



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-166

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

Appearances:

Ratcliff Law, PLLC, attorneys for petitioners, by Jennifer Ratcliff, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Lang School (Lang) for the 2020-21 school year. Respondent (the district) cross-appeals from the IHO's determination that Lang was an appropriate unilateral placement for the 2020-21 school year. The appeal must be sustained in part. The cross-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

During the 2019-20 school year, the student was in first grade attending a district general education classroom and receiving integrated co-teaching (ICT) services, as well as occupational therapy (OT) and physical therapy (PT), and had received diagnoses of attention deficit hyperactivity disorder (ADHD)—primarily hyperactive impulsive type and autism spectrum disorder (Parent Exs. L at p. 10; M at pp. 4-5). The student had undergone several psychological and neuropsychological evaluations including a May 11, 2017 neuropsychological evaluation, a March 20, 2018 psychological evaluation, an April 28, 2018 neuropsychological evaluation, a June

11, 2019 neuropsychological evaluation, and a September 4, 2019 psychological evaluation (Parent Exs. I; J; K; L; M).

The student's most recent neuropsychological evaluation report of June 2019 indicated that the student presented with a "meaningful pattern of strength and weakness that related to his cognitive functioning" (Parent Ex. L at p. 9). The evaluation report indicated that on measures of intellectual functioning, the student's performance fell within the very superior range on verbal-based tasks, his nonverbal abilities were above expectation for his age, and both his non-verbal reasoning and visuospatial skills were very superior (*id.*). Additionally, the evaluator reported that the student presented with an age-appropriate ability to integrate visual and motor skills (*id.*). The evaluator also reported that the student presented with executive functioning deficits that resulted in functional impairment but that his academic achievement was generally above expectations (*id.*). On measures of social communication skills, the June 2019 neuropsychological evaluation report indicated that the student had deficits in recognizing social cues and facial expressions, had difficulty drawing from past experiences when he had to predict what to do in similar social situations, and demonstrated weakness in flexibility (*id.* at p. 10).

The June 2019 neuropsychological evaluation recommended the student have a formal autism evaluation due to the student's difficulties in the areas of social skills and pragmatic language (Parent Ex. M at p. 5). The subsequent September 4, 2019 psychological evaluation to formally assess the student for an autism diagnosis, indicated that the student presented difficulty engaging in reciprocal conversations and showed limited insight into social relationships but had "most likely been able to compensate for some of his difficulties given his high cognitive functioning" (*id.*). The September 2019 psychological evaluation concluded that, based on the evaluation and the student's developmental history the student met the criteria for autism spectrum disorder (*id.*).

Prior to a March 2, 2020 CSE meeting, the district completed a February 4, 2020 class observation, a February 6, 2020 speech-language evaluation, and a February 26, 2020 educational evaluation (Dist. Exs. 3; 4; 5). The March 2020 CSE determined that the student remained eligible for special education services as a student with autism and recommended that he attend a general education classroom and receive ICT services for English language arts (ELA) and mathematics, one 30-minute session per week of individual counseling, one 30-minute session per week of OT, and two 30-minute group (3:1) sessions of speech-language therapy per week (Parent Ex. D at p. 14).¹ The CSE also recommended testing to take place in a location with minimal distractions (separate location with no more than eight students) (*id.* at p. 15). Due to the student's unique needs the March 2020 CSE recommended placement in a State-approved nonpublic day school (*id.* at p. 17).

Prior to a May 26, 2020 reconvene of the CSE—to discuss the student's speech-language services as well as his need for different academic activities and assignments—the district updated the student's social history on May 21, 2020 (Parent Ex. C at p. 5; Dist. Ex. 9). Because the student had expressed his boredom with grade-level work and his preference for learning through project-

¹ The student's eligibility for special education as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

based assignments, the May 2020 CSE recommended a project-based learning curriculum, particularly projects that required the student to work with a team of students (Parent Ex. C at p. 5). The May 2020 CSE changed the student's speech-language therapy mandate from two thirty-minute group sessions per week to one 30-minute individual session per week and one 30-minute group session per week and made some adjustments to the annual goals while maintaining the other recommendations as put forth on the March 2020 IEP including the recommendation to defer the school placement determination to the district's central based support team (CBST) to recommend a specific State-approved nonpublic day school (compare Parent Ex. D at pp. 14, 17, with Parent Ex. C at pp. 17, 21).

The hearing record shows that during July and August 2020, the district referred the student to several nonpublic schools and the parents communicated with four schools to determine if any of the various programs could appropriately meet the student's needs (Dist. Ex. 11 at pp. 1-2, 4).

On August 27, 2020, the parents signed an enrollment agreement with Lang to secure a seat for the student for the 2020-21 school year (Parent Ex. P at p. 7).² In a letter to the district dated August 28, 2020, the parents indicated that no State-approved nonpublic school had accepted the student and that the student had "no public school or approved school placement" to attend for the 2020-21 school year (Parent Ex. B at p. 1). Therefore, the parents notified the district of their intent to seek district funding of the costs of the student's attendance at Lang for the 2020-21 school year (id. at pp. 1-2).

