



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 21-161

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

**Appearances:**

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

Goldman & Maurer, LLP, attorneys for respondents, by Brian S. Goldman, Esq.

### DECISION

#### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that respondents' (the parents) unilateral placement of their son was appropriate and ordered it to reimburse the parents for his tuition costs at the Birch Wathen Lenox School (BWLS) for the 2019-20 school year. The appeal must be dismissed.

#### II. Overview—Administrative Procedures

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

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

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

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

The parties' familiarity with the facts and procedural history of this matter is presumed and will not be recited in detail here. Briefly, the student intermittently received speech-language therapy as a young child through elementary school (see Parent Ex. C at p. 1). The student's father stated that the student was having academic difficulties while attending third grade at a nonpublic school during the 2011-12 school year (Parent Exs. C at p. 2; S ¶ 2). The parents requested that the district conduct an evaluation of the student's learning issues and in June 2012, the CSE convened, determined that the student was eligible for special education, and developed an individualized education services program (IESP) (id. ¶ 2, 3). Subsequently, in August 2012 the parents obtained a private neuropsychological consultation, at which point the evaluator concluded that the student's cognitive functioning was within the average range, but that he exhibited

"primary difficulties with language, attention/executive functioning, and motor programming/planning" (Parent Ex. C at pp. 1, 5). The evaluator reported that the student's language difficulties were "reflective of two distinct developmental language disorders: a formulation disorder and a phonological processing disorder; the latter is commonly referred to as 'dyslexia'" (*id.* at p. 5). Additionally, the student had difficulty with praxis, which affected his motor functioning (*id.*). Recommendations at that time included that the student receive speech-language therapy, after school tutoring, a smaller classroom setting designed to meet his needs and those of similarly functioning peers—such as "an integrated co-teaching class"—and daily resource room support (*id.*).

According to the parent, an IESP for the student was developed in November 2013, and in May 2014 the CSE convened but "an IEP document was never developed from this meeting" (Parent Exs. B at p. 4; S ¶ 6). The student began attending BWLS during the 2014-15 school year (sixth grade), and continued there during the 2015-16, 2016-17, and 2017-18 school years (Parent Exs. P ¶ 9; S ¶ 10).<sup>1</sup>

In March 2018, the parents obtained a private neuropsychological re-assessment of the student (Parent Ex. A). At that time, the neuropsychologist concluded that the student's "pattern of performance indicated that he [was] functioning within age expectations across numerous cognitive domains" although "he continue[d] to exhibit mild weaknesses with aspects of attention/executive functioning, language, and academic achievement" and "appear[ed] to be experiencing underlying feelings of anxiety" (*id.* at p. 5). The student received diagnoses of a specific reading disorder, a frontal lobe and executive function deficit, and an adjustment disorder with anxiety (*id.*). In April 2018, the BWLS learning specialist reported that the student "continue[d] to struggle with decoding, fluency, reading comprehension, and written expression" (Parent Ex. G).

The student attended BWLS during the 2018-19 school year and on February 8, 2019 the parents signed an enrollment contract for the student to continue to attend the school for the 2019-20 school year (Parent Ex. E; *see* Parent Exs. P ¶ 9; S ¶ 10). By letter dated August 20, 2019, the parents notified the district that the student would be returning to BWLS for the 2019-20 school year "at public expense" (Parent Ex. L).<sup>2</sup>

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

In a due process complaint notice dated February 24, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (*see* Parent Ex. B). Specifically, the parents asserted that the CSE had failed to convene a CSE meeting, develop an IEP, and recommend a placement for the student for the 2019-

---

<sup>1</sup> The Commissioner of Education has not approved BWLS as a school with which school districts may contract for the instruction of students with disabilities (Parent Ex. R ¶ 6; 8 NYCRR 200.1[d], 200.7).

<sup>2</sup> The parent asserted that for the 2014-15 through the 2019-20 school years, the district failed to convene a CSE meeting and provide an IEP to the parents (Parent Ex. S ¶ 7). According to the parent, the district had "resolved each and every year" by reimbursing the parents for the "full tuition" and also when applicable, evaluation and tutoring costs that they had incurred (*id.* ¶ 9).

