 progress report include a rubric scale of student proficiency for specific skills in humanities and math as follows: \*-Newly introduced skill; 1-Observing the teacher model a task; 2-Taking a subordinate/shared role in completing a task; 3-Having the primary role in completing a task; 4-Completing a task independently on a regular basis (see Parent Ex. K at pp. 3, 6).

teacher testified that she worked collaboratively with the other humanities teachers to create appropriate curriculum and lesson plans for her cohorts (Parent Ex. J at p. 5). Care was taken to foster an environment that set up students for success in reading, writing, and interpreting their world, by building on students' strengths and experiences, through art integration, and through multisensory explorations (Parent Ex. K at p. 2). Students were supported in the organizational skills, executive functioning skills, interpersonal skills, and goal-setting required for growth (*id.*). In collaboration with speech-language therapy, students worked in small groups to support content-related conversations (*id.*).

Turning first to the parent's appeal of the IHO's determination that the evidence from Cooke personnel was "rife with contradictions and inaccuracies," such that it was "difficult to credit the specifics of what [was] in the evidence" the parent offered and that there was "no clear information as to how the [s]tudent's instruction [was] provided" (IHO Decision at pp. 8-9), generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd*, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). In the instant case, the IHO questioned the credibility of the evidence and more explicitly found that the written testimony by affidavit of the administrator was not credible (see IHO Decision at pp. 4-7, 8-9). In so finding, the IHO did not discredit live witness testimony but instead identified discrepancies between the affidavit testimony of the administrator as compared to the affidavit testimony of the head teacher and the progress reports in the hearing record with respect to the profile of the students who attended Cooke, the ratios of adults to students in the classrooms at Cooke, and the frequency and intensity of the student's related services (*id.* at pp. 4-17). Overall, even assuming that the IHO's findings on these discrete examples of factual discrepancy were supported by the hearing record, they do not warrant a finding discrediting all of the parent's evidence. Rather than interpreting the IHO's decision as making broad credibility findings, it would appear that her findings related more to the relative weight that she decided to afford the affidavit testimony of the Cooke personnel (see S.W. v. New York City Dep't of Educ., 2015 WL 1097368, at \*15 n.6 [S.D.N.Y. Mar. 12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; see, e.g., Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007], *aff'd*, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]). Indeed, where there are discrepancies on questions of the composition of a student's classroom and the frequency or intensity of a student's related services, the testimony of the teacher of the class or provider of the service in question would generally be accorded more weight than the testimony of an administrator. Accordingly, to the extent that I agree or disagree with IHO's findings of fact, it is with regard to the weight to be accorded to the affidavit testimony of Cooke personnel, not the credibility of its content (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*9-\*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

Next, regarding the parent's appeal of the IHO's determination regarding the humanities teacher's certification or lack thereof, the humanities teacher stated that she had obtained certification as an elementary teacher in another state, graduated from a Master's program after pursuing a Master's in special education, and passed the New York City licensing tests in "Educating All Students," and "Content Specialty Tests" in literacy and English language arts, arts and sciences, and mathematics (Parent Ex. J at p. 1). The humanities teacher then recounted her experience providing instruction to students with disabilities in a variety of settings (*id.* at pp. 1-2). The IHO took issue with the fact that the administrator testified that the humanities teacher held a Master's degree in childhood special education and was certified to teach students with disabilities grades one to six, in apparent contradiction of the humanities teacher's testimony (IHO Decision at p. 6; compare Parent Ex. H at p. 4, with Parent Ex. J at p. 1). Assuming without deciding that the administrator testified incorrectly regarding the humanities teacher's certification, as discussed above, the IHO's reasoning was nevertheless flawed because it relies solely on conflicting viewpoints over the teacher's current state certification status, but the Supreme Court has emphasized that a private school need not per se employ State certified special education teachers (Carter, 510 U.S. at 13-14), and in this instance, the IHO failed to explain why the lack of state certification on the part of the humanities teacher rendered the head teacher unqualified or in turn render student's program at Cooke inappropriate, especially when the uncontradicted evidence points overwhelmingly to the conclusion that she has an advanced degree in special education and substantial experience teaching students with disabilities. Any mistaken impression of the administrator regarding the head teacher's State certification was not a critical shortcoming in these circumstances.

### **b. Reading Instruction**

Regarding the IHO's finding that Cooke failed to provide the student with appropriate specialized reading instruction, according to the description in the February 2021 progress report, at Cooke reading instruction was designed to encourage positive habits and practices for independent readers as well as to hone specific reading strategies (Parent Ex. K at p. 2). In class, teachers modeled reading comprehension skills and students practiced and applied the skills through reading of leveled texts and "just right" books (*id.*). Students answered questions through the exploration of narrative text structure including what strategies help them strengthen their reading and writing, and how would they show their understanding of a text (*id.*). Additionally, students practiced identifying main characters, problems, solutions, and setting (*id.*).

