



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-065

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

Appearances:

Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Chrystal O'Connor, Esq.

DECISION

I. Introduction

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Eastern District of New York (*see V.A. v. New York City Dep't of Educ.*, 2022 WL 1469394 [E.D.N.Y. May 10, 2022]). This proceeding initially arose under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) previously appealed from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of her daughter's tuition at the Lowell School (Lowell) for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

III. Facts and Procedural History

The detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in Application of a Student with a Disability, Appeal No. 19-097. The parties' familiarity with those matters and the IHO's decision is presumed (see Application of a Student with a Disability, Appeal No. 19-097); however, the judicial review that followed the local and State level administrative proceedings and the consequent remand by the court are set forth below with some pertinent facts repeated from the prior State level decision.

The hearing record indicates that the student has received diagnoses of attention deficit hyperactivity disorder (ADHD)-inattentive type, generalized anxiety disorder, and social anxiety disorder (Parent Exs. J at p. 11; M). Due to residual signs of dyslexia, the student has also been considered for a diagnosis of specific learning disability with impairment in reading (Parent Ex. J at p. 11). In addition, the student's slow progress in math has resulted in a diagnosis of specific learning disability with impairment in mathematics (id.).

On June 8, 2018, a Committee on Special Education (CSE) convened to develop the student's individualized education program (IEP) for the 2018-19 school year (Dist. Ex. 1 at pp. 1, 19). The June 2018 CSE found the student eligible for special education as a student with a learning disability and recommended ten-month 12:1+1 special classes for math and English language arts (ELA) for seven periods per week each, and 12:1+1 special classes for social studies and science for five periods per week each (id. at p. 14). The CSE also recommended related services of individual counseling one time per week for 30 minutes and group counseling (5:1) one time per week for 30 minutes in a separate location (id.). Additionally, the CSE recommended direct and group special education teacher support services (SETSS) for math two times per week for a class period in the special education classroom along with related services of occupational therapy (OT), physical therapy (PT), and speech-language therapy (id. at pp. 14-15).

In a letter dated August 17, 2018, the parent provided notice to the district of her intent to unilaterally place the student at Lowell for the 2018-19 school year (Parent Ex. A pp. 1-2). The parent stated that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year, that Lowell was an appropriate unilateral placement for the student, and that she would be seeking public funding for the student's placement for the 2018-19 school year (id. at p. 2).

By due process complaint notice dated September 10, 2018, the parent alleged that the district failed to offer the student a FAPE for the 2018-19 school year based on various procedural and substantive deficiencies (Parent Ex. B at p. 1). As relief, the parent requested a determination that the student was denied a FAPE for the 2018-19 school year, that Lowell was an appropriate unilateral placement for the student, and that equitable considerations favored the parent (id. at p. 3).

The matter proceeded to an impartial hearing and the IHO issued a final decision on August 29, 2019 (Tr. pp. 1-486; IHO Decision). The IHO found that the district offered the student a FAPE for the 2018-19 school year (IHO Decision at p. 11). In addition, with respect to the parent's contention that the district did not provide her with a school location letter, the IHO noted that the district's witness testified that the school location letter was sent out in June 2018, although it was dated September 9, 2018 due to a computer glitch (*id.* at p. 13). The IHO also noted that the parent failed to mention her non-receipt of the school location letter in her 10-day notice and that, had the parent mentioned this in her letter, the district would have been able to cure the problem (*id.*).

Although the IHO found that the district offered the student a FAPE for the 2018-19 school year, the IHO also addressed the appropriateness of the parent's unilateral placement of the student at Lowell for the 2018-19 school year (IHO Decision at pp. 11-13). The IHO found that the parent did not meet her burden of proof in establishing that Lowell was an appropriate unilateral placement for the student (*id.* at p. 11). The IHO noted that the student's anxiety at Lowell appeared to be extreme and that the student was markedly anxious during the 2017-18 school year (*id.*). The IHO also noted that neither the parent nor the school provided an explanation as to why the student's anxiety was higher than the previous nonpublic school the student attended (*id.*). The IHO further noted that there was no evidence that the student was able to focus sufficiently in school to benefit from her education at Lowell (*id.*). In addition, the IHO stated that the testimony from Lowell ignored or contradicted the fact that the student was struggling with reading (*id.* at p. 12). The IHO also noted that the student continued to need intensive reading instruction and the student was only making slow progress in reading (*id.*). The IHO also noted that the student's struggles with expectations placed upon her at Lowell were a significant cause of the student's anxiety, especially in her core academic subjects (*id.* at p. 13). The IHO found that Lowell attributed too much of the student's difficulties due to anxiety and too little consideration on the student's academic deficits (*id.*).