In a due process complaint notice dated September 17, 2020, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19, 2019-20, and 2020-21 school years (see Parent Ex. A). For relief, the parents requested compensatory education and reimbursement for the costs of the student's attendance at Lang for the 2020-21 school year, including transportation (id.).

An impartial hearing convened on March 22, 2021 and concluded on May 24, 2021 after four days of proceedings (Tr. pp. 1-208). In a decision dated June 26, 2021, the IHO determined that the district had conceded that it failed to provide the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at pp. 3, 19). However, the IHO denied the parents' request for compensatory education, finding that there was insufficient evidence in the hearing record to support any compensatory relief (id. at p. 19). With respect to the 2020-21 school year, the IHO found that the district had demonstrated that the content of the May 2020 IEP was appropriate, as was its recommendation to place the student in an approved nonpublic school, but that the district's failure to make a final placement school offer for the student was an issue (id. at pp. 6-11). However, the IHO determined that the parents had impeded the district's efforts to locate a nonpublic school placement for the student such that the district was not responsible for the failure to place the student on both substantive and equitable grounds (id. at pp. 6-11, 14-19). The IHO denied all of the parents' requested relief (id. at p. 19). Lastly, noting that he need not reach the issue, the IHO nonetheless determined that Lang provided specially designed instruction to meet the student's unique needs (id. at pp. 11-13).

² The Commissioner of Education has not approved Lang as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

IV. Appeal for State-Level Review

The following issues presented in the district's appeal and the parents' cross-appeal must be resolved in order to render a decision in this matter:

1. The scope of the present appeal.
2. Whether the IHO erred in determining that the district met its burden to prove that it offered the student a FAPE for the 2020-21 school year absent a showing that a particular nonpublic school site could have implemented the student's May 2020 IEP.
3. Whether the IHO erred in determining that Lang was an appropriate unilateral placement for the student during the 2020-21 school year.
4. Whether IHO erred in determining that the parents had impeded the district's process for obtaining a placement for the student in an approved non-public school.

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" (Andrew 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 Andrew 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]).³

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

³ 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" (Andrew F., 137 S. Ct. at 1000).

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

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

VI. Discussion

A. Scope of Review

Initially, as neither party has appealed the IHO's determination that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years, that finding has become final and binding on the parties and will not be discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]). Although the parents requested compensatory education as relief for the denials of FAPE alleged in their due process complaint notice, on appeal, the only relief the parents seek is tuition reimbursement and funding at Lang for the 2020-21 school year either as relief for the district's failure to offer the student a FAPE for the 2020-21 school year or, alternatively, as a form of compensatory education to remedy the finding that the district failed to offer the student a FAPE for the 2018-19 and 2019-20 school years (Parent Ex. A at p. 5; Req. for Rev. ¶¶ 7, 8). Because this decision will address the parents' request for tuition and funding at Lang for the 2020-21 school year in the traditional Burlington/Carter framework, as set forth below, the parents' alternative characterization of the tuition funding as compensatory education need not be further addressed. Additionally, the parents' claim that the student's May 2020 IEP was flawed in that it failed to include specific special transportation services need not be addressed herein because it was not raised in the parents' September 2020 due process complaint notice and is unnecessary to reach given the other conclusions rendered herein.

B. FAPE

On appeal, the parents agree that the May 2020 CSE's recommendation for the student to attend a State-approved nonpublic school was appropriate; however, they argue that the IHO erred in finding that the district met its burden to prove that it offered the student a FAPE when the district did not establish that it assigned the student to attend a particular school for the 2020-21 school year at which his IEP could have been implemented. In denying the parents requested relief, the IHO rested on the degree to which the parents participated in the intake process with the State-approved nonpublic schools to which the district referred the student. However, while the parents' participation in the intake process may be relevant to determining relief (i.e., whether equitable considerations support an award of public funding of the unilateral placement), it does

not diminish the district's obligations to develop an appropriate educational program in an IEP and assign the student to a site where the IEP could have been implemented in the first instance.

Generally, parents are entitled to participate in determining the educational placement of a student with a disability (34 CFR 300.116[a]; 300.327; 300.501[c]); however, a district's assignment of a student to a particular school site is an administrative decision which must be made in conformance with the CSE's educational placement recommendation (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419-20 [2d Cir. 2009] [holding that educational placement refers to the "general educational program—such as the classes, individualized attention and additional services a child will receive—rather than the 'bricks and mortar' of the specific school"]; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014] [holding that while parents are entitled to participate in the decision-making process with regard to the type of educational placement their child will attend, the IDEA does not confer rights on parents with regard to the selection of a school site]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379-80 [5th Cir. 2003]; A.W. v. Fairfax County Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]). A school district "may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement" (Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). In this instance, the IEP provided that the student would attend a nonpublic day school, which implicates the district's administrative decision making in conformance with the IDEA and related State law, regulation, and policies.