The February 2021 progress report included extensive instructor comments indicating that during remote learning through October 9, 2020, the student's humanities classes were held online (Parent Ex. K at p. 3). Remotely, the humanities curriculum was delivered through daily live instruction using Zoom and supplemented with asynchronous assignments (*id.*). The remote class consisted of 12 students, one teacher, two assistant teachers, and two paraprofessionals (*id.*). Students were broken up into small breakout rooms for differentiated instruction (*id.*). When using Zoom, the student required the support of movement breaks in order to participate fully in remote lessons (*id.*). The student participated by asking on-topic questions, making connections to the content, engaging in conversations with peers, and using the chat function in Zoom (*id.*).

Instructor comments further indicated that on October 13, 2020 the student returned to in-person instruction with five other students, one teacher, one assistant teacher, and one

paraprofessional (Parent Ex. K at p. 3). The student independently worked collaboratively with her peers on humanities content and routines (id.). She completed her assignments and one-to-one check-ins to assess her comprehension of the task (id.). The student benefitted from the use of calm breathing and movement breaks in order to maintain focus and participate positively in academic instruction (id.). To deepen her understanding of strategies and vocabulary, she used movement and song to represent and provide repetition of the concepts (id. at pp. 3-4). Cooke staff anticipated that in the next semester, the student would be encouraged to continue participating with positive reinforcement to continue to boost her confidence (id. at p. 4).

Additionally, the student successfully used strategies to maintain her comprehension while reading instructional level texts, with the support of graphic organizers and teacher prompting for when to stop and think (Parent Ex. K at p. 4). In a reading group of two other students, the student identified the main idea of a text with the support of highlighting the key details of the text while reading, and stopping, thinking, and asking what the paragraphs have in common (id.). When reading a text, the student identified specific details in the text that supported a theme with minimal prompting (id.). The student demonstrated progress in her ability to advocate and articulate when she was confused, and with support, applied "fix-up" strategies such as rereading or asking specific questions about what was confusing (id.). Teacher comments indicated that in the upcoming semester, the student would practice identifying "just right" books and continue practicing skills to repair her comprehension more independently and advocate for support when needed (id.).

Review of the IHO's decision shows that she based her view of the student's reading needs and what her program should provide on the results of the June 2019 neuropsychological evaluation, which she requested the parties produce to produce new evidence after the impartial hearing proceedings had otherwise concluded (see IHO Decision at pp. 2, 9-10; Tr. pp. 116-17; IHO Ex. II at p. 2). After examining the evidence proffered by the parent, the IHO explained that the neuropsychologist had recommended that the student receive "systematic and explicit phonics and orthographic instruction" such as Orton-Gillingham, but that there was "no evidence that any such systematic and explicit phonics and orthographic instruction" had been provided at Cooke (IHO Decision at p. 9). The IHO then went on to determine that the focus of the student's reading instruction at Cooke addressed comprehension and not decoding needs, finding that a systematic decoding method of instruction should have been provided to the student all year and not just as of March 2021 (id. at p. 10).

While during the 2020-21 school year Cooke may not have implemented a systematic decoding program with the student in so many words, according to the February 2021 progress report, students at Cooke engaged in strategies to develop fluency, decoding, vocabulary, and comprehension skills (e.g. asking questions, making connections, etc.) through whole group shared readings and small group guided reading instruction, which was differentiated by instructional reading level based on Fountas & Pinnell benchmark assessments (Parent Ex. K at p. 2). The progress report indicated that during the second semester, the student would receive support to identify specific word patterns in order to apply decoding strategies to unfamiliar words (id. at p. 4). Additionally, upon questioning by the IHO, the humanities teacher testified that the student continued to require support in decoding, and Cooke had begun implementing "Words Their Way," which she described as a more strategic decoding program in order to match the student's higher comprehension skills (see Tr. pp. 108-09). The humanities teacher further stated that Cooke was working on strengthening the student's decoding skills to move closer to her comprehension level,

while continuing to challenge higher level texts to strengthen her comprehension skills (Parent Ex. J at p. 5).