In a State-level administrative appeal from the August 29, 2019 IHO Decision, the parent asserted that the IHO erred in finding that the district offered the student a FAPE for the 2018-19 school year. The parent also asserted that the IHO erred in finding that Lowell was not an appropriate unilateral placement for the student. In response, the district argued to uphold the IHO's decision in its entirety.

The undersigned upheld the IHO's determination that the district offered the student a FAPE for the 2018-19 school year (Application of a Student with a Disability, Appeal No. 19-097). The undersigned also found that there was enough evidence in the hearing record to give rise to the presumption of mailing of a letter from the district to the parent which identified the particular school location where the student's services would be provided (*id.*).

The parent sought judicial review of the SRO's decision in the United States District Court for the Eastern District of New York (V.A., 2022 WL 1469394). The District Court found that the evidence offered by the district was insufficient to give rise to the presumption of mailing and therefore overturned the IHO's finding that the district offered the student a FAPE for the 2018-19 school year (*id.* at *8). Turning to the appropriateness of Lowell, the District Court noted that, because the issue was not addressed as part of the State level review, the court must "look to the opinion of the IHO" who did address the issue (*id.* at *12). The District Court then found that the IHO's decision relating to the appropriateness of Lowell was "inadequate on th[e] issue" (*id.*). The

District Court further found that several conclusions of the IHO did not appear to be sufficiently supported by the evidence and identified several areas where the Court believed the evidence was in conflict with the IHO's findings (*id.*). The District Court noted that a determination as to "whether the Lowell placement was appropriate is one that requires educational expertise" and the Court decided it "passe[d] no judgement" on whether Lowell was an appropriate unilateral placement for the student and remanded the case to the State administrative process for a determination on the appropriateness of Lowell (*id.* at *13). The District Court also remanded the issue of whether equitable considerations favor the parent's request for relief (*id.*).

Upon remand, I have reexamined the record of the impartial hearing proceedings, the prior State-level submissions and administrative decisions, as well as the District Court's order of remand in order to address the remaining issues in dispute. As part of the review process and in response to the District Court's concerns regarding the IHO's decision, in a letter dated June 6, 2022, the parties were offered an opportunity to be heard by submitting their respective positions regarding the appropriateness of Lowell and the balancing of equitable considerations in writing to the Office of State Review. The parent submitted a Memorandum of Law on the remanded issues but the district declined the opportunity for a further written submission.¹

IV. Arguments on Remand

In her submission, the parent asserts that the hearing record supports a determination that Lowell was an appropriate unilateral placement for the student for the 2018-19 school year. In particular, the parent asserts that the student made meaningful educational progress at Lowell during the 2018-19 school year. The parent further asserts that the student had supports in and out of the classroom that addressed the student's anxiety. Next, the parent contends that the student was given extended time to take tests and complete assignments and that the student received 1:1 support in light of her ADHD, inattentiveness, processing, and focusing issues. Further, the parent contends that the student's progress reports and report cards for the 2018-19 school year, reflect that the student achieved academic success and was promoted to the ninth grade. The parent also contends that the district deferring the student to Lowell for the 2019-20 school year further supports her position that Lowell was an appropriate unilateral placement for the student during the 2018-19 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]).

¹ In its response letter dated June 24, 2022, the district noted that its Answer filed in *Application of a Student with a Disability*, Appeal No. 19-097, along with the hearing record, supports the IHO's determination that Lowell was not an appropriate unilateral placement for the student for the school year at issue.