20 school year (*id.* at pp. 4-5). As relief, the parents requested that the district reimburse them for the costs of the student's tuition and "any other documented" costs the parents incurred related to the 2019-20 school year (*id.* at pp. 5, 6).

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

An impartial hearing convened on September 3, 2020 and concluded on November 19, 2020 after four days of proceedings (Tr. pp. 1-117). In a decision dated June 16, 2021, the IHO determined that "it [was] clear that the [district] did not meet" its burden of showing that it provided an appropriate program to the student, which was "not even contested" (IHO Decision at p. 5). Next, the IHO determined that the parents had met their burden to show that BWLS was an appropriate unilateral placement and opined that it would be "unjust" to deny funding for an appropriate school in a situation such as this where the district did "not even dispute that it ha[d] not provided for an appropriate program" and "where the education ha[d] been tailored to address [the student's] unique learning style and the school ha[d] provided individualized assistance" (*id.* at pp. 5-6). Lastly, the IHO determined that there was "no basis in the equities" to deny the parents tuition reimbursement (*id.* at p. 5). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at BWLS for the 2019-20 school year (*id.* at p. 6).

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

The district appeals the IHO's determination that BWLS was an appropriate unilateral placement. Specifically, the district alleges that the IHO erred in determining that it would be unjust to deny tuition funding where the district conceded that it denied the student a FAPE, stating that in doing so, the IHO appeared to have lessened or eliminated the parent's burden of showing that the unilateral placement was appropriate. Next, the district asserts that although the IHO acknowledged that BWLS was not "technically a 'special education' school," he erred in finding that BWLS provided "tailored instruction to address [the student's] unique learning needs," as there was a discrepancy as to how much special education services the student actually received during the school year. Further, the district argues that the IHO erred by not determining that the lack of related services at BWLS resulted in a finding that the school was not appropriate, specifically, the lack of speech-language therapy to address the student's language deficits that affect his academic performance, and the lack of services to address his executive functioning needs. The district also asserts that certain instructional strategies and teaching styles that BWLS used were not evidence that the student received specially designed instruction to address his specific speech and executive functioning needs, rather, the evidence showed that "BWLS modified its instruction and employed other strategies to help the [s]tudent avoid" his speech-language and executive functioning deficits. Additionally, while acknowledging that BWLS was not required to develop "its own IEP of sorts," the district argues that the hearing record is devoid of any evidence that the school developed a plan or goals to address the student's speech-language or executive functioning deficits. The district further asserts that the evidence regarding the "extra help" and individualized attention the student received from his teachers was insufficient to conclude that BWLS provided specially designed instruction. Contrary to the IHO's finding, the district argues that the student did not make progress at BWLS, and that certain attributes of BWLS that benefited the student the most were "the kind of advantages that that might be preferred by parents of any [student], disabled or not", and not evidence that they were specially designed for the student. As such, the district

requests that the IHO's finding that the parents met their burden of demonstrating the appropriateness of BWLS be reversed.

In an answer, the parents respond to the district's allegations and first argue that the IHO properly found that in balancing equitable considerations, the district must reimburse the parents for the full tuition at BLWS as the district failed to raise any issues at the impartial hearing that would limit or preclude reimbursement on equitable grounds such as whether the parent failed to cooperate, the record is devoid of any such evidence, it is improper for the district to raise the issue for the first time in its request for review and the district admitted it failed to offer the student an appropriate program. Next, the parents assert that the IHO properly determined that BWLS was an appropriate unilateral placement for the student in that "it sufficiently addressed his educational deficits with educational instruction that was specifically designed to meet his unique special education needs" and that the evidence in the hearing record supported the IHO's finding that BWLS "tailored" the student's instruction to address his unique learning needs. Regarding an alleged discrepancy in testimony, the parents argued that the learning specialist was in a better position to explain how often she met with the student, and that she further described how she appropriately addressed the student's needs identified in the neuropsychological evaluation reports. Further, the parents assert that the district's allegation that the student required a "special education school" is "simply wrong" as such a placement would be too restrictive, and that courts have considered evidence of a private school's "general education milieu" in finding a placement sufficient for purposes of tuition reimbursement. Additionally, the parents contend that the math teacher's testimony showed that the student's teachers and advisor at BWLS provided him with appropriate academic supports. Regarding the district's suggestion that the student's language deficits warranted speech-language therapy as a related service, the parents point to the 2018 neuropsychological evaluation report which did not include a recommendation for that service, and the evidence that BWLS was aware of the student's language needs and addressed them accordingly. The parents argue that the district's allegation that the student was taught to avoid or "work around" learning issues is "false," rather, the evidence shows that BWLS provided specific, systematic instructional tools to the student, and many of the accommodations provided are "long standing standard procedural methodology" that the district has used extensively. Finally, the parents contend that the student made progress at BWLS. As such, the parents request that the IHO's decision should be upheld, and the district be directed to reimburse the parents for the full costs of tuition at BWLS for the 2019-20 school year.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>3</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. 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 – Unilateral Placement**