The IDEA contemplates that districts may not be able to address the needs of every student in public placements and may need to place some students in private placements at public expense in order to provide such students with a FAPE (Burlington, 471 U.S. at 369-70). Although a particular nonpublic school may meet the Commissioner's criteria for approval to provide special education programs and services to students with a disability (see Educ. Law § 4402[2][b][1], [2]; 8 NYCRR 200.1[d], 200.7; see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2d Cir. 1988] [noting that pursuant to the IDEA a district can only place a student in a nonpublic school that meets State educational standards, including the requirement for approval by the Commissioner of Education], abrogated in part by Carter, 510 U.S. 7; see also 20 U.S.C. § 1412[a][10][B][ii]), it is the individualized needs of a student with a disability that will ultimately "determine which of such services shall be rendered" by an approved nonpublic school (Educ. Law § 4402[2][a]).⁴ Before a district places a student in a nonpublic school, the district must conduct a CSE meeting with a representative from a proposed nonpublic school in attendance (see 34 CFR 300.325[a]; 8 NYCRR 200.4[d][4][i][a]; see also Gagliardo v. Arlington Cent. Sch. Dist., 418 F. Supp. 2d 559, 571 [S.D.N.Y. 2006] [stating that "the purpose of having the private school representative at the meeting is so that the parents familiarize themselves with the recommended placement"], rev'd on other grounds 489 F.3d 105; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 657-58

⁴ State regulation provides that "no contract for the placement of a student with a disability shall be approved for purposes of State reimbursement unless the proposed placement offers the instruction and services recommended on the student's IEP" (8 NYCRR 200.6[j][2]).

[S.D.N.Y. 2005] [finding that the absence of a school representative from the CSE meeting violated the procedural protections of the IDEA and denied the student a FAPE because the parent "could not ask questions or raise concerns about that proposed [school] with a knowledgeable individual"]).

Here, the district did not convene a CSE meeting with a representative from a proposed nonpublic school in attendance or ultimately identify a nonpublic school placement for the student to attend for the 2020-21 school year.

In early July 2020—as reflected in the testimony of a district CBST case manager and an "NPS Tracking Sheet" the district entered into evidence—the district referred the student to 17 nonpublic schools for the schools to evaluate whether they could accept the student and implement his IEP (see Tr. pp. 43, 49; Dist. Ex. 11). Of the 17 schools, 13 informed the district that they would not consider offering the student a spot for the 2020-21 school year, citing various reasons such as that the school could not provide an appropriate class grouping, could not offer a placement based upon behavior needs and functional disparity, or because the school did not have a seat available in an appropriate classroom (see Dist. Ex. 11 at pp. 1-5).⁵ Four of the schools reached out to the parents to begin to conduct intake processes to determine if the student would be a good fit for their programs (see id.).

The first school to reach out to the parents was the Brooklyn Blue Feather Elementary School (Blue Feather) which reported to the district in early July 2020 that the parents had refused an interview because they considered the school to be too far from home for the student, and testimony from the student's mother confirms this (Tr. pp. 53, 161-63, 176; Dist Ex. 11 at p. 4). The Green Chimneys School (Green Chimneys) contacted the parents in late July 2020 and conducted an intake interview with the student and the parents in early August 2020 (Tr. pp. 161, 167-68; Parent Ex. H; Dist. Ex. 11 at p. 1). Green Chimneys determined that the student would not be a good fit for the school because it could not provide the programming the student needed and recommended that the parents investigate a "twice exceptional" program (Dist. Ex. 11 at p. 1; see Tr. pp. 104, 177-78, 191; Parent Ex. H). The Mount Pleasant Cottage School (Mount Pleasant) initially contacted the parents in late July 2020, at which time the parents declined an interview (Tr. pp. 52, 161; Dist. Ex. 11 at p. 2). In early September 2020 there was further contact between Mount Pleasant and the parents and a discussion of whether the student and the school would be a good fit, however the record is not clear on whether, at this time, Mount Pleasant declined to offer the student a spot in the program or the parents rejected the program (see Tr. pp. 168-73, 198-200; Parent Ex. V; Dist. Ex. 11 at p. 2).

The Greenburgh-Graham School (Greenburgh-Graham) first reached out to the parents in early July 2020, but at that time the parents declined to make the student available for an intake interview, indicating that the school was located too far from the student's home (Tr. pp. 53, 71, 161, 164-65 Dist. Ex. 11 at p. 4).⁶ However, at a later date the parents reviewed a video tour of

⁵ The district CBST case manager noted that a school that accepted the student, instead, would have determined that it was able to implement the student's IEP with an appropriate classroom and student cohort (Tr. pp. 58-64, 71-72).