With respect to reading groups, the humanities teacher stated that she grouped students together based on their functional level with respect to decoding and comprehension levels (Parent Ex. J at p. 5). Students with similar decoding skills were grouped together while students who needed more support were grouped with students who had more developed comprehension skills in order to foster progress (*id.*). The student participated in a guided reading group with two other "Expanding level readers" (*id.*).<sup>11</sup> In the reading group, the student was encouraged to stop, think, and identify context clues (pictures and surrounding words) to identify unknown words (Parent Ex. K at p. 4). Further, during word study instruction, the student defined content related words through the support of using a Frayer model graphic organizer to "break words down" into a definition, sentence, picture, and synonym (*id.* at p. 4). Supports provided included an explicit approach and modeling of the skill to engage the student in actively thinking about word meanings, and she was encouraged to recognize the word in a different context (*id.*). Therefore, the evidence in the hearing record shows that Cooke addressed the student's decoding needs, albeit possibly not to the extent and through all of the methods recommended in the neuropsychological evaluation report. The problem with the IHO's reasoning with regard to Cooke is that even a public school CSE, after due consideration, would not be required to automatically adopt the specific methodological recommendations of a neuropsychological evaluation into a student's IEP because such methodological decisions are usually left to the discretion of a student's teacher (*see J.D. v. New York City Dep't of Educ.*, 2015 WL 7288647, at \*14 [S.D.N.Y. Nov. 17, 2015]; *T.G. v. New York City Dep't of Educ.*, 973 F. Supp. 2d 320, 340 [S.D.N.Y. 2013] [stating that "although a CSE is required to consider reports from private experts, it is not required to follow all of their recommendations"], quoting *M.H. v. New York City Dep't of Educ.*, 2011 WL 609880, at \*12 [S.D.N.Y. Feb. 16, 2011]; *J.C.S. v. Blink Brook-Rye Union Free Sch. Dist.*, 2013 WL 3975942, at \*11 [S.D.N.Y. Aug. 13, 2013] [holding that "the law does not require an IEP to adopt the particular recommendation of an expert; it only requires that that recommendation be considered in developing the IEP"]; *Watson v. Kingston City Sch. Dist.*, 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004]; *see also Rowley*, 458 U.S. at 204 [addressing methodology]; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; *A.S. v. New York City Dep't of Educ.*, 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; *R.E.*, 694 F.3d at 192-94; *M.H.*, 685 F.3d at 257). And if a public school teacher would not be required to adopt the neuropsychological evaluator's specific methodological approach, it makes little sense that the Cooke personnel would be held to a higher standard than district personnel in terms of adopting a specific methodology.

On one hand the IHO was appropriately concerned about the need to develop an adequate record of the student's needs before rendering a decision, but on the other hand, the IHO's process of receiving additional evidence after closing arguments did not provide the parties any additional opportunity to be heard with respect to her specific concerns regarding the neuropsychological evaluation or the extent to which Cooke's approach differed from the evaluator's recommendations (*see* IHO Ex. II). However, regardless of whether that hearing process was infirm, in this particular

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<sup>11</sup> Testimony by the humanities teacher defined an expanding level reader as a student whose reading level ranged from first into third grade (*see* Tr. p. 111).



instance the outcome of the case should not have changed with the addition of the admission of the neuropsychological evaluation into evidence because the identification of the student's needs in the June 2019 neuropsychological evaluation was consistent with the other evidence in the hearing record about the student's needs, and showed that the student had significant deficits in both decoding and reading comprehension, which Cooke addressed during the 2020-21 school year (compare IHO Ex. I at pp. 13-14, with Dist. Ex. 3 at pp. 1-2; see Tr. pp. 99, 108-09; Parent Exs. J at pp. 4, 5; K at pp. 2-4). Cooke's decision to focus on comprehension over decoding amounts, at most, to a pedagogical dispute among professionals about which need should take precedence and does not, without more, support a finding that Cooke was an inappropriate unilateral placement.

### **c. Progress**

Additionally, the IHO found that the "teacher's informal assessment [did] not support a finding of progress" (IHO Decision at p. 10). 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 humanities teacher testified that she collected data based on her observations and assessments (Parent Ex. J at p. 5). She assessed the students in her cohorts through formal assessments such as Fountas & Pinnell and the STAR reading assessment, and informally through observation and analyzing student's reading responses on a monthly basis (id.). In fall 2021, the humanities teacher assessed the student using a Fountas & Pinnell formal assessment and a STAR reading assessment; the results of those measures indicated that the student's skills were at a late first grade independent level, which corresponded to a second grade instructional level, and that her decoding skills were also at those same levels (see Tr. p. 99; Parent Ex. J at p. 5). According to the humanities teacher, per the results of the most recent assessment, the student had "gone up" one Fountas & Pinnell level since the end of last year (Parent Ex. J at p. 5). Additionally, the student scored 100 percent comprehension at her independent level, requiring the most support in decoding (id.). Further, the humanities teacher testified the next Fountas & Pinnell assessment would occur sometime between March and April 2021 and also that the student had been assessed through informal assessments and observations during academics (Tr. p. 105; Parent Ex. J at p. 5). At the time of her testimony, the humanities teacher stated that the student's greatest area of progress in reading was her increasing ability to make connections to her own life, other books or materials and current humanities topics, and asking on-topic questions to help her understand the text (Parent Ex. J at p. 5). The humanities teacher also indicated that she was satisfied with the student's progress in that she saw areas of growth in the student, such as the student's increased confidence in the classroom, and her increased ability to make connections to her reading and ask on-topic questions (Tr. p. 112).