The district has not appealed the IHO's determinations that it failed to offer the student a FAPE for the 2019-20 school year or that equitable considerations favored the parents' request for tuition reimbursement. Therefore, those determinations have 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 sole remaining issue to be determined is whether the IHO erred in finding that BWLS was an appropriate unilateral placement for the student.

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

---

<sup>3</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).

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).

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

Although not in dispute on appeal, a discussion of the student's needs is necessary to evaluate the appropriateness of the parents' unilateral placement of the student at BWLS for the 2019-20 school year (eleventh grade).

The parents obtained a neuropsychological re-assessment of the student in March 2018 toward the end of his ninth-grade school year (Parent Ex. A). In the report, the evaluator reiterated results from the August 2012 neuropsychological evaluation and a March 2018 psychoeducational evaluation of the student (id. at p. 2). Following administration of numerous standardized assessments, the evaluator concluded that the student's general cognitive functioning and vocabulary were within the low average range, and he exhibited average cognitive efficiency, fluid reasoning, short-term working memory, and comprehension-knowledge skills (id. at pp. 2-3). However, the student continued to exhibit difficulties with aspects of attention/executive functioning skills, in that his "vigilance was slightly weak, and he had trouble with set-shifting and cognitive inhibition" (id. at p. 5). Also evident was difficulty in the student's ability to see things in a holistic manner, and such difficulties affected his performance on measures of memory and retrieval (id.). According to the evaluator, aspects of visuospatial functioning were weaker than they had been at the time of the prior evaluation, and his fine motor skills were low average bilaterally (id.).

Regarding language skills, the evaluator determined that the student's naming ability was slightly reduced, and that he continued to demonstrate difficulties with phonological processing (Parent Ex. A at p. 5). Consistent with that finding, the student's reading rate, accuracy, and comprehension skills were below expectations, ranging from impaired to low average, and his spelling skills were in the low average range (id.). In contrast, the student exhibited math skills in the average range (id.). The evaluator reported that the student had demonstrated language-based difficulties since childhood, and with considerable support he had made significant progress; his receptive and expressive language skills were age appropriate, he communicated his thoughts in an organized manner, and he drafted grammatically appropriate written responses to questions (id.). Nevertheless, according to the evaluator the student's pattern of performance continued to suggest the presence of a developmental language disorder, specifically an impairment in phonological processing, that in turn affected his reading ability (id.). The evaluator further indicated that the student's reading difficulties may be exacerbating his attention problems and vice versa (id.). Additionally, the evaluator reported that the student appeared to be experiencing underlying feelings of anxiety, and the parent reported concerns about the student's hesitancy to go to school each day (id.).

In April 2018, the student's learning specialist reported that the student struggled with decoding, fluency, reading comprehension, and written expression (Parent Ex. G). She also reported that the student had great difficulty grasping concepts in science and math, needed to learn math facts on an automatic level, and had difficulty following directions and multi-step instructions (id.). At that time, the student received preferential seating, checking for understanding, directions repeated, meeting with teachers for extra help daily, and meeting with the learning specialist weekly to work on learning study techniques and strategies (id.). According to the learning specialist, with the help provided, the student had continued to progress academically (id.).

The undated BWLS document reflected that the student's "major deficits" were in the areas of speech-language skills including vocabulary, slow processing speed, listening comprehension, and sounding out unfamiliar words; as well as deficits in executive functioning skills, specifically, focusing, following directions, and working memory (Parent Ex. K at p. 1).