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]).²

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

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

VI. Discussion

A. Unilateral Placement

As set forth above, the District Court found that the district denied the student a FAPE and that finding has become law of the case. The Court remanded this matter for a determination on whether Lowell was an appropriate unilateral placement for the student's 2018-19 school year (V.A., 2022 WL 1469394 at *12-*13). Following a comprehensive review of the hearing record and the supplemental submission from the parent on remand, the hearing record establishes that Lowell was an appropriate unilateral placement for the student's 2018-19 school year because it provided specially designed instruction to meet the student's needs and the student made progress.

² 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).

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; Matrejek, 471 F. Supp. 2d at 419). 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. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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., 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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 the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that 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 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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 only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

1. Specially Designed Instruction

The student's educational needs for the 2018-19 school year are set forth in detail in Application of a Student with a Disability, Appeal No. 19-097 and in a June 2018 IEP (Dist. Ex. 1). In brief, at the time the parent decided to unilaterally place the student at Lowell for the 2018-19 school year the student demonstrated broad cognitive functioning in the average range but continued to struggle on measures of cognitive processing including rote memory, short-term memory, working memory and sustained attention and vigilance (Dist. Ex. 1 at p. 2). The student demonstrated academic weaknesses in reading, writing and mathematics (id. at pp. 2-3). In addition, the student had difficulty retaining and recalling verbally presented information, defining, and explaining target vocabulary, and engaging in group discussions at an appropriate volume (id. at p. 4). With respect to social development, the student experienced feelings of anxiety, frustration, sadness and low self-esteem that easily overwhelmed her and she had difficulty verbalizing why she was upset or asking for help (id. at p. 5). In terms of physical development, the student's fine and gross motor skills were functional, but below age level as she demonstrated difficulty with balance, limited physical endurance, and weak graphomotor skills (id. at pp. 5-6).

Lowell is described in the hearing record as a small, special education school of approximately 115-120 students (Tr. pp. 255-56, 391). Cognitively, students at the school primarily function within the average range with some students functioning at the higher and lower ends of average (Tr. pp. 364-65). The school is approved by the Commissioner of Education to accept students with a number of educational disability classifications including learning disability, speech or language impairment, or other health impairment (Tr. p. 365). All of the classes at Lowell employ a 12:1+1 class ratio and all of the teachers are certified in special education (Tr. p. 365). In addition, the secondary teachers are certified in specialized grade subjects and the teaching assistants at Lowell have to fulfill the State-mandated certification requirements (Tr. pp. 365-66). The students at Lowell are grouped "cognitively and academically, as well as socially" (Tr. p. 373). During the 2018-19 school year, the student received instruction in ELA, math, science, social studies, health, physical education, family and consumer science, computers/robotics, music, and Spanish (Parent Exs. G at pp. 1-2; Q). In addition to attending a 12:1+1 special class, the student also received counseling, speech-language therapy, PT, and OT (Parent Exs. G at p. 3; H; P). At Lowell, the student was provided instruction using a modified Common Core curriculum (Parent Exs. G at p. 3; P at p. 1; R at p. 1).

The student's management needs, as well as the resources and strategies used to address them, were noted throughout the Lowell progress reports (Parent Exs. G; P; R). Specifically, the progress reports indicated that the student benefitted from 1:1 teacher instruction and guidance, small group instruction, modeling, teacher encouragement and prompting, new material presented in smaller chunks, reinforcement and review of material presented, prompts to transition from task to task and count-down time, redirection/refocusing, differentiated instructional support, scaffolding, wait time to formulate answers, and a slower pace of instruction (see generally Parent

Exs. G; P; R).

The school psychologist from Lowell, who had served as the student's counselor since she entered the school (for the 2017-18 school year), reported that she was familiar with the student, and indicated that she and the student worked very closely together (Tr. pp. 252-54, 274). The school psychologist confirmed that the student had a difficult time adjusting to Lowell when she first arrived, and it took a while to help the student transition (Tr. pp. 273-74). She noted that the student received 1:1 support, so staff was able to help her with transitioning from one classroom to another, something the student could not independently accomplish when she first arrived at Lowell (Tr. p. 274). As the student became more familiar with the other students and staff in the school, the student became more comfortable and the school was able to slowly decrease the amount of support she needed (Tr. p. 275). The school psychologist noted, however, that the student was not completely independent and an unexpected event or unfamiliar visitor to the school could spark anxiety for the student (*id.*). With regard to anxiety associated with academic work, the school psychologist indicated that the student became anxious if she felt there was too much work to do or that she was not going to get a good grade (Tr. pp. 275-76). The school psychologist indicated that the student's anxiety was rooted in her lack of self-confidence and self-esteem (Tr. p. 276). She reported that the student was provided with as much 1:1 support as needed but that she still had a lot of self-doubt and became anxious about being able to perform (Tr. pp. 275-76). The school psychologist acknowledged that the student had anxiety with respect to social issues and that, when she wanted to start up a conversation with a peer, she would feel anxious and worried about what they were going to think of her (Tr. p. 276). The student also shut down with friends (Tr. p. 277). When the student shut down socially with her peers, the school psychologist indicated that the counselor often brought another student into the student's counseling session, either someone the student wanted to get to know or someone with whom she was having difficulty (*id.*). The counselor then provided support to the student (Tr. pp. 277-78).