With regard to the student's goals and performance in reading during the first semester of the 2020-21 school year, for guided reading, the student achieved a proficiency rating of "3-Having the primary role in completing a task" for tasks where the student would ask questions when

engaged with instructional level text, determine a theme or central idea of a text and how it is developed by key supporting details, refer to the text to answer who, what, where and when questions to demonstrate understanding of key ideas in the text, and respond in discussion and writing to a literary read aloud (Parent Ex. K at p. 3). The student achieved a proficiency rating of "2-Taking a subordinate/shared role in completing a task" for being able to make text to world connections that spoke to the text's relevance to current or past history (id.).

The IHO reiterated that at the start of the 2020-21 school year (October 2020) the student was assessed at a late first grade independent/second grade instructional reading level and that at the time of her testimony in March 2021, the humanities teacher indicated that the student was "at an instructional second grade level," as such, there was "no evidence of significant progress" (IHO Decision at p. 7; see Tr. p. 99).<sup>12</sup> Given the student's significant cognitive and language deficits, which the IHO acknowledged, it is unclear how much progress the IHO expected the student to have made between October 2020 and March 2021 in order for her to determine that the Cooke program was appropriate (see IHO Decision at pp. 7-8, 10). Furthermore while a showing of progress is a relevant factor to consider regarding a unilateral placement (but not dispositive), it is not clear that the converse is true, that is, that a lack of progress at a unilateral placement would carry sufficient weight to conclude that the private school was inappropriate under the Burlington/Carter standard. As such, I decline to find that the student's program at Cooke during the 2020-21 school year was not appropriate on the basis of a lack of instruction in reading decoding or that the student made insufficient progress.

Further, as discussed above, aside from reading deficits the student exhibited other academic skill needs (Dist. Ex. 13 at pp. 1-2), and the evidence in the hearing record shows that Cooke addressed those needs as well. Regarding written language, the February 2021 progress report indicated that at Cooke writing instruction was integrated fluidly into both social studies and reading (Parent Ex. K at p. 2). Additionally, writing was used to make connections to content, as an assessment of content knowledge, or as a reflection of activities and experiences (id.). Students were brought through the stages of the "Writing Process" (prewriting, drafting, revising, editing, and publishing) including using graphic organizers and sentence starters to plan and produce one or more cohesive paragraphs (id.). Students used acronyms in the revising and editing stages of the writing process, including "COPS" - a checklist to monitor the use of Capital letters, Organization, Periods, and Spelling (id.). Using various prompts, students were guided in adding important details to their work and sequencing and summarizing after reading (id.).

Instructor comments in the February 2021 progress report noted that when engaging in low-stakes writing prompts such as sharing her weekend news, identifying a time she was brave, or sharing an important event in her past, the student used one-to-one check-ins in order to revise her work and support her with spelling, graphic organizers and prompts to add details (Parent Ex. K at p. 4). The student asked for help when spelling unfamiliar words, wrote simple sentences,

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<sup>12</sup> I note that the June 2019 neuropsychological evaluation report included a then-current report from the student's teacher that the student "receive[d] modified homework assignments, usually at a K-1 instructional level" and that she could "decode words at an end-of-Kindergarten text level if there [were] pictures to assist her" (IHO Ex. I at p. 13). The results of the reading measures Cooke administered to the student in fall 2020 indicated that the student's decoding skills were at a late first grade independent level, corresponding to a second grade instructional level (see Tr. p. 99; Parent Ex. J at p. 5).

and had made progress in adding more details to her work (id.). During the writing process, the student benefitted from graphic organizers to support brainstorming including visuals to activate her prior knowledge (id.). When revising, the student required support to add details to her work through prompts from a teacher used a checklist with minimal support to edit for punctuation (id.). Additionally, the progress report indicated that the student would continue to receive support with generating ideas, revising, editing, adding details to her work in the upcoming semester (id.).

The February 20201 progress report indicated that with regard to written expression, the student achieved a proficiency rating of "3-Having the primary role in completing a task" for tasks where the student would revise to enhance ideas by adding descriptions in detail, use precise language and content-specific vocabulary to inform and/or to explain the topic, and use several pre-writing strategies (e.g., web, brainstorm, etc.) (Parent Ex. K at p. 3). The student achieved the highest proficiency rating within the rubric proficiency rating of "4-Completing a task independently on a regular basis" for writing several sentences about a topic (id.).