⁶ In testimony the student's mother also stated that she had reviewed some information from the school and

Greenburgh-Graham and saw some things that they liked about the school, and they went on to meet with a representative from the school on two occasions in August 2020 to discuss possible placement for the student at Greenburgh-Graham for the 2020-21 school year (Tr. pp. 164-67; Parent Ex. U; Dist. Ex. 11 at p. 4). Although the student's mother is the only witness to these meetings who testified at the impartial hearing, the hearing record indicates that Greenburgh-Graham had accepted the student and was prepared to offer the student a spot at the school for the 2020-21 school year (Tr. pp. 53, 72-74, 166-67, 175-76; Dist. Ex. 11 at p. 4). The district CBST case manager's "NPS tracking sheet" states that Greenburgh-Graham's response to the district's referral of the student to the school as "Agree to Accept but Parent Refused Placement Program," further indicating that as of August 27, 2020 the parents "chose placement at another school" (Dist. Ex. 11 at p. 4). The district's CBST case manager testified to her understanding of the offer from Greenburgh-Graham as the "school felt that the [student] was appropriate, therefore they accepted the [student]" (Tr. p. 72). The student's mother testified that, "yes, they agreed to accept [the student] on that call with us, but it was on a provisional basis as a bridge to a better placement"; she continued, noting that they "never received an acceptance letter from them, so [they] never officially refused them" (Tr. p. 176; see Tr. pp. 166). The parent further testified that, "at the time," they did not "know what [they] were doing with Lang," but she did not believe that they "had formally accepted Lang at that stage" (Tr. p. 176).

In light of the above, when Greenburgh-Graham informed the district that it had or would accept the student and could implement the student's IEP, the district should have held a CSE meeting with the attendance or participation of a "representative" from Greenburgh-Graham (see 34 CFR 300.325[a]; 8 NYCRR 200.4[d][4][i][a]; see, e.g. Application of a Student with a Disability, Appeal No. 13-016 [discussing procedural history in that matter wherein a CSE recommended deferral to CBST for a nonpublic school placement and conducted a reconvene of the CSE to amend the recommendation for placement in a specific nonpublic school that had accepted the student therein for implementation of the amended IEP]). The CBST case manager testified that, generally, if a school was willing to admit a student, she would issue a "notice of site procurement," the school would issue a letter of acceptance, the CSE would thereafter reconvene, and the acceptance would be "recorded" (Tr. pp. 45-46).

Rather than hold a new CSE meeting to discuss Greenburgh-Graham—the approved nonpublic school that had accepted the student—the district instead determined that the parents had unilaterally placed the student and that, therefore, no further action from the district was required. To wit, the district's CBST case manager stated that, "I contacted the parent because that would indicate whether the case should be active or not, whether the parent went to community school, chose to privately pay, and I made the call and that's when the father stated they have found a school . . . of their own volition, which is a parentally placed decision" (Tr. p. 72). Contrary to the district's position, the parents' choice to unilaterally place the student did not absolve the district of its obligation to offer the student a FAPE.

The district makes much of the parents' purported lack of cooperation with the intake process and, while I can certainly understand the district's position that the parents were

objected to its "at risk" student population and use of "behavior teams" which was not something the student needed in her view (Tr. pp. 164-65).

unreasonably "prescreening" nonpublic school options (see Dist. Answer. ¶¶ 11, 12), in this instance, the parents' cooperation was sufficient to result in a school offering the student attendance, and the district may not blame the parents for its failure to complete the process. In light of the above, the district has failed to meet its burden to prove that it completed the CSE process or recommended a particular nonpublic school location for the student to attend notwithstanding evidence that there was a nonpublic school that accepted the student for the 2020-21 school year. Thus, the failure to recommend a final placement for the school year at issue herein lies at the feet of the district, and the IHO erred in finding that the district offered the student a FAPE.

C. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2020-21 school year, the next issue to determine is whether Lang was an appropriate unilateral placement. The district argues that the hearing record does not contain evidence that Lang provided the student with instruction specially designed to meet his unique needs—including those addressed by related services—that he did not make progress, and it was not the student's LRE. Contrary to the district's position, a review of the evidence in the hearing record supports the IHO's finding that Lang was an appropriate unilateral placement for the student for the 2020-21 school year.

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

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

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

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

Although the student's needs are not in dispute on appeal, a discussion thereof provides context for the discussion of whether the student's unilateral placement at Lang was appropriate. As discussed above, the June 2019 neuropsychological evaluation report indicated that the student's verbal, nonverbal reasoning, and visuospatial cognitive abilities were above expectation for his age, and made note of the student's difficulty with social communication skills, restricted interests, difficulty with behavioral inhibition, maintaining attention, organizing materials, and impulsivity and indicated that the student's deficits in executive functioning resulted in functional impairment (see Parent Ex. L at pp. 9-11).