With regard to academics, the school psychologist indicated the student received frequent check-ins to assess her understanding, wait time to be able to give her answers, frequent prompting, and chunking of material (Tr. p. 278). The school psychologist testified that "step-by-step instructions needed to be broken down for [the student]" because she got very overwhelmed and her processing could be slow (*id.*). The school psychologist indicated the student was academically grouped with students on a similar level (Tr. p. 279).

Testimony by the student's Lowell School teacher for ELA, social studies, health, and Spanish for the 2018-19 school year, indicated that when planning he made sure that he had someone who was going to be with the student throughout the day (Tr. pp. 290-91, 293, 295). He indicated the student attended a 12:1+1 class staffed by himself and a teaching assistant (Tr. p. 299).³ The teacher stated the biggest thing for the student was that her academics were "driven by the social-emotional aspect" in the class (Tr. p. 300). He explained that if something was bothering the student she would shut down and there was "no talking to her" and "no getting her to explain" (Tr. p. 301). The teacher estimated that 15 percent of the time throughout the year was spent on the social aspect and trying to calm the student down (*id.*). The teacher indicated that Lowell dealt mostly with trying to help the student "maintain her anxiety," and it was "amazing" to see the

³ The teacher testified that each classroom at Lowell had up to 12 students, with a teacher and a teacher assistant (Tr. p. 308).

student respond to her comfort level, challenge herself, and face her fears (*id.*). The teacher recalled a situation where the student stepped out of her comfort zone to help comfort a friend who "froze" while performing in a talent show (Tr. p. 302). The teacher testified all of his lesson plans were written so that the teaching assistant was basically sitting with the student in her group and he used preferential seating to make sure the student was with people she was comfortable with (Tr. p. 299). The teacher commented that, although the student required two to three times the amount of time it took other students to get things done, her academic functioning was "wonderful" (Tr. p. 293). At the beginning of the school year, regardless of the differentiation of instruction, the student needed to complete class assignments at home, something she understood and was willing to do (Tr. pp. 293-94, 315). As the student became more comfortable with Lowell over the course of the school year, the situation improved (Tr. p. 294). The teacher reported that, in order to transition between classes, the student received five minutes before the end of every period to start her transition to the next class (*id.*). The teacher stated that the same concerns were noted "across the board" in all academic classes and the student's teachers collaborated with each other (Tr. p. 295). He noted that he provided the student with "a lot more time" to get tasks done, something that enabled the student to pass the ELA class (Tr. p. 296). He further noted that if he gave everybody the same amount of time the student would not be able to do it (*id.*). The teacher differentiated work on projects where the student also received more time to complete the assignments (Tr. 297). In order for the student to work in a small group, the teacher provided the student with a very specific role to finish whatever "her end of things" was within the group (Tr. pp. 297-98). Similar accommodations were provided for health class and Spanish class (Tr. 298). The teacher indicated that the student was getting her work done, but that it was with a lot of modifications (Tr. p. 297). According to the teacher, the student was passing social studies; however, for example, she was provided with extensive time (two to three periods) to complete a 20-question quiz (*id.*).