For math, the February 2021 progress report indicated the focus of the first semester was developing a productive disposition towards mathematics, problem solving, number sense and the conceptual understanding of how to choose appropriate strategies when approaching real world and mathematical problems (Parent Ex. K at p. 5). Students worked through learning strategies that had become part of their mathematical toolbox, such as color coding or using a table (id.). Students also focused on developing strategies for self-monitoring and self-assessment (id.). They used a traffic light visual to practice metacognitive reflection about particular problems and as a framework for explaining their feelings (id.). As the school year began, students' social/emotional well-being was incorporated into the mathematics curriculum through fostering classroom communities which embraced mistake-making, risk-taking, and the safe sharing of thoughts and ideas (id.). Students were encouraged to see mathematics as sensible, useful, and worthwhile, as well as establishing their own efficacy (id.).

According to the February 2021 progress report, the mathematics curriculum was delivered to students both remotely and in-person (Parent Ex. K at p. 5). During remote instruction, class was taught through daily live instruction using Zoom and supplemented with asynchronous assignments (id.). Throughout the semester, both remotely and in-person, students were broken into small, differentiated groups to inquire about the essential questions of each unit and how to integrate their prior knowledge of number sense within real life contextual problems (id.). Using scaffolded graphic organizers, visual representations and aids, step-by-step instructions, guided instruction and direct modeling from teachers, engagement in safe hands-on tasks designed at each student's zone of proximal development, and multi-modal presentations of information, students developed an understanding of the math skills in each unit of the semester and how to apply them in real-life situations (id.).

In the first unit of the semester, students worked through questions including how to make sense of problem-solving situations, why it was important to be familiar with problem solving situations, and how number sense and operations could be applied to solve real world problems (see Parent Ex. K at p. 5). To answer those questions, students constructed an understanding of problem solving for independence while utilizing prior knowledge of numbers and operations (id.). Students were introduced to instructional routines which focused on making sense of the problems called "Would You Rather," "Notice & Wonder," and "Slow Reveal Word Problems" (id.). When

engaging with the Would You Rather routine, students practiced making a choice and justifying their answer (id.). The Notice & Wonder routine challenged students to make thoughtful observations about different scenarios, and the Slow Reveal engaged students in the process of problem solving by gradually exposing additional pieces of information to help students work towards solutions (id.). Students also used knowledge of the world around them to engage in problem solving applications (id.). As a culminating project the students were tasked with creating their own problem-solving situation and they worked on writing (using words, drawings, or using pre-printed visuals) scenarios at appropriate levels and asking questions (id.). Additionally, students used their problem-solving strategies to solve their own and their classmates' word problems (id.).

The second unit began with students exploring place value and its relationship to the composition, decomposition, and computation of numbers (Parent Ex. K at p. 5). They engaged in activities and games that highlighted concepts inherent in the base ten system such as bundling groups of ten and comparing numbers based on the value of each of the digits (id.). Students worked through questions of the unit, such as how place value relates to the base ten system, how place value could be used to solve computation problems, and how knowledge of place value could be applied in real-life contexts (id.). During the course of the unit, students constructed an understanding of place value through a variety of hands-on activities and games (id.). Students used their knowledge of place value to compose, decompose, and compute different numbers in a variety of problem-solving activities at each student's individual instructional level (id.). The students then used a developed understanding of place value in project-based, real-life contexts (id.). Students used manipulatives such as "base-ten blocks" and snap cubes as representations and models of the base ten system (id.). As a culminating project, students were tasked with creating their own "t-shirt factories" in small groups and worked together to "sell" and "keep inventory" using groups of hundreds, tens, and individual t-shirts (id.).

The February 2021 progress report included extensive instructor comments indicating that during remote learning, the math curriculum was delivered through daily live instruction using Zoom and supplemented with asynchronous assignments (Parent E. K at p. 6). In-person class consisted of six students, one teacher, and one 1:1 paraprofessional (id.). According to the progress report, the student was an active participant in math, asked extension questions, and made connections between math and her life (id.). She was a leader in the classroom and a model for others to follow the classroom routines in class (id.). The student consistently expressed what she liked and found what was just right for her in math, as well as what was challenging for her (id.). Additionally, the student had increased her confidence and ability to advocate for help and persevere through challenges (id.).

The instructor comments also indicated that the student independently added and subtracted fluently within 100 and continued to develop her ability to add and subtract fluently within 1000 with the support of math tools (e.g., hundreds chart and the use of manipulatives) (Parent Ex. K at pp. 6-7). According to the instructor, the student demonstrated progress in her understanding of the targeted mathematical content as evidenced by a variety of activities, performance tasks, and formative assessments completed throughout the semester (id. at p. 7). During the first unit, the student had developed an understanding of solving mathematical and real-world problems (id.). She independently represented and solved problems involving addition and subtraction and continued to work on her ability to utilize those skills with multi-digit numbers

with the support of teacher prompts and the use of tools such as counters and hundreds charts (id.). The student particularly benefitted from the "I notice, I wonder" instructional routine to engage her inquisitive nature in relation to mathematical and real-world problems (id.). As a culminating project, the student created her own word problem with the support of teacher modeling and graphic organizers (id.).