## **B. Specially Designed Instruction**

Initially, with regard to the district's assertion that the IHO lessened or eliminated the parents' burden to show that BWLS was an appropriate unilateral placement due to his comment that it would be unjust to deny tuition funding where the district conceded that it had denied the student a FAPE, a review of the IHO's analysis shows that he first determined that BWLS was appropriate as it provided specially designed instruction and that the student had made progress (IHO Decision at pp. 5-6). As such, the decision read as a whole does not support a finding that the IHO's primary determination that BWLS was appropriate was based on any improper consideration of equitable factors during his analysis of the unilateral placement.

Next, with regard to the parties' dispute over whether BWLS was appropriate to address the student's needs, the director of the BWLS upper school (director) testified that BWLS is a kindergarten through twelfth grade coeducational college preparatory school that enrolled approximately 544 students during the 2019-20 school year who had different levels of educational needs and skills (Parent Exs. P ¶ 3, 5; Q ¶ 4; R ¶ 4). The director stated that BWLS employed teachers with a wide range of qualifications, although most had master's degrees in their subject areas and several were pursuing additional education (Parent Ex. P ¶ 16). BWLS also employs a "dedicated" psychologist for the upper school and has brought in "additional specialists" for consultation as needed (id. ¶ 17). According to the director, although BWLS does not follow the New York State Department of Education curriculum, the school does "cover the same core curriculum as well as a range of elective options" (id. ¶ 1, 4). The director testified that BWLS does not provide special education classes for students with IEPs, rather, the school employs a learning specialist who is available to meet with students individually (id. ¶ 6). He continued that BWLS teachers meet with students who have IEPs for extra one-on-one help during office hours and by appointment, and students can receive accommodations such as preferential seating, and if recommended in a psychoeducational evaluation, use of a computer, extended time during exams, and in certain cases, exams read aloud (id. ¶ 7).

Specific to the student in this matter, the director testified that the student received instruction in English, math, a math elective, science, history, art, health, and physical education in "small classes" of 15 students or less (Parent Ex. P ¶ 10, 12). He indicated that the small classes allowed staff to provide the student with "close attention," and individualized extra help, and also that they developed close working relationships with the student (id. ¶ 12). The student had many teachers for more than one class, which allowed for continuity in his experience, close relationships with faculty, and in turn faculty had in-depth knowledge of the student's learning style and academic difficulties (id.). The director testified that BWLS "cater[ed]" to the student's specific needs by providing him with extended time on assignments, and the opportunity to meet with teachers for extra help and the learning specialist for one 40-minute period per week (id. ¶ 13). The director acknowledged that BWLS does not provide speech-language therapy, but he further indicated that the student had "arranged for individualized extra help with various teachers of his and the learning specialist addressing those subjects with which he [was] having difficulties" (id. ¶ 18).

An undated document entered into the hearing record stated that "[e]ach student that has an IEP at BWLS, has a [l]earning [s]pecialist that is assigned to them, who meets with them regularly for extra one-on-one help," and, in addition, the school provides those students with "an

array of preferential accommodations in various subjects, on an as needed basis" (Parent Ex. K at p. 1). The BWLS learning specialist testified that she has a master's degree in education, holds a New York State "[t]eachers [l]icense" and is certified in Orton-Gillingham (Parent Ex. O ¶ 3). She stated that her job duties included implementing accommodations and providing test coordination and academic student support (id. ¶ 4).

A review of the learning specialist's testimony reflects that she was familiar with the student's needs, and she stated that she had experience working with students who exhibited needs similar to those with which the student had presented (compare Parent Ex. A at p. 5, with Parent Ex. O ¶ 10). Regarding the student, the learning specialist testified that the March 2018 neuropsychological re-evaluation report provided her with the appropriate recommendations to support the student academically in school, including extra time, world language waiver, and preferential seating (Parent Ex. O ¶ 5-7). She further testified that she met with the student for three sessions per week "to discuss any academic/behavior issues that might be presented" and to provide support to the student with his learning challenges (id. ¶ 7; see Parent Ex. K at p. 3). Specifically, the learning specialist testified that she assisted the student using the strategies of review, repetition, previewing and planning, as well as "SQR3, Cornell note taking method, and Orton-Gillingham" methodologies (id.; see Parent Ex. K at p. 3).<sup>4</sup> She opined that BWLS was meeting the student's specific needs, and that the small class allowed him the opportunity to participate, ask questions, and receive personalized attention regarding the concepts with which he struggled (id. ¶ 12).