The Lowell School admissions director testified that the school individualized its program to meet the student's needs by, for example, increasing the amount of time (i.e., multiple days as opposed to two periods for other students) for the student to take a test in conjunction with 1:1 support to address the student's anxiety (Tr. pp. 377-78). Additional accommodations allowed for the student to navigate hallways within five minutes after the bell had rung and after the other students found their way to their classrooms (Tr. p. 379). The student was allowed to have a space in the cafeteria that was just for her and her small group of peers with whom she sat (*id.*). The admissions director also indicated that the student not only received scheduled counseling, but she saw her counselor daily, and sometimes multiple times in a day to check in and help her figure out how her anxiety was affecting her (Tr. pp. 379-80). The student often sat with support by her side, provided by either the teacher or the teacher assistant (Tr. p. 380).

Consistent with the recommendations included in the September-October 2017 neuropsychological consultation report, Lowell addressed the student's needs in the areas of anxiety and socialization, which were described in the report as of "paramount concern" (*see* Parent Exs. G; H; J at p. 11; O; R). For example, a December 2018 counseling progress report indicated the student received individual counseling one time per week and group counseling one time per week to address her social/emotional difficulties that interfered with her ability to function in the classroom (Parent Ex. H at pp. 2-3). The progress report indicated that, in individual counseling, the student worked on improving her ability to communicate her feelings and needs as well as to

apply positive coping strategies independent of support (*id.* at p. 3). The report noted that the student approached counseling with a positive attitude and could be engaged in conversation with minimal prompting (*id.*). She was able to identify her feelings and share her experiences, making good use of her sessions (*id.*). The student was receptive to counselor feedback and strategies provided, but at the time of the progress report the student was not able to use strategies practiced in counseling without support (*id.*). According to the progress report, the student benefited from assistance to recognize and frame negative thoughts and to acknowledge personal accomplishments (*id.*). In group counseling, the student continued to work on improving her social skills as well as her self-confidence initiating and maintaining peer interactions (*id.*). She continued to work on strengthening her communication and self-advocacy skills (*id.*).

Based on the foregoing, a review of the hearing record reveals that Lowell identified the student's academic and social/emotional needs and developed and implemented a program including educational instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to permit the student to benefit from instruction (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

2. Progress

A review of the hearing record reveals that the student also made progress while attending Lowell during the 2018-19 school year. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v Northeast Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522, and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

A March 2019 progress report indicated that, in individual counseling, the student continued to work on improving her ability to communicate her feelings and needs to others in order to improve her self-advocacy skills (Parent Ex. P at p. 4). She also continued to work on improving her ability to apply positive coping strategies for anxiety and frustration independently (*id.*). In group counseling, the student was able to make positive contributions to group discussions with support (*id.*). She benefited from counselor feedback in order to remain engaged and on-topic (*id.*).

Turning to the student's performance during the 2018-19 school year, a June 2019 Lowell progress report showed that the student made some progress toward meeting her annual goals related to counseling but did not master the goals (Parent Ex. R at pp. 4-5). With regard to the first goal, which addressed the student's ability to accurately identify feelings and appropriate coping strategies during counseling sessions when presented with real or imagined situations, the Lowell report stated that the student demonstrated progress in her ability to identify and verbalize her feelings as well as possible triggers (*id.* at p. 4). However, the student continued to struggle with

expressing her feelings to others, as well as with identifying and applying positive coping strategies independent of support (id.). The report indicated that more time was needed for the student to master the goal (id.). With regard to the second goal directed at developing self-advocacy skills for enhanced school performance, the student demonstrated some progress towards improving her ability to assert her needs to ask for help throughout the school day (id. at pp. 4-5). She did not however, consistently self-advocate and often waited for a staff member or peer to notice that she needed either academic or emotional support (id. at p. 5). The report indicated that the student continued to need encouragement, reinforcement, and practice in this area, and needed more time to achieve the goal (id.). According to the Lowell report, the student also worked on a third goal which addressed her need to develop greater confidence to enable her to speak in a group of peers and share her feelings about academic or social concerns (id.). The June 2019 counseling progress report indicated the student willingly attended all group counseling sessions and was usually able to make positive contributions to group discussions with support (id.). She demonstrated some progress in her ability to share her feelings with her fellow group members but continued to benefit from counselor prompting and encouragement (id.). The student continued to struggle with her self-confidence and her ability to apply skills practiced in counseling independent of support (id.). The report noted that more time was needed for the student to meet this goal and recommended that the student receive continued counseling to help support her social/emotional development (id.).