According to the instructor comments, throughout the second math unit of the semester, the student had shown a strong understanding of place value to the hundreds place (Parent E. K at p. 7). She independently represented numbers in different ways, including expanded form, standard form, and base ten blocks (id.). With the use of visual aids, like drawing pictures, and using manipulatives, such as base ten blocks, she had shown a developing understanding of generalizing place value understanding for multi-digit whole numbers (id.). The student continued to grow her skills of composing and decomposing numbers based on the corresponding groups of hundreds, tens, and ones (id.).

During the first semester of the 2020-21 school year, the February 2021 progress report indicated with regard to problem solving, the student achieved the highest proficiency rating of "4-Completing a task independently on a regular basis" for being able to understand addition as putting together and adding to, and subtraction as taking apart and taking from (Parent Ex. K at p. 6). The student achieved a proficiency level of "3-Having the primary role in completing a task" for tasks where the student solved word problems that called for addition of three whole numbers whose sum was less than or equal to 20, used addition and subtraction within 100 to solve one-step word problems involving situations of adding to, taking from, putting together, taking apart, and comparing, with unknowns in all positions, and used addition and subtraction within 20 to solve one-step word problems involving situations of adding to, taking from, putting together, taking apart, and/or comparing, with unknowns in all positions (id.). The student achieved a proficiency rating of "2-Taking a subordinate/shared role in completing a task" for being able to use addition and subtraction within 100 to develop an understanding of solving two-step problems involving situations of adding to, taking from, putting together, taking apart, and comparing, with unknowns in all positions (id.).

With regard to skills related to the base ten system, the student achieved the highest proficiency rating of "4-Completing a task independently on a regular basis" for being able to compose and decompose the numbers from 11 to 19 into ten ones and one, two, three, four, five, six, seven, eight, or nine ones, understand that the digits of a three-digit number represent amounts of hundreds, tens, and ones, and understand that the two digits of a two-digit number represent amounts of tens and ones (Parent Ex. K at p. 6). The student achieved a proficiency level of "3-Having the primary role in completing a task" for tasks where she read and wrote numbers to 1000 using base-ten numerals, number names, and expanded form (id.). Further, the student achieved a proficiency rating of "2-Taking a subordinate/shared role in completing a task" for fluently adding and subtracting within 1,000 using strategies and algorithms based on place value, properties of operations, and/or the relationship between addition and subtraction (id.).

In the area of "procedural fluency," the student achieved the highest proficiency rating of "4-Completing a task independently on a regular basis" for adding and subtracting within 10, counting to 100 by ones and by tens, and fluently adding and subtracting within five (Parent Ex. K at p. 6). The student achieved a proficiency level of "3-Having the primary role in completing

a task" for the tasks of adding and subtracting within 20, and adding within 100 (id.). Further, the student achieved a proficiency rating of "2-Taking a subordinate/shared role in completing a task" for being able to add and subtract within 1000 (id.).

Turning next to how Cooke addressed the student's communication, social/emotional, visual perceptual and IADL skills, February 2021 progress report included a different rubric than the one used for academic subjects (see Parent Ex. K at pp. 10, 12, 14).<sup>13</sup> The February 2021 progress report indicated that the speech-language pathologist supported communication in the academic setting as well as in the community, across the domains of receptive and expressive language, executive functioning, literacy, and speech production, and that the speech-language pathologist individualized therapeutic intervention for each student (id. at p. 10).

The February 2021 progress report included instructor comments that indicated the student started the school year participating in remote speech-language therapy sessions that were provided synchronously twice weekly for 30 minutes in a small group setting via Zoom (Parent Ex. K at p. 10). Asynchronous activities were provided for assessment purposes or to support therapeutic goals, as necessary (id.). After school opened for in-person instruction, the student participated in three 30-minute weekly sessions in a small group setting (id.). One of those sessions was provided as a speech-language center in the humanities class (id.). Additionally, the speech-language pathologist provided rotating support during lunch, snack, and dismissal (id.). Collaboration and consultation with classroom teachers and other related service providers occurred on a weekly basis to promote carryover and generalization of skills (id.). According to the progress report, the student's speech-language goals for the 2020-21 school year were established through file review, class observations, and informal assessments (id.).

The progress report comments indicated that to address the student's receptive and expressive language skills, listening passages and videos were presented in order to target answering wh- questions and comprehension (Parent Ex. K at p. 10). The student answered wh-questions with minimal prompting from the therapist and throughout those activities the student was exposed to new vocabulary words (id.). She advocated for herself when a word was new by asking the therapist for the definition and repeated definitions for novel words (id.). To further address this skill, the student worked toward using them in a sentence (id.). In order to describe a personal experience, the student used a graphic organizer with the "5 W's" to ensure she added an appropriate amount of details (id.). With support of the graphic organizer, the student had shown improvement with narrative skills, demonstrated by an increase in the use of details and thoroughness of the narrative (id.).