The BWLS math teacher testified that she had known the student for a number of years and was his eleventh-grade algebra 2 teacher during the 2019-20 school year (Parent Ex. Q ¶ 5). She stated that the student's class met five times per week and was composed of 12 students who "explor[ed] concepts at a slower pace than other [a]lgebra 2 courses" at BWLS (id.). According to the math teacher, the student's math class reviewed some concepts from algebra 1 and got through less content but in a more in-depth way with more repetition than the other classes (Tr. pp 57-58). The math teacher testified that she identified the student's needs by accessing the student's neuropsychological evaluation reports and learning specialist notes, as well as conducting an assessment of the student at the beginning of the school year (Parent Ex. Q ¶ 6). In her testimony, the math teacher described the student's difficulty with retrieval and recall, executive functioning, and ability to focus, read, comprehend and follow directions, process higher level math concepts, read and interpret word problems, and differentiate between various solving methods and identify when to apply them (id. ¶ 7-9, 13; see Parent Ex. K at p. 2).

The student's math teacher agreed that the smaller classroom, the individualized attention, and having teachers frequently available for extra help and one-to-one interactions was what benefitted the student the most (Tr. pp. 68-69). She testified that to address the student's difficulty with reading, they spent "extensive time solving word problems," and used strategies such as "decoding," underlining, highlighting, and circling key words, repeating, and "trying to find a pattern within . . . specific types of problems" (Tr. pp. 87-88). The math teacher also used verbal equations to write out what was being solved for while looking for key terms, explained how to

---

<sup>4</sup> According to the parents, "SQR3" is the acronym for the reading strategy of "Survey, Question, Read, Recite, Review" (Answer ¶ 11).

interpret directions, and provided constant reminders to look back at the directions (Tr. p. 88). To address the student's need to express his knowledge on written tests, the math teacher testified that she used practice, repetition, and having the student interpret what the question was asking, teaching him to outline a chapter rather than only completing practice problems, and having him create his own study guide (Tr. pp. 92-93).

To help the student keep information organized and help him develop effective study strategies, the math teacher testified that she "created guided notes for him each day that he could use" while she taught class, which were identical to what was projected on the board (Parent Ex. Q ¶ 10, 11; see Tr. pp. 57-59). According to the math teacher, the guided notes helped the student with his difficulty with multi-step problems because he had "the stuff there" and was "not spending so much time just writing down the steps," rather, he could "focus on the problems themselves" (Tr. pp. 60-61). She also "broke down each concept and scaffolded the lessons to build as [the student] acquired new skills" (Parent Ex. Q ¶ 10; see Tr. pp. 63-64; Parent Ex. K at p. 2). Additionally, she taught the concepts at a slower pace with practice and repetition built into the curriculum to allow the student more time to process information and aid with memory and recall (id. at ¶ 10, 11). Further, the math teacher testified that the student benefitted from the requirement that he sit in the first two rows of the classroom, that she "constantly checked that he was completing the notes," and also provided him with "ample opportunities to attempt problems on his own so that [she] could assess his understanding throughout a class period" (id. ¶ 11, 15; see Tr. pp. 61, 65-66; Parent Ex. K at pp. 2-3). According to the math teacher, the student was encouraged to attend extra help more frequently because he benefitted from small class instruction and one-on-one attention and instruction (id. ¶ 12, 15; see Parent Ex. K at p. 3). She further indicated that because there were fewer students in the class and the student sat in the first two rows, she could call on him more frequently and "pull him back in more easily" when he lost focus, which was beneficial to him (Tr. pp. 70-71, 88-90). At times, she provided the student with a "break" to go get water to address his focusing issues (Tr. p. 89).