The May 2020 IEP academic present levels of performance, which are not a subject of dispute in this matter, indicate that the student was performing above grade level with respect to reading but that the student's ability to comprehend content vocabulary was dependent on his interest level in the subject matter and he was uninterested in writing fictional pieces with interacting characters, did not complete the final assessment for realistic fiction, and refused to engage in the research-based evaluation in writing (Parent Ex. C at p. 3). With respect to mathematics the student was reported to be capable of completing sixth-grade level calculations but needed to use estimation skills to show math thinking, use math vocabulary, use math processes, and complete step-by-step plans for proving his work (id.). Additionally, the skill for "writing about math" was difficult for the student as "writing [was] a less developed skill across content areas" (id.). The IEP cited the student's conversational difficulties, difficulty with flexibility, transitions, and class participation, and noted that, despite receptive and expressive language skills in the above average range, the student struggled with the social rules of communication reflecting pragmatic language difficulties that impacted his academic performance (see id. at pp. 2-3).

Regarding executive functioning skills, the May 2020 IEP indicated that the student had well developed working memory skills but needed a system for organizing materials, reminders to

organize his materials in content folders, clearly defined due dates, and directions written down and reviewed to support the student's time management needs (Parent Ex. C at pp. 3-4). The May 2020 IEP also indicated that the student needed strategies to support cognitive flexibility and transitioning to different activities (id. at p. 4). To support the student's need to be able to converse on a presented topic rather than his preferred subject, the IEP indicated that the student responded to rehearsing what he might say before engaging in discussions and that he benefited from the use of social stories (id.). The IEP indicated that the student exhibited challenging behaviors particularly related to transitions, which required support through counseling services (id. at p. 5). The behaviors the student exhibited included shutting down, becoming defiant, and refusing to cooperate (id.). According to the IEP, the student at times was "very self-directed" and it was challenging to re-direct the student as he was described as strong-willed and persistent (id.).

With respect to the student's motor and sensory needs the May 2020 IEP indicated that the student preferred a quiet learning environment, benefited from cues to keep letters and words on the lines, was "often easily distracted and impacted by environmental stimulus," had difficulty initiating and completing tasks in the classroom even with prompting, and demonstrated difficulty transitioning throughout the school, which required OT to support his sensory, organizational, fine motor and visual motor skills (Parent Ex. C at pp. 4, 6).

The May 2020 CSE determined that the student needed "different academic activities and assignments" and recommended that "project-based learning across all content areas be incorporated into [the student's] classroom learning" (Parent Ex. C at p. 5). Further, the CSE noted that standards-based curriculum did not support the student's unique learning needs and he would benefit from working on projects with a team of students to help him develop appropriate problem-solving and team-building skills noting that the student was "[o]ften" oppositional and did not want to complete a lot of typically expected academic tasks (id.).

Based on the aforementioned description of the student in the June 2019 neuropsychological evaluation report and the May 2020 IEP, the hearing record presents a consistent portrayal of the student's challenges with social communication skills, executive functioning skills, task initiation and completion, cognitive flexibility, and transitioning, despite his above average cognitive and academic abilities.

1. Specially Designed Instruction

The hearing record indicates that Lang is a program for "twice exceptional" students that focuses on building students' strengths while supporting students' areas of need as well as developing their talents (Tr. pp. 143-44; Parent Ex. N at p. 1). According to an overview of Lang, the program is designed to help students develop self/social awareness, self-advocacy skills, affective communication skills, and foster cognitive and behavioral flexibility, as well as pro-social skills (Parent Ex. N at p. 1). The Lang director testified that generally, the students at Lang struggled with executive function, anxiety, or challenges with social communication (Tr. pp. 143-44). She also testified that the students were grouped into a homeroom cohort with individual programs based on the student's "zone of proximal development" to foster grouping by ability rather than just age (Tr. p. 145).

For the 2020-21 school year Lang was operating remotely due to the COVID-19 pandemic (Tr. p. 146).⁷ The director testified that the Lang remote program was 100 percent synchronous as the teachers and students were online with screen breaks and movements breaks throughout the day (Tr. p. 147). According to the director, the students reportedly had access to small groups, individual conferencing, all their therapies, and special programming just as when they attended Lang in person (*id.*). According to the student's teacher, the student participated in the Lang remote learning program 99 percent of the time, and his parent testified that the student required very little prompting to log on and participate in the remote school day (Tr. pp. 108-09, 186-87, 200-02).

Regarding the student's program at Lang, the hearing record indicates that through a review of the application material and upon joining Lang it was determined that the student was appropriate for the older cohort for mathematics and science (fourth/fifth grade), which was deemed his "ability peers" (Tr. pp. 99, 107, 126, 151-52). For all the remaining subjects the student was placed in the multi-age (seven to ten years) grade one to four setting (*id.*). According to the student's schedule, he received instruction in ELA, French, math, civics, social studies, science, physical education, music, engineering, drama, creative lab (art), and applied logic (Tr. p. 113; see Parent Ex. Q). Additionally, the student participated in related services including OT, counseling, and speech-language therapy, as well as learning skills, community building, KidWorks, and Basis programs (Tr. p. 146; Parent Ex. Q).