During the first semester of the 2020-21 school year, February 2021 progress report indicated that with regard to receptive language, the student achieved a designation of "3-Demonstrates with Fading Models or Prompts" for her ability to answer wh-questions based on a listening passage or video (Parent Ex. K at p. 10). The student achieved a designation of "2-Demonstrates with Models or Prompts" for expressively increasing lesson-based vocabulary; for

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<sup>13</sup> The rubric scale of proficiency for related services in the February 2021 progress report was as follows: \*- Newly introduced skill; 1-Working at a Beginning Level; 2-Demonstrates with Models or Prompts; 3-Demonstrates with Fading Models or Prompts; 4-Demonstrates Successfully (Parent Ex. K at pp. 10, 12, 14).

the executive function skill of describing a personal experience using sentences, and for the pragmatics skill of self-advocating during group activities (id.).

Next, regarding the student's social/emotional instruction, the February 2021 progress report indicated all students participated in social/emotional programming throughout the school year as part of their instruction at Cooke (Parent Ex. K at p. 12). According to the progress report, the programming was designed to teach students the skills that were necessary for successful social interactions and regulation of their emotions (id.). All students received counseling/social skills group once per week, which was aimed at increasing social/emotional functioning and facilitated by the students' school psychologist as pullout sessions (id.). Each counseling session followed a schedule consisting of feelings check-in, direct instruction coupled with a relevant activity, and structured play (id.).

The February 2021 progress report also indicated that students learned about a variety of topics (e.g., utilizing coping strategies, garnering positive attention from others, identifying one's emotions) through direct instruction, personal narratives, video models, and structured play (Parent Ex. K at p. 12). Roleplays in which students acted out various social scenarios were used and allowed students to receive immediate feedback about the impact of their actions on the emotions and perceptions of others (id.). Moreover, written exercises were incorporated to allow students to measure their knowledge of the week's lesson and apply newly learned skills to their own personal experiences (id.). Lastly, while engaging in structured play, students practiced social initiation, reciprocity, game termination, and emotional regulation by playing various online games (e.g., Spot It, Connect Four, Jeopardy, Sorry) (id.). Specifically, students practiced skills such as following the rules of the game, taking and waiting for his/her turn, monitoring the progression of the game, and displaying good sportsmanship (id.).

The February 2021 progress report indicated that during the first semester while receiving remote instruction, the student participated in one 30-minute session per week of group counseling services, and asynchronous activities were provided to support therapeutic goals, as deemed necessary (Parent Ex. K at p. 12). Parent consultation and coaching was available on an ongoing basis as a component of virtual therapy sessions to further promote progress with goals (id.). Weekly consultation occurred with classroom teachers and other related service providers to increase generalization of skills across a variety of environments (id.). After returning to in-person schooling, the student continued to participate in remote group counseling services via Zoom with on-site staff supervision provided during those sessions (id.). Parent consultation/coaching continued to be available, as were asynchronous activities and materials to further support progress with goals (id. at pp. 12-13). Weekly consultation with the student's academic and therapeutic team was also conducted (id. at p. 13).

According to the February 2021 progress report, during the first semester group counseling lessons primarily focused on cultivating appropriate peer relationships and developing emotion regulation skills (Parent Ex. K at p. 13). In terms of peer relationships, the semester's lessons focused on the importance of recognizing qualities of a good friendship, maintaining a positive outlook when conversing with others, and providing assistance to other people when they need it (id.). Regarding emotion regulation, lessons focused on identifying one's emotions through use of a visual, developing one's flexibility in response to challenging situations, and determining emotions that might necessitate the use of a coping strategy (id.). Particular emphasis was placed

on maintaining flexibility in the COVID era, which was rife with unexpected changes on a regular basis (id.). During group counseling, the student required minimal support to remain on-task during both the structured lesson and role-play activities (id.). She spontaneously participated during most lessons and provided relevant commentary (id.). The student was a pleasure to have in group, and she interacted with her peers in an appropriate manner during that time (id.). At times, she required reminders to reduce silliness (in response to a peer's behavior) that detracted from the overall lesson; however, she was very responsive to those reminders (id.). Outside of group counseling, the student had a positive transition to middle school (id.). She engaged with a wide variety of peers, was respectful towards adults, and consistently followed Cooke's middle school expectations (id.). Going forward, the student was continuing to work on using explicitly taught coping strategies (e.g., tell an adult when someone makes you uncomfortable, remove yourself from a situation) when experiencing a difficult emotion (id.). Another ongoing goal for the student involved practicing self-advocacy skills across contexts (e.g., home, school, community) (id.).

With regard to the student's social skills performance, the February 2021 progress report indicated that for the first semester, she achieved a designation of "3-Demonstrates with Fading Models or Prompts" for her ability to engage in cooperative play skills such as sharing, turn taking and maintaining personal space, initiate conversation with peers, and demonstrate flexibility during times of "transition" or changes to the daily schedule by implementing coping mechanisms (i.e. ignore, deep breathing, verbal expressions of feelings, counting to ten) to remain calm (Parent Ex. K at p. 12). The student achieved a designation of "2-Demonstrates with Models or Prompts" for her ability to display emotional regulation/coping skills, recognize and label feelings/emotions, participate in appropriate reciprocal conversation with peers, and use appropriate problem-solving strategies to resolve conflicts with others (id.).

Finally, for OT, the February 2021 progress report provided a detailed account of what OT at Cooke entailed, including that it helped individuals achieve independence in all facets of their lives and addressed the physical, sensory, and cognitive aspects of ADLs, IADLs, rest and sleep, education, work, play, leisure, and social participation (Parent Ex. K at p. 14). In the school setting, OT focused on promoting independence and supporting the child's role of "student" throughout the school day (id.). Through analysis of the activity and the environment, modifications and adaptations were made to diminish any hurdles in occupational engagement (id.).

According to the February 2021 progress report, the student's OT skills for the 2020-21 school year were established through file review, classroom observations, virtual observations, parent/teacher report, and informal assessments throughout September and October (Parent Ex. K at p. 14). During remote instruction, the student participated in OT during one 30-minute dyad session per week via Zoom, and asynchronous activities were provided to support therapeutic goals, as necessary (id.). Collaboration and consultation with classroom teachers and other related service providers occurred on a weekly basis to promote carryover and generalization of skills (id.). Since the school opened for in-person instruction on October 13, 2020, the student had participated in two 30-minute sessions of individual OT per week (id.). Additionally, the occupational therapist had provided rotating support during specials, lunch, recess, arrival, and dismissal (id.). Collaboration and consultation with classroom teachers and other related service providers had occurred on a weekly basis to promote carryover and generalization of skills (id.).



With regard to the student's visual perception goal, the occupational therapist's comments indicated that the student was very happy and engaged during her OT sessions (Parent Ex. K at p. 14). She worked to improve discrimination between the left and right sides of her body by engaging in games such as "Simon Says," donning and doffing her shoes, and performing gross motor exercises (id.). The student required minimal verbal cues in order to remember the differences between the right and left sides of her body (id.). The occupational therapist reported that regarding IADLs, the student demonstrated increased knowledge of her personal information, such as her address, date of birth, and phone number (id.). She recalled parts of her home address (building number and street name) accurately (id.). However, she required moderate verbal and visual support to write other parts of her address (apartment number, city, state, and zip code (id.). She recalled her date of birth (month, day, and year) accurately (id.). The student recalled most of her phone number, however, she required visual support to remember her area code (id. at pp. 14-15). According to the progress report, OT would continue to focus on the above areas to promote academic and functional independence (id. at p. 15).

With regard to the student's OT skills performance, the February 2021 final progress report indicated that for the first semester, specific to visual perception, she achieved a designation of "3-Demonstrates with Fading Models or Prompts" for her ability to demonstrate left/right discrimination (Parent Ex. K at p. 14). According to the progress report, concerning IADL skills, the student achieved a designation of "2-Demonstrates with Models or Prompts" for her ability to demonstrate knowledge of personal information (e.g., locates, recites, or writes/types name, home/school phone number, home/school address, emergency contact info, date of birth, medical information) (id.).

In consideration of the detailed description of how Cooke addressed the student's global academic, communication, social/emotional, visual perceptual, and IADL/ADL deficits, under the totality of the circumstances, the evidence in the hearing record supports a finding that Cooke provided the student with an appropriate program of specially designed instruction to address her special education needs.

### **C. Equitable Considerations**

The final criterion for a reimbursement award is that the parent's claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was

justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

At the hearing the district's attorney indicated that the district had no issues with regard to equitable considerations (see Tr. p. 20). In its answer, the district has not raised any concerns regarding equitable considerations that would warrant a reduction or denial of the parent's requested tuition reimbursement.

## **VII. Conclusion**

As the evidence in the hearing record supports a finding that Cooke offered the student an appropriate program of specially designed instruction to address her special education needs during the 2020-21 school year and that there are no equitable considerations that warrant a reduction in the parent's award of tuition reimbursement, the necessary inquiry is at an end.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the decision of the IHO dated April 7, 2021 is modified by reversing that portion which determined that Cooke was not an appropriate unilateral placement for the student during the 2020-21 school year; and

**IT IS FURTHER ORDERED** that the district shall reimburse the parent for the cost of the student's tuition, related services, and transportation at Cooke for the 2020-21 school year upon the parent's submission to the district of proof of payment.

**Dated:**           **Albany, New York**  
                          **June 24, 2021**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**