The student's father testified that BWLS addressed the student's academic deficits by providing him with preferential seating, small class size (between 10 to 15 students), specific time during the day for one-to-one instructional support, time for "[s]tudy [s]kills [l]earning" focused on his executive functioning, organization, and time management skills, additional test time and "post-exam corrections support," and in certain classes, the opportunity to "provide answers orally to complement his initial written responses" (Parent Ex. S ¶ 10; see Tr. pp. 75-77; Parent Ex. K at p. 1). According to the parent, the study skills learning session was provided to students at BWLS who had needs similar to the student, at which time he was given "reinforcement" as to how he should study, approach various questions, and move forward, by means that were "customized" to best address his individual challenges (Tr. pp. 77-78). To address the student's identified needs in focusing and concentration, working memory, vocabulary, slow processing speed, listening comprehension, and spelling, the parent testified that BWLS teachers have provided the student with "extra in-class additional attention," substantive review of previously taught material, and scaffolded lessons, directions, and activities (Parent Ex. S ¶ 12; see Parent Ex. K at p. 2). Additionally, to address the student's listening comprehension difficulties, BWLS teachers provided him with "visual Google Slides presentations that accompanied various lessons," and the parent indicated that hand-outs were made available for various lessons so that the student "rarely had to rely on his listening comprehension skills alone" (id. ¶ 13; see Parent Ex. K at p. 2). Further, BWLS teachers also broke tasks up into smaller steps, provided extra individualized attention,

verbal encouragement, "tight boundaries," and "a lot of structural support during writing assignments" (*id.*; *see* Parent Ex. K at p. 2).<sup>5</sup> Specifically, the student was provided with "in-depth outlines which mapped out, step-by-step, how to write each paragraph," along with information on the BWLS website regarding the "teacher's presentations about the writing process," and assigned due dates (*id.* ¶ 14; *see* Parent Ex. K at p. 2). According to the parent, the teachers frequently checked on the student's progress toward those assignments (*id.*; *see* Parent Ex. K at p. 2).

Regarding the district's specific allegation on appeal concerning discrepant evidence with regard to how much instruction the student received from the learning specialist, in her written affidavit the learning specialist stated that she attended weekly advisory meetings at which time she discussed the student's academic progress with his teachers, and that she also met with him "three times per week" to help the student use specific, identified strategies via selected instructional methods (*see* Parent Ex. O ¶ 7). Although the director stated that the student only received one session per week of instruction with the learning specialist, in weighing the accuracy of the testimony, I find that the learning specialist arguably would be in the best position to discuss the frequency with which she worked with the student, and this discrepancy does not indicate that BWLS was an inappropriate placement on that basis (*see* Parent Ex. P ¶ 13). In any event, the testimony of both the director and learning specialist establishes that the learning specialist worked frequently with the student.

Next, the district asserts that BWLS was not appropriate because it did not provide related services such as speech-language therapy or services to address the student's language-based and executive functioning needs. The evidence in the hearing record, however, does not indicate that the student's "mild weakness" with aspects of language could only be addressed via speech-language therapy per se; he did not receive a diagnosis of a language disorder following the most recent neuropsychological testing, nor did that evaluator recommend that the student receive speech-language therapy (*see* Parent Ex. A at pp. 5-6). Rather, the neuropsychological evaluation identified difficulties that affected his reading and executive functioning abilities, which as discussed in detail above, were addressed by the accommodations provided at BWLS (*compare* Parent Ex. A at pp. 5-6, with Parent Exs. K; O ¶ 5-7, 10; Q ¶ 10, 11, 15).<sup>6</sup>

In response to an inquiry by the attorney for the district during the impartial hearing about whether the math teacher's guided notes allowed the student to "avoid" his executive functioning deficits rather than address them directly, the math teacher testified that she did not provide the "exact steps" every single day, rather, the steps were scaffolded and not necessarily the same from day to day (*see* Tr. pp. 63-65). Checking in with and monitoring the student's understanding helped

---

<sup>5</sup> The parent clarified that "tight boundaries" referred to the structure and support specifically used to address the student's challenges and meet the task at hand (*see* Tr. p. 79).

<sup>6</sup> The district is correct that BWLS was "not required to prepare its own IEP of sorts" (Req. for Rev. ¶ 17). As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as BWLS—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (*Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13-14 [1993]), and, furthermore, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with an IEP, which in this instance the district failed to develop.

him improve his executive functioning skills by verbally working through where he was stuck (see Tr. pp. 66-67). In order for the student to require less than "constant guidance" the math teacher testified that she taught him the algebra concepts rather than to just memorize the steps, she used strategies such as underlining or highlighting key words and tried to help the student through multistep problems by going one step at a time, which resulted in the student needing less guidance over the course of the school year (Tr. pp. 67-68). Further, in response to questioning about the skills BWLS taught the student to address his reading and attention difficulties so he could require less one-on-one support, the student's father testified that BWLS had been teaching the student vocabulary skills, basic reading skills, and "all these types of aspects that a person" who had received the same diagnoses as the student "would otherwise be . . . afforded" (Tr. pp. 82-83).

Accordingly, consistent with the IHO's findings, I find that the evidence in the hearing record establishes that the parents met their burden by demonstrating that BWLS provided the student with a program specially designed to address his academic deficits as well as his unique special education needs in the areas of speech and language, and executive functioning.

However, given that the parents base their argument on appeal, in part, on a "general educational milieu" theory with respect to the appropriateness of the unilateral placement, and the district argues against characterizing general programmatic elements of a unilateral placement as "specialized instruction," some further discussion of this issue is warranted.

In assessing the appropriateness of a unilateral placement for tuition reimbursement purposes, a tension may sometimes exist between the legal requirement that the parent demonstrate that the private school provides specialized instruction tailored to the student's unique individual needs and the reality that a private school may appear to be a "good fit" for a student with a disability largely based upon the school's general philosophy and mission, preferred pedagogical methodology, and overarching programmatic framework – elements which are available to all attending students – even where more detailed evidence related to the student's individualized program may be lacking. Indeed, some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, as the parents argue here, and in some cases may constitute special education, while recognizing that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]).

Assessments of appropriateness employing, in part, a "general educational milieu" analysis allow for the consideration of programmatic elements that may nonetheless sufficiently address a student's needs, particularly where the school in question has been designed with a specific student population in mind – i.e. students diagnosed with autism, or those students who present with

complex interfering behaviors or learning disabilities or reading needs, just to name a few possibilities. At the same time, one potential danger of applying a more liberal standard in examining the appropriateness of unilateral placements is that an educational environment which might be deemed desirable for any student – such as small class size, individualized attention to the unique learning profile of each student, and collaboration between teachers to address a student's individual needs - may improperly become conflated with specially designed instruction which addresses the unique needs of a student who has been classified and found eligible for special education and related services (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"])).

In this instance, the hearing record contains evidence concerning the general programmatic structure, learning environment, instructional framework, and methods BWLS employed; accordingly, aspects of the instruction, supports, and services provided to the student at BWLS were part of the school's program and therefore may have been available to all students. Overall, however, when evaluating the totality of the circumstances, there is sufficient evidence in the hearing record concerning individualization of the school's programmatic elements to address the student's unique needs such that reliance primarily on the school's environment and general educational assets to determine the appropriateness of BWLS as a unilateral placement is not necessary. Specifically, BWLS provided the student with preferential seating, checking for understanding, directions repeated, meeting with teachers for extra help daily, and meeting with the learning specialist weekly to work on learning study techniques and strategies. The school also identified his individual needs in the areas of speech-language skills including vocabulary, slow processing speed, listening comprehension, and sounding out unfamiliar words, as well as deficits in executive functioning skills, specifically, focusing, following directions, and working memory, and modified instruction to provide the student with strategies and support to address these issues. The student also received modifications and supports to address specific difficulties he experienced in math as described by this math teacher for the 2019-20 school year. As a result, I find no basis in the hearing record to disturb the IHO's determination that BWLS was an appropriate unilateral placement for the student.

### **C. Progress**

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"])).

Turning to the student's progress here, according to the director, since he began attending the school the student had received "Bs" and "Cs" and was promoted every year (Parent Ex. P ¶ 10, 19). The learning specialist testified that during eleventh grade with the supports in place, the student progressed "well" as measured by assessments, teacher observation and comments, and grades (Parent Ex. O ¶ 9). The student's father testified that the student had "clearly demonstrated . . . slow and steady educational progress" and that the "small educational environment and close

contact" the student had with BWLS staff had made a positive impact on him (Parent Ex. S ¶ 15). Specifically, the parent testified that by instituting preferential seating, small class size, and individualized extra support BWLS "ha[d] clearly put [the student] in a much better situation" than he otherwise would have been, and resulted in an improvement in his grades and aptitude that had been "increasing at a slow and steady pace" (Tr. pp. 79-80).

According to the math teacher, the student's ability to learn concepts in class was considerably stronger than his ability to demonstrate that knowledge on a formal assessment, therefore, his test and quiz grades and overall grade for the class did not necessarily fully reflect his complete understanding of the course content (Parent Ex. Q ¶ 14; see Tr. pp. 90-91, 95-96). She stated that the student's performance varied throughout the year, in that when he went in for extra help "there would be improvements in his understanding and performance," and that he did well in class when he sat up front and the teacher checked his work throughout the class period (id. ¶ 14, 16). When that did not occur, the teacher indicated that the student "would easily get lost in the shuffle" and that he worked very quickly and at times tried to complete assignments in the fastest manner possible without taking into account accuracy and effective learning strategies (id. ¶ 14). She continued that the student attended "extra help more frequently and his comprehension improved, but then the pandemic occurred and classes were mostly online" (id. ¶ 12; see Tr. p. 69).<sup>7</sup> However, the math teacher testified that the student had "certainly strengthened his [a]lgebra skills that were lacking at the beginning of the year," his problem-solving skills improved, and he made progress in decoding word problems and identifying patterns throughout various but similar problems (id. ¶ 16). She further clarified that even if the student did not go in for extra help, there still would have been some improvements but "just not as much" as when he received one-on-one help, which she opined was "pretty typical for most students (Tr. pp. 69-70).

The student's April 2020 third term progress report included teacher comments that the student had fewer absences in English and as a result, was better able to stay on top of his assignments (Parent Ex. D at p. 1). The teacher complimented the student's creativity with writing assignments but noted that one of his papers could have been more developed and that he needed to learn how to correctly cite his sources (id.). The English teacher noted that although the student's attention in class wandered at times, he was "easy to bring back to task" (id.). The student's US history teacher reported that the student earned a grade of "B" for the second and third quarters, noting that as the third quarter progressed, he was "more willing and able to participate in class discussions (id.). The teacher opined that the student could improve, and particularly needed to focus on improving his writing skills (id.). The student's algebra 2 teacher indicated that the student was making a "much bigger effort recently to attend our workshop period and extra help sessions" noting that he benefited from the one-on-one sessions (id. at p. 2). According to the math teacher, the student had been working harder, was not socializing, and was focused on the work at hand, although he did not always check in with the teacher to make sure he completed the work correctly (id.). The teacher reported that the student's motivation wavered, he had difficulty assessing his own understanding, and his homework did not always reflect the level of effort seen in class (id.). She noted that the quality of the student's homework varied greatly and opined that

---

<sup>7</sup> The math teacher stated that unfortunately, online learning was not the best environment for the student because he did not have a teacher in the room keeping him on task and focused, noting that without that accountability, the student took shortcuts that prevented him from mastering the material (Parent Ex. Q ¶ 16; see Tr. pp. 80-81).

he could have used his notes to complete the homework with more precision (id.). The teacher identified areas of math that the student needed to practice, commenting that she would continue to be available for extra help (id.). After commenting that the first two quarters were not the student's "best," his finite math teacher indicated that he was pleased with the student's third quarter improvement, noting that he started performing better on assessments and handed in all assignments on time (id.). In physics, the teacher reported that the student's homework effort was inconsistent, he missed and had trouble with assignments, several assignments were submitted late, and his grade indicated a lack of preparation given that students were allowed a note sheet for most quizzes (id. at p. 3). The physics teacher indicated that going forward, it was "imperative" that the student keep on top of his work, he should reach out for help, and take advantage of the "modification in assessment format" to improve his test grades (id.).

Accordingly, although not dispositive, the hearing record indicates that despite a somewhat mixed record of progress, the student overall demonstrated slow and steady progress during the 2019-20 school year. Accordingly, the hearing record supports a finding that the student made some progress during the 2019-20 school year at BWLS which is a relevant factor that further supports a finding that BWLS was an appropriate unilateral placement for him.

## **VII. Conclusion**

Having determined that the evidence in the hearing record sufficiently supports the IHO's determination that BWLS was an appropriate unilateral placement for the student for the 2019-20 school year, the necessary inquiry is at an end.

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

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
August 25, 2021**

---

**CAROL H. HAUGE  
STATE REVIEW OFFICER**