The student's Lang teacher testified that she and a co-teacher taught a class of six students (Tr. pp. 107-08). She indicated that academic instruction was presented through a combination of whole and small group lessons with some independent work and one-on-one conferencing (Tr. p. 116). With respect to ELA, the teacher indicated that they used the Teachers College reading and writing program as well as the SRSB program (Tr. pp. 113-14). She described the Teachers College reading writing curriculum as a workshop model that gradually released responsibility to the students to engage with each other and work independently after a concept was presented (Tr. p. 114). The SRSB curriculum provided scaffolds for reluctant or struggling writers, encouraged the monitoring, evaluating, and revision of writing pieces, while using graphic organizers and exemplar text to organize the students' writing (*id.*). In mathematics the teacher testified that they used the Singapore Math curriculum, described as a three-step learning model that moves from concrete (using manipulatives) to pictorial (creating visual representation on paper) to more abstract activities like problem solving, with instruction provided in small groups (Tr. pp. 115-116).

During classroom lessons, the student's teacher testified that they taught flexibility and transitioning by developing the curriculum and lessons to engage the student so he could get excited about the work (Tr. p. 105). She testified that the lessons and activities were specialized toward the student's areas of interest to foster his engagement (*id.*). For example, the teacher stated that sometimes the student enjoyed showing his work verbally but might not be interested in writing down the work, so they planned and were flexible in their teaching, generally modifying the lessons and expectation to fit the student's needs (Tr. p. 106).

⁷ The hearing record indicates that Lang returned to in-person learning on May 3, 2021 (Tr. pp. 146, 200).

According to the student's teacher, the student had time in his schedule each day (Basis) to catch up on his work, work in small groups, or conference individually with teachers (Tr. pp. 110-11; Parent Ex. Q). Flexible time was provided for the student to make choices regarding what activity to engage in, and Lang provided a once-weekly talent development program (KidWorks), which included areas such as drawing, art, construction, storytelling, or music (Tr. pp. 111-112; Parent Ex. Q). The student was assessed at the beginning of the school year to determine the best fit and then he used the time and creativity for project-based activities (Tr. p. 112). The student also took part in a learning skills program where he practiced organization skills, time management skills, executive functioning, self-advocacy skills, and study skills, which was student led, and the co-teachers saw what the student needed help with (Tr. pp. 112-13; Parent Ex. Q).

When the student had difficulty starting a task that was not preferred, the teachers provided conferencing to determine what was holding him back, eliminated distractions, and at times modified the task to make it attainable for the student (Tr. pp. 116-18). Although his teacher testified that they did not create lessons specifically for the student, she stated that they tried to reflect in the curriculum what the student is doing well in and what interested him and tried to include that in the curriculum (Tr. p. 132). By way of example his teacher testified that they allowed the student to collaborate with a peer on writing tasks because the student enjoyed writing with a partner (id.). She indicated that they also tried to incorporate the student's interests into the curriculum to bridge the content knowledge the student had with the skills that they were trying to teach him (Tr. p. 133).

The student's teacher testified that the student had academic goals and behavioral goals (Tr. p. 118). She stated that the student's academic goals included re-telling and taking apart what he just read, re-telling in order, prioritizing story elements, and learning to share and show his work (id.). Behaviorally, the student's goals targeted skills related to following through on social cues, particularly when it was time to move on or it was time for someone else to share and speak (Tr. pp. 118-19). She testified that the behavior goals were determined by herself and the co-teacher and were a reflection of the areas where they observed the student was struggling, including his tendency to interrupt and his need to be able to read conversational cues (Tr. p. 133).

According to the student's September 2020 to January 2021 progress report his teachers supported the student by offering concrete instructions, increased expectations aligned with his progress, and ongoing encouragement when the student made his best effort throughout the day (Parent Ex. R at p. 2). In ELA, the progress report indicated that they supported the student by providing him with scaffolded tools, 1:1 conferencing, teacher models, and writing planners (id. at p. 10). Regarding math, the progress report indicated that the student was supported by using interactive and collaborative models, showing his thinking on paper, and having multiple opportunities to share his strategies but also listen to other strategies from peers (id. at p. 17). To encourage the student's growth in listening and turn-taking during class discussions the progress report indicated that the teacher provided the student with scaffolded tools for discussion, teacher models, and opportunities to reflect that allowed him to participate fully and as part of a group (id. at p. 25).