Turning to the IHO's finding that the student did not make progress and was struggling in reading during the 2018-19 school year, the student's report cards indicated passing grades for all subjects (Parent Exs. G at pp. 1-2; O at p. 1; Q at p. 1). The report cards included anecdotal comments about the student including that during the first quarter of the 2018-19 school year, in her ELA class, the student struggled with her emotions, which affected her completion of classwork (Parent Ex. G at p. 1). The student made up her work at home and submitted it the next day (id.). In math, the student benefited from small group instruction where problems were modeled, broken down, and re-explained (id.). In science, the student benefited from encouragement and positive reinforcement (id.). In social studies, the student benefited from visual supports such as video and visual illustration to better understand text (id.). Review of anecdotal comments on subsequent report cards from the same school year reflected teachers provided support and encouragement, assistance, and daily review (Parent Exs. G at p. 2; O at p. 1).

Additionally, contrary to the IHO's finding, the hearing record notes some progress in the area of reading during the 2018-19 school year. More specifically, as the District Court pointed out, results of a Fall 2018 "NWEA MAP Test" referred to in the student's December 2018 progress report indicated that the student's reading skills were above grade level in the ninth grade (Parent Exs. G at p. 4; U). Additionally, the student took the same assessment in Spring 2019 and had a higher RIT score (233 in spring 2019 versus 228 in fall 2018), which was attributed to a grade level equivalent of 11 in spring 2019 (Parent Ex. U).

According to the Lowell School special education teacher, the student tested "very poorly" on assessments measuring her reading comprehension because of the amount of time that it took the student to complete the assessments (Tr. p. 329). During testimony in June 2019, the teacher explained that the student took eight hours to complete the last ELA assessment that the school gave, where other students in the class took two to two and a half hours to complete it; however, according to the teacher, given the extended time, the student's reading comprehension was measured at a 10th grade level (Tr. pp. 329-30). In contrast, the teacher testified that given the

same assessment at the beginning of the school year, the student was reading at an eighth-grade level (Tr. p. 330). Although the teacher did not believe the student had progressed two grade levels in reading comprehension during the school year and that it was more likely the student had a good day during the testing at the end of the school year, the teacher believed the student had "definitely improved," specifically noting the student's comfort level and improved attention (Tr. pp. 331-32).

As noted by the District Court, the IHO's reliance on the 2017 neuropsychological consultation report to show a lack of progress in reading during the 2018-19 school year was misplaced as the evaluation was conducted in September and October 2017—a year prior to the school year at issue and at a time when the student had just started attending Lowell (see Parent Ex. J). Nevertheless, at the time of the evaluation, the student was reported as "performing far below grade level" (id. at p. 5). Scores from an administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III) in 2017 (seventh grade) show that the student received a grade level equivalent score of 3.9 in reading comprehension and 4.1 in oral reading fluency (id. at p. 8). The student had performed better in pseudoword decoding and spelling, scoring a grade level equivalent of 8.1 and 5.2 respectively in seventh grade (id.). The WIAT III administered to the student in 2015 (fifth grade) indicated a grade level equivalent of 1.7 in reading comprehension and 1.4 in oral reading fluency, indicating that the student was making progress in reading as of 2017, when she was still adjusting to Lowell (id.).

Overall, contrary to the IHO's finding that the student did not make progress, the evidence in the hearing record shows that student appears to have made progress while attending Lowell, and the student's progress in reading appears to have continued while at Lowell.

In addition to the above, the student's teacher testified that Lowell was a "great fit" for the student and that she made gains in her adjustment since the start of the school year (Tr. pp. 303-05). He further testified that the student found the courage to be herself at Lowell (Tr. pp. 318-19). According to the teacher, everyone in the student's class was in eighth grade and in a lot of ways the other students were similar to her (Tr. p. 303). At the beginning of the school year, the student walked into school in tears (Tr. p. 304). At the time of the impartial hearing, the teacher indicated the student walked into school with a jump in her step, and although she might shut down, she was not always crying (Tr. p. 304; see Tr. p. 314). She sang in class and appeared comfortable (Tr. p. 304). The student's classmates were empathetic towards her (Tr. pp. 314-15). In the event a student experienced emotional distress, the school's counselor was contacted (Tr. p. 315). In addition, Lowell had a school-wide behavior intervention program where every student in the school had a points sheet that went with them from class-to-class (Tr. pp. 310-11). Each week, the program contained different goals that students needed to reach (Tr. p. 311). The teacher testified that in the student's case, the behavior plan reminded the student of what was expected of her throughout the week and targeted her ability to employ strategies she had been taught throughout the year to begin her work on her own instead of waiting for the teacher to come over and get her started (Tr. pp. 320-21, 324). The teacher indicated that with assistance, the student was meeting her BIP goals (Tr. p. 311).

Testimony by the admissions director from Lowell was consistent with the above noted teacher's testimony with regard to the appropriateness of Lowell. She noted that the student's cognitive and academic profile was very much in line with the school's student profile (Tr. p. 366). The admissions director indicated Lowell was "extremely appropriate" for the student because in

light of her profile, the student made slow and steady incremental gains across both academic and social/emotional areas (Tr. p. 367). She stated that the student's gains were meaningful because they allowed the student to function (*id.*). The admissions director noted the student was passing all of her classes and that in addition to her mandated counseling sessions and the additional counseling Lowell added for her, the student received daily consistent support (*id.*). With regard to the student's progress at Lowell, the admissions director indicated that at the beginning of the previous school year, it took the student approximately four to five months in order to participate under any capacity (Tr. p. 375). When her anxiety peaked, she was often found trying to lie down on the floor to calm herself (*id.*). For the school year in question, the student started the year feeling more comfortable, and in less time (approximately two months) she was able to start asking for help and was able to seek out support more often than just completely shutting down (*id.*). Socially, the student made some connections with peers and with significant prompting and support, she had made great academic progress (Tr. p. 376).

Overall, based on the foregoing, the hearing record supports a finding that Lowell offered specially designed instruction to address the student's identified unique needs as discussed above, and that the student demonstrated progress while attending Lowell for the 2018-19 school year; therefore, Lowell constituted an appropriate unilateral placement for the student for the 2018-19 school year.

As one final point, the District Court noted that the district funded the student's placement at Lowell for her seventh grade (the 2017-18 school year) and tenth grade (the 2020-21 school year) and indicated that the district's funding of Lowell for those school years could be relevant in evaluating the appropriateness of Lowell for the 2018-19 school year (see *V.A.*, 2022 WL 1469394). On this point, it is not clear why the district funded the student's placement at Lowell. Accordingly, without more information—such as evidence that a CSE met to plan for the student's educational programming, reviewed the student's progress and the educational programming provided at Lowell during the 2018-19 school year and determined that Lowell was addressing the student's needs—the mere fact that the district funded Lowell for the student's seventh and tenth grade school years yields no insight into why Lowell was tailored to address the student's unique needs during the student's eighth grade school year. Generally, the courts have been clear that for purposes of a tuition reimbursement claim, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see *M.C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; *Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist.*, 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; *Student X v. New York City Dep't of Educ.*, 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]). Instead, the evidence in the hearing record regarding the student's needs and the services provided shows that Lowell was appropriate for the student during the 2018-19 school year.

B. 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.*, 226 F.3d at 68; 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"]).

The hearing record reflects that the parents cooperated with the June 2018 CSE, did not impede or otherwise obstruct the CSE's ability to develop an appropriate special education program for the student, and did not fail to raise the appropriateness of an IEP in a timely manner or act unreasonably (C.L., 744 F.3d at 840). Therefore, equitable considerations do not weigh against an award of tuition reimbursement.⁴

VII. Conclusion

Having reviewed the hearing record with regard to the two issues remanded by the District Court, the hearing record establishes that Lowell was an appropriate unilateral placement for the student for the 2018-19 school year and equitable considerations support an award of tuition reimbursement.

IT IS ORDERED that the district shall reimburse the parent for the costs of the student's attendance at Lowell for the 2018-19 school year.

Dated: **Albany, New York**
 July 25, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER

⁴ The district failed to raise any arguments regarding whether equitable considerations should not favor the parent during the prior State-level administrative appeal and did not submit any further arguments in response to the June 6, 2022 letter from the Office of State Review.