On appeal the district alleges that Lang did not provide the student with specific instruction to address his social skill needs and that the counseling recommended in the student's September 2019 autism evaluation was not reflected in the student's schedule or progress reports. The

student's teacher testified that to address the student's need to engage in reciprocal conversations he received speech-language therapy twice per week (one period with the whole class of six students and one period with a small group of three) and that communication skills were practiced throughout the day as well as during community building sessions and OT (Tr. pp. 105, 127-28, 134). The school psychologists taught the community building sessions wherein the students engaged in games and bonding activities, practiced taking turns, observed reactions, and communicated with each other to build a positive community (Tr. p. 110; Parent Ex. Q). His teacher testified that the student worked closely with the school psychologists on communication skills and that in class they used the same types of language and strategies, so his program was consistent across all periods thereby reinforcing the skills (Tr. p. 127). Although the student's schedule had changed once Lang was back providing in-person instruction, his teacher stated that the student received individual counseling twice per week with two different school psychologists (Tr. p. 128). While the district is correct that counseling per se was not reflected on the student's schedule (see Parent Ex. Q), as described above, Lang addressed the student's social skills, behavior, and social communication needs via the speech-language therapy provided, community building sessions, and in-class behavior goals and targeted lessons (see Tr. pp. 104-05, 118-20, 127, 203).

Further, to the extent that the district argues that the evidence regarding Lang's use of "various methodologies" with the student failed to establish how those methodologies addressed the student's deficits, an overall reading of the hearing record does not show that the student required one specific methodology to learn, rather, as discussed below, the evidence shows that the student exhibited progress at Lang with the complement of methodologies implemented.

In light of the above, the evidence in the hearing record supports the IHO's finding that Lang provided the student with specially designed instruction to meet his unique special education needs.

2. Progress

The district contends on appeal that Lang cannot be considered an appropriate unilateral placement for the student because the hearing record shows that the student did not make progress in reading at Lang. However, the evidence in the hearing record shows that the student made progress in many areas of need at Lang, and I decline to overturn the IHO's finding solely on the basis of the amount of the student's progress or lack thereof in reading.

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 Lang director testified that academic progress was determined by conducting a baseline assessment at the beginning of the year and the same assessment at the end of the year, observing the student, and administering quizzes and projects to assess progress throughout a unit (see Tr. p. 148). She stated that the students were given "a lot of choice" in terms of unit-based

assessment such as doing a presentation versus a written assignment (id.). The student's reading level was established by way of a reading assessment conference at which time the student read aloud and answered comprehension questions regarding what was read (id.). The director indicated that the student demonstrated progress regarding his ability to accept feedback, and that he continued to meet his goals in reading and writing in that he was "writing more, expressing himself very well and continuing to meet the next level in all of his areas of work" (Tr. p. 149).

The student's teacher indicated that the student showed improvements in both academic work and behavior (Tr. p. 119). She testified that she conducted formal assessment in ELA and informal assessment in other subjects such as social studies (Tr. p. 129). His teacher reported that the student had expressed that previously he did not like school and now at Lang he felt happy about school (Tr. pp. 119-20). She stated that the student was excited to come to school and he felt a part of the class community (Tr. p. 120). With respect to behavior, his teacher testified that the student had improved regarding his awareness of conversational cues (Tr. p. 122). She indicated that at the start of the year the student had significant difficulty raising his hand and he interrupted quite often, but with the practice and reinforcement of the class rules and strategies, the student now understood that the end of the period was the time to share information (id.).

With respect to writing, the student reportedly progressed from being reluctant to even start a writing assignment to loving to write (Tr. p. 122). His teacher stated that at the beginning of the year the student refused to do the writing pre-assessment and in December of the school year, he completed the post-assessment and achieved a score of three out of four, indicating that "he did really well" (Tr. p. 131). His teacher testified that the student had done "really great work" as he liked to write comics, wrote persuasive letters, and liked writing about nonfiction topics and informational texts (Tr. pp. 122-23). The progress report indicated that the student did not complete the pre-assessment in writing as he showed difficulty responding to a prompt as a way of generating ideas, but over the writing unit the student developed skills in organizing his writing using a planner, writing in fuller sentences that better captured his ideas, and revising his work over multiple days (Parent Ex. R at p. 10). The student's final book showed he made progress in terms of several benchmarks for nonfiction writing including organizing his thinking into multiple chapters, covering the topics he felt were important, including topic sentences and clear supporting details, adding key words, bolding, and underlining for emphasis (id.). Although the progress report noted the student performed best when working with a partner, the teacher noted that he made progress in his ability to write and revise independently (id.).

Regarding reading, his teacher testified that she completed "running records" which kept track of the student's reading levels, at the beginning of the year and also mid-year (Tr. p. 129). At the beginning of the school year, the student's teacher stated that the student was instructionally (reading with teacher help) reading at level O (id.). She indicated that at the mid-year point the student was reading independently at level P and instructionally at level Q (Tr. p. 130). The progress report indicated that the student's reading level meant that the student was able to access texts on a third grade independent level (on grade level), he comprehended main story details as well as some deeper inferential thinking, and during classroom discussions he comprehended the text, asked questions, drew on text features, identified the main idea and key details, synthesized across texts, and summarized information (Parent Ex. R at pp. 1, 10). The progress report also indicated that the student was engaged when reading and participated in meaningful conversation about texts (id. at p. 10).

The Lang director testified that the student performed "very strongly across different areas" was in a cohort above his age (fourth and fifth grade), and was doing "very, very well in math and science" (Tr. pp. 145-46). She indicated the student was enhancing his ability to write a cohesive writing piece, he was getting his work done, and he was participating in whole group activities (Tr. p. 146).

According to the Lang progress report, the student's academic grades ranged from 3.15 to 4.0 with grades for effort ranging from 3.0 to 4.0 (Parent Ex. R at p. 3). The student's civics teacher noted that the student was "a very engaged member of the civics classroom community and he readily shared his thoughts and ideas about the topics being discussed. He sometimes became focused on off-topic subjects, such as the comics he creates, but he could be redirected to the topic under consideration" (*id.* at p. 6).⁸

While a finding of progress is not dispositive in determining the appropriateness of a unilateral placement, as presented in the discussion above, the hearing record demonstrates that the student made progress at Lang, including progress in reading, in just one semester while attending the program.

3. Least Restrictive Environment

The district challenges the restrictiveness of the unilateral placement, asserting that the student had been recommended for an integrated setting and the hearing record provided no evidence that Lang's classroom placement of six students and two teachers allowed the student opportunities to interact with typically developing peers. Additionally, the district contends that the evidence suggests that the student performed just as well in a large group setting as in a small group setting.⁹

It is well settled that although the restrictiveness of a parent's unilateral placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 105 [2d Cir. 2000]; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014] [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same

⁸ The Lang progress report indicated that the student demonstrated mastery of the basics of French conjugation, pronunciations, and vocabulary, diligently completed his homework, studied for quizzes and his performance improved further by the end of the semester when more structured worksheets were introduced (Parent Ex. R at p. 15).

⁹ To the extent that the district asserts that Lang was not appropriate from an LRE perspective based on arguments related to the size of the student's instructional group in the classroom, such arguments misconstrue LRE principles and are therefore misplaced and will not be further addressed.

mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]).

The Lang program overview indicates that the school recruits gifted and twice-exceptional students with and without psychoeducational or neuropsychological evaluations and IEPs; therefore, the program may have included students who were considered gifted but not necessarily with a disability (see Parent Ex. N at p. 1). Although the student's opportunity to engage with non-disabled peers was not well addressed in the hearing record, that aspect of the student's programming does not weigh so heavily as to preclude the determination that the parents' unilateral placement of the student at Lange for the 2020-21 school year was appropriate when considering the totality of the circumstances.

Based on the foregoing, the evidence in the hearing record supports the IHO's finding that Lang provided the student with a program of specially designed instruction to meet his unique needs and therefore was an appropriate unilateral placement for the 2020-21 school year.

D. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE]

can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district's arguments with respect to equitable considerations are aimed at the parents' asserted lack of cooperation with the district's efforts to locate a nonpublic school that would accept the student for the 2020-21 school year. Where parents attempt to exercise a veto over the district's proposals to provide the student with an appropriate school placement, equitable considerations may warrant a reduction or denial of tuition reimbursement (see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12 [S.D.N.Y. Dec. 16, 2011]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 675-76 [S.D.N.Y. 2011]). However, as described above, while the parents did not at all times approach the State-approved nonpublic school intake processes with enthusiasm, they ultimately participated in three out of four of the intake processes initiated by the schools such that, ultimately, a school agreed to the student's attendance during the 2020-2021 school year. Because I have found that the parents adequately cooperated with the CSE during the formulation of the IEP and the pursuit of a nonpublic school placement, and because the parents provided the required notice of their intention to unilaterally place the student at Lang for the 2020-21 school year, I decline to deny or reduce the award of tuition reimbursement (Parent Ex. B).

As a final matter, the parents request that the district be required to reimburse them for the amount that they have paid towards the student's tuition and to directly fund the remainder. With regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). The court held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

Here, since the parents unilaterally chose Lang and their financial status is at issue, it is the parents' burden of production and persuasion with respect to whether they had the financial resources to "front" the costs of the services and whether they are legally obligated for the student's tuition payments (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-

130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

As noted above, the evidence in the hearing record includes a contract between Lang and the parents, demonstrating the parents' financial obligation for the costs of the student (see Parent Ex. P). In addition, the parents offered evidence of their financial resources (see Parent Ex. S), which tends to support that the parents did not have the resources to pay the tuition. According to hearing record, the parents made monthly payments towards the student's tuition (see Tr. p. 189). At this point, assuming such payments continued, the parents should have paid the entire tuition owed. However, to the extent a balance remains, I will require the district to directly pay Lang for any tuition still owed for the student's attendance during the 2020-21 school year.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that the that the district failed to offer the student a FAPE for the 2020-21, that Lang was an appropriate unilateral placement for the student, and equitable considerations do not warrant a reduction or denial of tuition reimbursement.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated June 26, 2021, is modified by reversing that portion which found that equitable considerations barred the parents' claim for tuition reimbursement at Lang for the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for and/or directly fund the cost of the student's tuition, related services, and transportation at Lang for the 2020-21 school year.

Dated: Albany, New York
October 18, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER