



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-125

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

Appearances:

Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Mary H. Park, Esq.

Law Office of Gottlieb & Gottlieb, LLP, attorneys for respondents, by Marc A. Gottlieb, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered the district to fund compensatory education for respondents' (the parents') son. The appeal must be sustained in part.

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

As a young child, the student experienced delays in language development (Tr. p. 62; Dist. Ex. 2 at p. 2). During a kindergarten screening at the student's initial district of residence, he was identified as needing intervention and subsequently he received kindergarten academic intervention services (Parent Ex. Q at p. 1). In first grade, the student was referred to the CSE and found eligible for special education as a student with a learning disability (Dist. Ex. 2 at p. 2; see Dist. Ex. Q at p. 1).¹ For some or all of elementary school the student attended a 12:1+1 special

¹ The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

class and received related services of occupational therapy (OT), speech-language therapy, and counseling; he also received reading support and was provided with a behavior intervention plan (BIP) (Dist. Ex. 2 at p. 2). In sixth grade, an assistive technology consult was added to the student's IEP and the BIP was removed (Parent Ex. Q at p. 2; Dist. Ex. 2 at p. 2).² In seventh grade, for the month of September, the student was provided with an aide during physical education and at dismissal (Parent Ex. Q at p. 2).

By parent report, the student was diagnosed with Asperger's syndrome in 2014 (Dist. Ex. 2 at p. 2). For ninth grade (2014-15 school year), the student was enrolled in high school in his initial district of residence and attended special classes for math and English and received consultant teacher services for social studies and science (Parent Ex. Q at p. 1). The student also received daily resource room services and counseling (id. at pp. 1-2). Due to inconsistencies in the student's grades, the district implemented a "behavioral plan" in order to assist him with completing his homework (id. at p. 2).

As part of the student's triennial reevaluation, the initial district of residence administered the Wechsler Intelligence Scale for Children, Fourth Edition (WISC-IV) to the student over several days between October 2014 and March 2015 (Parent Ex. Q).³ Based on the results, the evaluating psychologist reported that the student's intellectual functioning fell within the "[l]ow [a]verage" range (id. at p. 4). The evaluator indicated that the student demonstrated age appropriate skills in verbal comprehension and perceptual reasoning and skills in the low average range on tasks requiring short-term recall and tasks that measured the student's speed of mental and graphomotor processing (id. at pp. 4-5). District achievement testing conducted in February and March 2015 indicated that the student's academic skills, ability to apply academic skills, and academic fluency were all in the low average range (Parent Ex. R at pp. 2, 6). The student's ninth grade, fourth quarter report card showed that he failed algebra, earth science, and global studies for the 2014-15 school year (Dist. Ex. 2 at p. 2; Parent Ex. S).⁴

At the end of the 2014-15 school year, the student's initial district of residence advised the parents that the student had been accepted to the "PWNBOCES Oasis program" (Dist. Ex. 8 at p. 1). Around this same time, the parents purported to move to the district that is the petitioner in this appeal (id.; see Dist. Ex. 2 at p. 3). The parents reported that they contacted the district in summer 2015 in order to request a program and placement for the student for the 2015-16 school

² The hearing record indicates that the student received resource room services for reading during the summer but that, by ninth grade, he no longer needed reading services or extended school year services for reading (Parent Ex. Q at p. 2).

³ The evaluator reported that she ended the first testing session after she observed the student falling asleep (Parent Ex. Q at p. 2). Although she reported that the student seemed more alert during the second testing session, he was unable to focus for an extended period of time and, therefore, by mutual agreement the evaluator and student scheduled a third session (id.). The evaluator reported that, during the third session, the student was "only able to attend to tasks asked of him for a short amount of time" (id.). The evaluator opined that the student lacked motivation or interest during certain subtests that required him to attend and concentrate (id.).

⁴ The student's report card included his cumulative absences for the school year which ranged from 11 absences in writing workshop to 26 absences in "Resource 9" (Parent Ex. S).

year but that the district did not reply (Dist. Ex. 8 at pp. 1-2). The parents then unilaterally placed the student in the Woodhall School (Woodhall), an out-of-State residential nonpublic school—and were reimbursed for the cost of the student's tuition at Woodhall for the 2015-16 school year by the district (*id.*; *see* Dist. Ex. 2 at p. 2).⁵ For the 2015-16 school year at Woodhall, the student repeated the ninth grade (Dist. Ex. 2 at p. 2).

The following year, on June 3, 2016, the parents executed an enrollment contract with Woodhall for the student's attendance during the 2016-17 school year (10th grade) (Parent Ex. D).

In a letter dated August 13, 2016, the parents provided the district with notice that they intended to unilaterally place the student at Woodhall for the 2016-17 school year at district expense because the district failed to conduct a CSE meeting (Dist. Ex. 1).⁶

Due to concerns regarding the student's academics, the parents referred the student to the CSE for an evaluation during the 2016-17 school year (Dist. Exs. 2 at p. 1; 5 at p. 1). In response, the district conducted a social history/parent interview in December 2016 (Dist. Ex. 2). The social history report indicated that, by parent report, the student struggled with attending and that math was his greatest academic challenge (*id.* at p. 2). The report further indicated that the parents were happy with the student's performance and progress at Woodhall (*id.* at pp. 2-3). In a prior written notice dated January 22, 2017, the district outlined a "[c]omparable [s]ervice [p]lan" for the student which included placement in a 15:1 special class for five periods per week and weekly individual and small group counseling (Dist. Ex. 3).⁷

The district subsequently conducted a psychoeducational evaluation in June 2017 (Dist. Ex. 5). Results of standardized testing showed that the student's cognitive abilities were in the average range, as were his overall reading and math skills (*id.* at pp. 2-3, 7).⁸ However, the student's writing skills were in the below average range and his responses to projective testing were suggestive of fatigue and dysphoric mood (*id.* at pp. 3-7). The student received the following "final" grades for the 2016-17 school year: Modern World History, B; English 10, B+; Environmental Science, B; Geometry, C+; and German, A- (Parent Ex. T at pp. 1-2).

⁵ Woodhall has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d]; 200.7).

⁶ According to the parents, the district contacted them at least twice by mail during the 2016-17 school year, with one of the letters being an invitation to meet and discuss the student's educational needs (*see* Dist. Ex. 8 at p. 2).

⁷ The prior written notice advised the parents that, since the student had an IEP from another school district, the services outlined in the notice were "the comparable special education services [the student] w[ould] receive" until there was a CSE meeting to develop a district IEP (Dist. Ex. 3 at p. 2).

⁸ Although the student's composite score for mathematics was in the average range, his performance on the numerical operations subtest was in the below average range (Dist. Ex. 5 at p. 3).

On July 9, 2017, the parents executed an enrollment contract with Soundview Preparatory School (Soundview) for the student's attendance during the 2017-18 school year (11th grade) (Parent Ex. L).⁹

On July 10, 2017, a CSE convened to conduct an initial eligibility determination of the student and to develop an IEP for the 2017-18 school year (Dist. Ex. 6). Finding that the student was eligible to receive special education as a student with a learning disability, the July 2017 CSE recommended a 15:1 special class placement (35 times per week) with the following related services: one 40-minute session per week of individual counseling and one 40-minute session per week of group counseling (*id.* at p. 9).

In a letter dated August 21, 2017, the parents notified the district that they intended to return the student to Woodhall for the 2017-18 school year at district expense because the district failed to conduct a CSE meeting (Dist. Ex. 20).

A. Due Process Complaint Notice

By due process complaint notice, dated May 9, 2018, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 and 2017-18 school years (Parent Ex. A at pp. 1-3). Specifically, with respect to both school years, the parents alleged that the district failed to conduct required evaluations and failed to convene CSEs to develop IEPs for the student (*id.* at p. 1). In addition, the parents recounted communications between the parents and district regarding the possibility of settling the parents' claims and argued that the district adopted a strategy of "willful delay" in order to prolong and, ultimately, forestall the possibility of settlement (*id.* at p. 3). The parents further alleged that Woodhall and Soundview were appropriate unilateral placements and that equitable considerations weighed in favor of an award of reimbursement and/or prospective funding (*id.*).

As relief, the parents requested "[t]uition reimbursement and/or prospective funding, award and implementation of specialized transportation, related services, attorneys' fees, and any additional relief the IHO may deem just and proper" (Parent Ex. A. at p. 3).

B. Impartial Hearing Officer Decision

After a prehearing conference with a different hearing officer on July 23, 2018, on August 3, 2018, counsel for the parties discussed the contours of the dispute with the IHO who was appointed to hear the matter on July 26, 2018, including the district's request for documentation of the student's residence (Tr. pp. 1-31).¹⁰ On August 10, 2018, the IHO issued an interim decision, finding that the district was estopped from denying the parents' assertion of the student's residence in the district in the context of the impartial hearing and that the district was required to defend its provision of services to the student from the date the student became known to the district as a

⁹ Soundview has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (*see* 8 NYCRR 200.1[d]; 200.7).

¹⁰ The IHO, who presided over the July 23, 2018 prehearing conference subsequently recused himself from the matter (*see* Tr. pp. 1, 4-5, 9-11).

resident (IHO Interim Decision at p. 4). The parties continued with the impartial hearing on September 7, 2018 (see Tr. pp. 32-259), at which time the district declined to defend the "IEP or recommendation[s]" for the 2016-17 and 2017-18 school years (Tr. pp. 58, 111).¹¹

In a decision dated September 20, 2018, the IHO found that the district conceded that it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years, that the unilateral placements were both appropriate and inappropriate, and that there were no equitable considerations that would warrant a reduction or denial of the parents' requested relief (see IHO Decision at pp. 64-77).¹² With respect to the appropriateness of the student's unilateral placements for the 2016-17 and 2017-18 school years, the IHO found that the parents "failed to provide adequate clinical or observational foundation, other than anecdotal and post-hoc retrospective evidence not allowed by R.E., . . . to support an order placing the student into the unilateral placements" (id. at p. 66). In so finding, the IHO indicated that his task was "simply to determine whether the [parents'] unilateral placement was reasonably calculated to provide Andrew benefit" (id. at p. 72). The IHO found that the parents "had[d] not fully met this burden" (id.). Specifically, the IHO found that, although the services the student received at the unilateral placements for the 2016-17 and 2017-18 school years "provided meaningful, even substantial, benefit to the student," they did not do so "as part of a comprehensively crafted program specifically tailored to address this student's needs" based on a "clinical understanding" of those needs (id. at pp. 72-73). The IHO further described the lack of evidence in the hearing record regarding the "core perceived impairments arising from [the student's] affective response to schooling," his anxiety and "school averse behaviors," and the IHO also noted the anecdotal nature of the evidence concerning the student's "nosedive" in school during the 2014-15 school year, as well as the fact that the unilateral placements did not hold themselves out as special education schools, and the "post-hoc" nature of the evidence regarding the student's success in the programs (id. at pp. 73-75). The IHO noted that "none of the clinical evidence before [him] sustain[ed] a finding that the student required a residential placement at the end of the 2015-16 school year (id. at p. 75). Based on the foregoing, the IHO concluded that the appropriateness of the unilateral placements failed the Burlington/Carter test for tuition reimbursement (id. at pp. 73, 75). However, the IHO found that the unilateral placements satisfied the Andrew F. standard (id. at p. 75). The IHO explained that the unilateral placements were "reasonably calculated to be beneficial" because they were "adult-intensive, flexibly-contoured, supportive programs with extremely high adult:student ratios" (id.). Further, the IHO further found that the student received intensive tutorial services designed to address the student's anxiety and stress (id.). The IHO found that the services the student obtained from the unilateral placements were more akin to tutoring services and met the Reid standard for an award of compensatory services in that they brought the student back to where he would have been but for the district's denial of a FAPE (id. at pp. 73, 75-76).

¹¹ The district presented 21 exhibits as evidence but chose not to call any witnesses to testify at the impartial hearing (Tr. p. 58; see Dist. Exs. 1-21).

¹² The IHO also reiterated his earlier determination that the question of residency was not before him but went on to note that, even if he had reached the issue of residency, he would have concluded that the family "had the capacity, should the district have offered an appropriate placement, to reside in and intend to remain in their NYC domicile," emphasizing the impact that the educational planning process could have on a family's decision to establish residency (IHO Decision at pp. 65-66, 70-72 [emphasis in the original]).

Turning to equitable considerations, the IHO found no basis to deny relief to the parents (IHO Decision at p. 76). For relief, the IHO awarded compensatory education services comprised of "two hours of 1:1 or small group tutoring per day for the 104 weeks of those two school years, a total of 1040 hours of service" (*id.*). The IHO quantified this award based on "a mid-range hourly rate for private tutoring" of \$75 per hour, totaling \$78,000 to be used "retroactively or prospectively" (*id.*). The IHO ordered:

the district to allocate funds in that amount to be drawn down against either as reimbursement to the famil[y] for documented qualifying expenditures made by them, or paid directly to providers for amounts due for the past provision of such services during 2016-17 and 2017-[1]8, or to be paid prospectively for future documented tutoring services by appropriately licensed teachers as documented by the family, for services to be provided between [the date of the IHO decision] and August 31, 2019

(*id.* at pp. 76-77). The IHO also ordered that the funds could be used "in full or in part to pay all or part of any indebtedness remaining for tuition at the two schools attended" by the student for the 2016-17 and 2017-18 school years (*id.* at p. 77).

IV. Appeal for State-Level Review

On appeal, the district argues that the IHO erred in awarding the student compensatory education to remedy a denial of a FAPE for the 2016-17 and 2017-18 school years. Initially, the district argues that the parents are not entitled to compensatory education because they did not request it in their due process complaint notice or at the impartial hearing. Next, the district argues that the hearing record did not contain sufficient evidence to support a compensatory education remedy. More specifically, the district argues that the IHO failed to explain how he calculated the number of hours or sessions per week and that it is unclear how the IHO determined the award was tailored to the student's needs to compensate him for the denial of a FAPE. The district also asserts that the hearing record does not include support for the IHO's finding that \$75 per hour constituted the market rate for tutoring. Next, the district argues that the IHO's award of 1040 hours was unreasonable and excessive. The district further argues that the parents are not entitled to compensatory education because the student no longer needs special education, as evidenced by testimony that, for the 2018-19 school year, the student has returned to his initial school district of residence and attends a general education setting in a public school and is making progress. Lastly, the district alleges that the IHO erred in granting a compensatory award that could be utilized to reimburse the parents for tuition costs at the student's unilateral placements for the 2016-17 and 2017-18 school years.

In an answer, the parents respond to the district's allegations and generally argue in favor of upholding the IHO's award of relief, while acknowledging that such relief is "unconventional" and "highly unusual."

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere

'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see 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]).¹³

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

As a preliminary matter, a discussion of the IHO's analysis regarding the appropriateness of the unilateral placements is required. The IHO made numerous findings regarding the unilateral placements, which were both internally inconsistent and inconsistent with the standards he applied.

¹³ 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).

Initially, as described in more detail below, in Burlington, the Supreme 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). On the other hand, while compensatory education—an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997])—generally takes the form of prospective services (Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n. 2 [2d Cir. 2008] [noting that compensatory education is "prospective equitable relief"]), some courts in other circuits have found that compensatory relief may take the form of reimbursement for private services the parents obtained to make up for deficiencies in the student's IEP or even reimbursement for tuition in a year other than the school year at issue (see Foster v Bd. of Educ. of City of Chicago, 611 Fed App'x 874, 879 [7th Cir. May 11, 2015] [awarding reimbursement for services where student denied a FAPE and "her sessions with the speech and language pathologist had been an appropriate—although not entirely sufficient—alternative"]; I.T. v. Dep't of Educ., 2013 WL 6665459, at *5 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education services the student received at the nonpublic school]; Reg'l Sch. Unit 51 v. Doe, 920 F. Supp. 2d 168, 209-10, 212-15 [D. Me. 2013] [finding that reimbursement of tuition as compensatory education may be awarded if the nonpublic school was an appropriate placement and upholding the IHO's award of reimbursement in a later school year to make up for a denial of a FAPE in earlier school years]; but see P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3d Cir. 2009] [compensatory education is not an available remedy when a student has been unilaterally enrolled in private school]).¹⁴

In this matter, the IHO found that the unilateral placements chosen by the parents did not meet the standard set forth in Andrew F. because they did not have "a comprehensively crafted program specifically tailored to address this student's needs" (IHO Decision at pp. 72-73). The IHO then noted that because the unilateral placements did not hold themselves out as special

¹⁴ The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see Newington, 546 F.3d at 123 [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . . compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address [] the problems with the IEP"]; S.A. v. New York City Dep't of Educ., 2014 WL 1311761, at *7 [E.D.N.Y. Mar. 30, 2014] [noting that compensatory education "serves to compensate a student who was actually educated under an inadequate IEP and to catch-up the student to where he [or she] should have been absent the denial of a FAPE"] [internal quotations and citation omitted]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette Cnty., Ky. v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

education schools, did not have licensed special education professionals on staff, and only offered small class sizes, intensely supported environments, extensive scaffolding in the form of tutoring and study support, and flexibility in when assignments could be turned in, the evidence did not support finding that the unilateral placements met the Burlington/Carter standard and therefore did not support an award of tuition reimbursement (id. at pp. 74-75). Next, the IHO equivocated and found that the unilateral placements met the Andrew F. standard because the parents' decisions were "reasonably calculated to provide [the student] with meaningful educational benefit, and that [they] did, in fact, do so" (id. at p. 75). The IHO noted that "[t]he student received . . . extremely intensive tutorial services in a setting designed to accommodate the anxiety and stress that his family anecdotally detailed on the record" (id.). The IHO then found that the tutorial services provided by the unilateral placements "address[ed] the deficits resulting from the acknowledged denial of FAPE" and accordingly met the standard set forth in Reid for compensatory education (id. at pp. 75-76).

The IHO's analysis, as set forth above, conflicts with the standards set forth in his decision. For example, the IHO noted that relief in the form of reimbursement and compensatory education "differ . . . with respect to timing—reimbursement is retrospective, while compensatory services are generally prospective" (IHO Decision at p. 54), yet the IHO awarded compensatory education as a form of retrospective relief. In addition, while the IHO described the standard for determining the appropriateness of a unilateral placement as "whether the program reasonably could have been expected, at the time of placement, to offer meaningful educational benefit to the child," and the IHO found that the parent's decision to place the student at Woodhall and then at Soundview, were "reasonably calculated to provide meaningful educational benefit," the IHO nevertheless found that the standard he set forth was not met (compare IHO Decision at p. 41, with IHO Decision at p. 75). Moreover, while the IHO indicated a compensatory award of reimbursement may be appropriate where "the child has already received services sufficient to address the full range of the deprivation engendered by the CSE's actions," the IHO does not sufficiently explain how a program could meet this standard yet not qualify as an appropriate unilateral placement, one that offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112).

In summary, since during the course of the proceeding, the parents have unambiguously sought reimbursement for the costs of the student's tuition at Woodhall for the 2016-17 school year and Soundview for the 2017-18 school year (see Parent Ex. A), and due to the ambiguity in the IHO's decision regarding whether the unilateral placements chosen by the parents were appropriate, the traditional Burlington/Carter analysis will be applied in determining the appropriateness of the unilateral placements (see Burlington, 471 U.S. at 370; Carter, 510 U.S. at 15-16; see also 20 U.S.C. 1412 § [a][10][C][ii]; Gagliardo, 489 F.3d at 111-12; Frank G. v. Bd. of Educ. of Educ. of Hyde Park, 459 F.3d 356, 363-64 [2d Cir. 2006]); Cerra, 427 F.3d at 192; M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 102 [2d Cir. 2000]); M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]).

Turning to the standard to be applied in reviewing the appropriateness of the unilateral placements, 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., 231 F.3d at 104). "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., 459 F.3d at 364; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

A. 2016-17 School Year—Appropriateness of Woodhall

1. Student's Needs

In this instance, although the student's needs are not directly in dispute, a discussion thereof provides context for the discussion of the disputed issue to be resolved—namely, whether the student's unilateral placement at Woodhall was appropriate for the 2016-17 school year.

The hearing record does not include a daily schedule, course descriptions, progress reports, or teacher logs from Woodhall for the 2015-16 school year which would potentially help identify the student's needs as of June 2016. However, there is also no evidence in the hearing record that the CSE met to develop an IEP for the student for the 2016-17 school year. One Court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (id. at p. 207; see Application of the Bd. of Educ., Appeal No. 08-056).

Under the circumstances of this proceeding—where the district conceded that it failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and did not develop an IEP for the student for the 2016-17 school year, which could have demonstrated the district's view of the student's special education needs at that time—the responsibility for any deficiency in understanding the student's needs falls on the district, rather than the parents (see A.D., 690 F. Supp. 2d at 208; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027).

The evaluations most contemporaneous with the parents' decision to unilaterally place the student at Woodhall for the 2016-17 school year are the March 2015 psychoeducational evaluation and social history update and April 2015 triennial educational evaluation (Parent Exs. Q; R). At the time of the March 2015 psychological evaluation and social history update, the student was classified as a student with a learning disability, attended the ninth grade in a public school in his previous district of residence, and received special class services for math and English, consultant teacher services in social studies and science, daily resource room, and counseling (Parent Ex. Q at p. 1). Due to the student's fatigue and difficulty sustaining attention to task for an extended period of time, the school psychologist administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) to the student over a four-day period (id. at pp. 1-2). The examiner cautioned that, based on her observation of the student's attention, motivation, and effort, the assessment results "may be an underestimate" of the student's "cognitive functioning at this time" (id. at p. 1). The student's full-scale IQ, as measured by the WISC-IV, fell in the low average range (id. at p. 3). Specifically, the examiner reported that the student exhibited overall abilities in the average range on the verbal comprehension index, which was comprised of subtests related to identifying similarities, vocabulary, and comprehension (id.). On the perceptual reasoning index, the student performed in the average range on visual spatial processing, picture concepts, and matrix reasoning subtests (id.). In the area of working memory, the examiner reported that the student's scores were "significantly discrepant" as they ranged from average in the digit span subtest, to extremely low in the letter-number sequencing subtest (id. at pp. 3-4). However, the

examiner noted that the student was later able to correctly answer some questions on this subtest, suggesting that his previous "lack of effort may have contributed to an underestimate of his ability" (id. at p. 4).¹⁵ The student scored in the low average range on the processing speed index, which tested his ability to "scan, sequence or discriminate between pieces of simple visual information" (id.). Notably, the student scored in the low average range on the coding subtest but in the average range on the symbol search subtest, which according to the examiner indicated that the student's perceptual discrimination and psychomotor speed fell within normal limits (id.). Again, the examiner opined that the student's motivation and ability to attend to task may have accounted for the discrepant scores (id.). Based on her evaluation, the school psychologist concluded that the student demonstrated age appropriate verbal comprehension and perceptual reasoning skills and overall cognitive functioning in the low average range (id.). The examiner reported that the student's performance on tasks involving recall of short-term information and tasks that tapped his speed of mental and graphomotor processing was in the low average range (id. at pp. 4-5).

The teacher who completed the April 24, 2015 triennial educational evaluation indicated that she administered the Woodcock-Johnson III-Tests of Achievement (WJ-III) to the student over the course of several days due to the student's inability to sustain attention to task (Parent Ex. R at p. 1). According to the resultant report, the student's oral language skills were in the average range, while the student's academic skills, ability to apply academic skills, and fluency with academic tasks were all in the low average range (id.). According to the evaluator, compared to others at his age level, the student's standard scores were in the low average range in broad reading, broad mathematics, math calculation skills, broad written language, and written expression (id. at p. 6). The student achieved his lowest score on the passage comprehension subtest which required students to use syntactic and semantic cues (id.). However, the evaluator noted that the student was very distracted on this subtest and indicated that the student's score should be interpreted with caution (id.). The evaluator suggested that the WJ-III test scores be compared with the results of other current test data in order to assess its reliability (id.). She further indicated that it would be helpful to obtain ongoing feedback from the faculty members who worked with the student on a daily basis and noted that this additional information would make a more comprehensive understanding of the student's learning style and needs (id.).

As noted above, the student's June 2015 report card showed that he failed algebra, earth science, and global studies for the 2014-15 school year (Parent Ex. S; see Dist. Ex. 2 at p. 2). After the student's first year at Woodhall during the 2015-16 school year, the student received the following final grades: English 9, C+; Algebra I, C+; Biology, B-; Roots of Western Civilization, B; and Studio Art I, B (Dist. Ex. 14). Some additional impressions about the student's needs during the relevant time frame were described in testimony and are summarized in the analysis below.

¹⁵ The examiner indicated that in "an effort to test the limits and obtain additional information about the student's short term memory abilities, [she] asked [the student] to repeat certain items again at the end" of the test administration (Parent Ex. Q at p. 4). She noted that the student was able to answer some of the items correctly, but that the correct responses did not count toward the student's score.

2. Specially Designed Instruction and Progress

Based on the foregoing, the limited information in the hearing record about the student's needs indicates that the student demonstrated weaknesses with regard to letter-number sequencing, motivation, and the ability to attend to task, as well as some "low average" academic skills.

Woodhall is an out-of-State residential nonpublic school for high school-age male students (Parent Ex. F). The head of Woodhall described the students at the school as "bright" young men, with "fragile self-esteem" who had not met with success in other school environments, and that every student at the school had "a diagnosed learning disability" (Tr. pp. 217-18; see Parent Ex. F). The head of school acknowledged that Woodhall was not held out as a special education school, that the school did not employ teachers certified in special education or certified counselors (Tr. pp. 201, 225). However, he described the school as a "hybrid of both a traditional school," a school intended for students with learning disabilities, and a "therapeutic program" (id.). The head of Woodhall testified that the school provided small class sizes of three to four students, as well as multimodal, differentiated, and individualized instruction to boys who had experienced difficulties in traditional school (Tr. pp. 193, 197-98, 214; see Parent Ex. F). The head of Woodhall further explained that the school emphasized a "process over content approach" to address a student's executive functioning skills "in all areas of his life," as well as the communications program, which helped students gain skills in self-reflection, self-expression, and social understanding (Tr. p. 198; see Parent Ex. F).

According to the parent, she chose Woodhall based on her research of schools that would address the student's needs associated with his lack of independence, social isolation, and diagnosis of Asperger's syndrome (Tr. pp. 76, 101). Furthermore, the parent decided on Woodhall specifically because it addressed the needs of students with "above average intelligence," who had academic and psychological concerns, and because the residential component would provide structure and eliminate the student's tendency to isolate himself (Tr. pp. 76-77, 80, 101).

During the admission process for the 2015-16 school year, the student reportedly presented as anxious and "painfully shy" (Tr. pp. 204-05, 207). The head of Woodhall stated that when the student arrived at the school he appeared impacted by anxiety and struggled with mathematics, general academics, life skills, and self-advocacy (Tr. p. 209). During his first year at Woodhall, the student reportedly received "a lot of intensive one-on-one intervention" with his teachers (id.). The head of Woodhall reported that the student had a relative strength in verbal skills and staff found that they were able to draw the student out by getting him to talking about his feelings, as well as to talk about things that he did not understand (id.). The head of Woodhall explained that once staff was able to "verbally mediate that" they were able to apply strategies such as breaking down math problems into small, manageable parts (Tr. pp. 209, 211). The head of Woodhall attributed the student's success to the school's "immersive milieu" and the "residential setting with charismatic adult mentors who can really have an impact on a young person's neuroplasticity" (Tr. pp. 211-12). Further, the head of Woodhall testified that, once the student's anxiety was addressed, "he was better able to receive the strategies for his academics and social and emotional functioning" and "put them into practice" (Tr. p. 212). The head of Woodhall worked with the advisors to set goals for the student to support his executive functioning skills (Tr. p. 213). Further, according to the head of Woodhall, the school provided parents a "full narrative" of their children's

progress in all of their classes at the end of each trimester and "family weekends" twice per year when parents met with teachers (Tr. p. 214).

The head of Woodhall also testified that the student initially required small class sizes because of his difficulty during his "first 9th grade experience" at the public school and because at the private school "the teachers knew him," which resulted in the student's ability to "to come into his own and begin to meet with consistent success" (Tr. p. 215). The head of school also testified that the student specifically needed a small class ratio during the 2016-17 school year because the academic and social/emotional skills he initially gained during his first year at Woodhall (2015-16) were "nascent," and, had he moved to a more traditional school environment for the 2016-17 school year, his anxiety could have returned and his academic and social functioning could have suffered (*id.*). The head of school stated that Woodhall provided the student with a "highly structured program" from 7 a.m. until 10 p.m., sports six days per week, adult mentors, and "chaperoned social activities off campus with other schools" (Tr. p. 216). The head of school added that, due to his anxiety, the student may not have been able to play on a basketball team without the "scaffolding" and "mentorship" provided at Woodhall (Tr. p. 217). In addition, the head of school opined that the student may have continued to isolate himself and "go into shutdown mode in a different school environment" (*id.*). The head of school stated that the student was well liked and respected by peers, was "elected captain of the basketball team," and was "a student leader" (Tr. p. 218). Further, the head of school testified that the student's emotional functioning had been significantly impacted by his attendance at Woodhall (*id.*). The head of school opined that the student benefitted from the residential component because he was provided "scaffolding" and support for his social/emotional needs after school hours, which a day program could not provide (Tr. p. 221).

According to the head of Woodhall, the teachers adopted individualized strategies for the student based on his needs (Tr. pp. 218-19). For example, he stated that the student was able to "articulate" to his teacher his difficulty in geometry, prompting the teacher to provide part of the geometry exam as an oral exam, and enabling the student to gain confidence and improve his performance (Tr. p. 219). In comments completed by the student's teachers after the spring term of the 2016-17 school year, the student's math teacher stated that he provided the student with "tangible examples of geometric principles to help him anchor the formulas in his mind" (Parent Ex. T at p. 2). In addition, the teacher provided the student with "quick feedback" in order to prevent him from "internalizing improper procedures" (*id.*). To address his difficulty with transitions between concepts, the teacher provided the student with "copious written instructions" and "significant verbal clarification on topics with which he had trouble" (*id.*). The student reportedly took initiative to speak with his English teacher about his "self-proclaimed lack of interest" in the required reading (*id.* at p. 1). In his spring communications group, the student received encouragement to be an "active listener" and to verbally share "his own personal insights and struggles" (*id.*).

With respect to the student's progress at Woodhall, 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]; see also Frank G.,

459 F.3d at 364).¹⁶ 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]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

While not dispositive, a review of the hearing record reveals that the student made progress while attending Woodhall during the 2016-17 school year. For example, the parent stated that the student had "transformed" during the 2016-17 school year as he was now "applying himself" academically, had greatly improved his writing skills, had become more social, had increased self-esteem, and had begun taking pride in his appearance (Tr. pp. 84-86). According to the student's history teacher's comments after the spring 2017 term, the student served as a leader in the daily classroom conversations, "engaged actively in the flow of the curriculum," and served as a positive role model for peers (Parent Ex. T at p. 1). The student's English teacher wrote that the student demonstrated resourcefulness by joining in a study group with his peers (id.). The science teacher noted that the student's participation in class was "consistent" and that he "regularly contributed to class discussions" (id. at p. 2). The student was able to collaborate with peers during class science experiments, and the teacher opined that the student's hard work and "ability to ask his peers for tutoring" would continue to be helpful for the student (id.). The student's math teacher noted the student's steady progress and hard work (id.). Finally, the student had shown enthusiasm for peer engagement and was selected as a student leader, which demonstrated the confidence his peers had in him (id. at p. 3). The student's final grades ranged from A minus to C plus (id. at pp. 1-2).

Overall, based on the foregoing, the hearing record supports finding that Woodhall offered specially designed instruction to address the student's individual needs in the areas of academics, particularly with respect to mathematics, as well as in the areas of social/emotional and executive functioning, and that the student demonstrated progress while attending Woodhall for the 2016-17 school year, and therefore, Woodhall constituted an appropriate placement for the student for the 2016-17 school year.¹⁷ During the hearing, the district also raised the restrictiveness of placement in a residential school as a reason Woodhall was not appropriate for the student. Generally, although the restrictiveness of the parents' unilateral placement is a factor that may be considered

¹⁶ The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]).

¹⁷ As the district noted during the hearing, there is no evidence that the student received counseling services at Woodhall or that Woodhall provided what would be considered a "therapeutic" environment (see Tr. pp. 250-51). While a unilateral placement may be inappropriate by failing to provide a student with a necessary service (see R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 2018 WL 2304740, at *6 [N.D.N.Y. May 21, 2018] [unilateral placement inappropriate because it avoided student's anxiety-related needs rather than addressing them]), under the circumstances presented herein, and considering the program as a whole, the lack of formal counseling services at Woodhall did not render it inappropriate for this student (see T.K., 810 F.3d at 878 ["[P]arents need not show that a private placement furnishes every special service necessary to maximize their child's potential"], quoting Frank G., 459 F.3d at 365).

in determining whether the parents are entitled to an award of tuition reimbursement (Rafferty, 315 F.3d at 26-27; M.S., 231 F.3d at 105), parents are not held as strictly to the standard of placement in the LRE as are school districts (see Carter, 510 U.S. at 14-15; C.L., 744 F.3d at 839 [indicating that "while the restrictiveness of a private placement is a factor, by no means is it dispositive"]; D.D.S., 506 Fed. App'x at 82). While the evidence in the hearing record may not support a finding that a residential program was necessary for the student, as noted above, the hearing record indicates that the student made progress at Woodhall and that Woodhall provided supports to address the student's needs. Considering the totality of the circumstances, LRE considerations do not outweigh the other indications in the hearing record that Woodhall was an appropriate placement for the student for the 2016-17 school year.¹⁸

B. 2017-18 School Year—Appropriateness of Soundview

1. Student's Needs

In contrast to the information leading up to the 2016-17 school year, the information in the hearing record about the student's needs leading in to the 2017-18 school year is more robust.

According to the district's prior written notice, in order to develop the student's July 2017 IEP, the CSE reviewed and discussed the student's August 6, 2015 IEP, a January 17, 2017 social history, a January 26, 2017 teacher report, a May 9, 2017 report card, a June 6, 2017 psychoeducational evaluation report, a June 6, 2017 classroom observation, and a June 6, 2017 vocational assessment (Dist. Ex. 7 at pp. 1-2; see Dist. Exs. 2; 5; 6).¹⁹ The student's mother acknowledged that she attended a meeting on July 10, 2017 "with an individual and two others" whose names she did not recall, but stated that "[i]t did not . . . occur to me as an IEP meeting" (Tr. pp. 109, see Tr. p. 117).

In December 2016, the district conducted a social history/parent interview that included the reason for the student's referral to the CSE, a description of parents' concerns, the student's educational history, the student's developmental and medical history, a description of the current family status and any changes within the family structure, and a description of the student's behavior at home and in the community (Dist. Ex. 2). The social worker who completed the social history/parent interview report noted that the information gathered for the report was obtained from the student's mother (id. at p. 1). The social history report indicated that the referral was

¹⁸ Nevertheless, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]). Additionally, a parent's failure to locate a placement closer to home—to obviate the need for a residential placement—may be considered as a factor in reducing tuition reimbursement (R.C., 2013 WL 563377, at *10).

¹⁹ The August 2015 IEP and May 2017 report card were not included in the hearing record. The social history report included in the hearing record is dated December 7, 2016 but reflects that it was transmitted by facsimile on January 17, 2017 to an unknown recipient (Dist. Ex. 2). While the January 26, 2017 teacher report and the vocational assessment are not included in the hearing record, their contents are summarized in the July 2017 IEP (see Dist. Ex. 6).

initiated by the student's mother who had concerns regarding the student's academics, as he struggled with his studies and put hours of work into his school work (id.). The educational history indicated that the student had been attending Woodhall since September 2015, where he repeated ninth grade (id. at p. 2). According to the parent, at the time of the interview, the student was currently in 10th grade at Woodhall and was functioning at a 10th grade level (id.). According to the social history, the nonpublic residential school offered a 4:1 student-to-teacher ratio, an "individualized" program, and had a communication program and a social residence that helped the student learn independent living skills (id.). The social history report noted that, by parent report, the student was diagnosed with Asperger's syndrome in 2014 and displayed "very good behavior in school" (id.). The parent reported the student's academic strengths as "he [wa]s willing to work hard and his success in language class, ha[d] been a 'surprising gift,' as well as Biology and History (id.). The parent further reported that math was the student's greatest academic challenge and that the student "struggle[d] with attention as it [wa]s difficult for him to focus" (id.). The social history report indicated that the parent was happy with the student's then-current school and had observed progress as the student went from "failing everything to passing" with As and Bs (id.). The developmental and medical history indicated that the student experienced developmental delays with respect to toilet training and speech-language development and that the student was currently taking medication to assist him with study hall (id.). With respect to the student's behavior at home and in the community, the parent described the student as "amazing, mature for his age, thoughtful of others, hard on himself, a good leader, very creative and a great problem solver" (id. at p. 3). The social history report indicated that the student got along well with his immediate and extended family and spent time with the boys from school (id.).

The psychoeducational evaluation, completed by the district in June 2017, included an assessment of the student's cognitive functioning, academic achievement, and social/emotional development (Dist. Ex. 5). The evaluator reported that the student was cooperative and respectful throughout the evaluation session and demonstrated that he understood the various directions and instructions that were given (id. at p. 2). The evaluator noted that, although the student appeared to try his best on test items, he apologized for his performance on sections that he found difficult and shared that he had learning disabilities in writing and math (id.). Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) yielded a full-scale IQ of 96, which the evaluator reported was within the average range of intellectual functioning (id. at pp. 2, 8). With respect to fluid reasoning, the evaluator stated that the student showed appropriately developed skills on tasks requiring the use of quantitative and analogical reasoning and involving the ability to understand and predict visual patterns and sequences (id.). On the verbal comprehension tasks, the student displayed adequately developed abilities to answer questions involving verbal analogies and to define vocabulary words (id.). According to the evaluator, on the visuospatial and nonverbal reasoning tasks, the student demonstrated an adequate ability to construct visual representations of pictures and models, understand whole-part relationships, and identify constituent parts of a specific visual image (id. at pp. 2-3, 8). With respect to memory, the student demonstrated adequately developed abilities to recall and organize sequences of numbers and sequences of pictures (id. at pp. 3, 8). The evaluator reported that the student demonstrated a relative strength in processing speed and indicated that the student was able to efficiently copy symbols paired with numbers and scan a group/array and identify a target symbol (id. at pp. 3, 7, 8).

To assess the student's academic achievement, the evaluator administered the Wechsler Individual Achievement Test-Third Edition (WIAT-III) (Dist. Ex. 5 at pp. 3-4, 8). The evaluator reported that the student's score on the basic reading composite was in the average range and that the student demonstrated appropriately developed reading comprehension skills and was able to adequately decode lists of both real and nonsense words (id. at pp. 3, 8). With respect to the mathematics composite, the student scored in the average range; however, he scored in the below average range on the numerical operations subtest (id.). The evaluator reported that the student was able to solve word problems involving quantity, calendar skills, reading simple graphs and charts, simple probability, place value, fractions, and arithmetic (id. at p. 4). However, the student had difficulty with problems involving decimals, reading pie charts, calculating an average score, and identifying prime numbers (id.). The evaluator further reported that the student was able to solve equations involving single and double-digit addition, subtraction and multiplication, addition with integers, and identifying the value of pi (id.). However, the student had difficulty with equations that involved solving for variables, multiplication and division of numbers with three or more digits, and simplifying fractions (id.). With respect to the written expression composite, the evaluator reported that the student's skills were in the below average range (id. at pp. 4, 8). The student was able to construct some simple sentences and write a paragraph when prompted to write about his favorite game (id. at p. 4). The evaluator reported that, although the student performed well on the spelling subtest, he made many spelling errors while writing sentences and an essay (id.). The evaluator noted that the student's handwriting included poor letter formation and spacing between letters and words and further noted that the student indicated that he typed most of his written work at school (id.).

Turning to the student's social/emotional development, the evaluator reported that the student's responses to interview and projective testing were reflective of fatigue and dysphoric mood (Dist. Ex. 5 at p. 4). She noted that the student gave brief answers to questions and did not initiate conversation (id.). Completion of the Behavior Assessment System for Children, Third Edition (BASC-3) Parent Rating Scales by the student's father yielded "at-risk" scores on the internalizing problems composite scale, behavioral symptoms index, adaptive skills composite, and some measures on the content scale (id. at pp. 5-6). The student's adaptability score fell in the clinically significant range (id. at p. 5). The parent responses indicated that the student displayed several health-related concerns (id.). The evaluator explained that, when a serious health problem was not present, these concerns may indicate an underlying emotional problem (id.). The parent responses further indicated that the student was seemingly alone, had difficulty making friends, and was sometimes unwilling to join group activities (id.). In addition, the student had difficulty maintaining necessary levels of attention in school (id.). The parent responses also indicated that the student had "extreme difficulty" adapting to changing situations and it took longer for the student to recover from difficult situations than most students his age (id. at pp. 5, 6). According to the parent responses, the student had difficulty complimenting others and making suggestions for improvement in a tactful and socially appropriate manner (id.). The student also had difficulty making decisions, lacked creativity, and had trouble getting others to work together effectively (id. at p. 6). With respect to activities of daily living, the student had difficulty performing simple daily tasks in a safe and efficient manner and the student demonstrated difficulty with functional communication; specifically, he demonstrated poor receptive and expressive communication skills and had difficulty seeking out and finding information on his own (id.). Next, the parent responses showed that the student sometimes had difficulty controlling and maintaining his behavior and mood (id.). With respect to executive functioning, the student's overall score fell in the elevated

range and the parent reported that the student exhibited difficulty with planning, making decisions, organization, concentration, following directions, and may display sudden mood changes and periods of emotional instability (id. at pp. 6-7).

According to the January 2017 teacher report, as reflected in the July 2017 IEP, the student demonstrated difficulty with decoding, fluency, and reading comprehension, but was able to write coherently given scaffolding and graphic organizers (Dist. Ex. 6 at p. 2). The student was below grade level in spelling, grammar, organization, math calculation, and math fluency (id.). The student reportedly lacked internal motivation, exhibited slow processing speed in the classroom, as well as executive functioning deficits, and needed assistance "getting started on tasks" (id.). The student presented with a depressed demeanor, needed "coaching and mentorship" in order to feel less isolated, and needed guidance to adopt a more positive perspective (id.). The student had difficulty with transitions, tended to be rigid in his thinking, was easily distracted, and had difficulty following directions (id.). According to the July 2017 IEP the student benefitted from modeling, repetition, scaffolding, prompts, chunking, graphic organizers, praise, and encouragement, refocusing and redirection, assistance with social situations, breaks, checklists, small groups, and role playing (id. at p. 3).

The June 2017 Woodhall report card, detailed above in describing the student's progress during the 2016-17 school year, provided additional insight into the student's educational needs at the time his parents decided to place him at Soundview for the 2017-18 school year (Parent Ex. T).

2. Specially Designed Instruction and Progress

The student attended Soundview during the 2017-18 school year, as he no longer wished to continue attending a residential placement and, according to the parent, "[h]e seemed ready to make that transition" to a day program (Tr. p. 89). Soundview determined that the student met its admission criteria of "academic/intellectual potential and character consistent with the positive atmosphere" of the school (Dist. Ex. 16).

The head of Soundview testified that the school's educational model was "one of flexibility and individualization" and that the school looked to find "pathways for success" for students to work through their social/emotional or learning problems (Tr. p. 157; see Tr. pp. 178). According to the head of school, approximately 40 percent of the students at Soundview had an IEP or an accommodation plan pursuant to section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794 [a]) (Tr. pp. 179, 183). The school averaged four students per class, and students were grouped according to age, ability, and interests (Tr. pp. 158, 164-65).

The head of Soundview described the student as intelligent, diligent, and "very good at writing" (Tr. p. 162). The head of school also stated that the student became "overwhelmed" at times and would succumb to his anxiety (id.). The head of school described examples of how the school accommodated the student's anxiety including giving the student the option to take his tests in a separate location with extra time and by offering flexibility with homework assignments (Tr. pp. 162-63, 166, 186-87). In addition, the head of school stated that, to further address the student's anxiety, the student could "spend time" with a "number of adults" when he "wasn't feeling well" due to anxiety (Tr. pp. 185-86).

The head of school opined that the student was successful at the school due to the small class size and the "nurturing," "laid back" environment (Tr. p. 165). The head of school also stated that the small classes enabled the teachers to differentiate instruction (Tr. pp. 165-66, 167). Soundview also featured a "flexible support center" where students focused on "executive functioning, time management, [and] test taking strategies" with the support of staff who "accommodate kids based on the challenges that they're facing" and serve as mentors and advocates (Tr. pp. 168-69). In addition, the student regularly met with his math teacher to get help (Tr. pp. 170-71).

Soundview reportedly utilized IEPs developed by school districts in order to determine course placements for students at Soundview (Tr. p. 180). The head of school acknowledged that the school did not provide related services of counseling, speech-language therapy, physical therapy, or OT but indicated that the guidance counselor at the school provided social/emotional support to students who were "not feeling ready to learn" and recommended strategies for other staff to support the students (Tr. pp. 184-85, 187).

With respect to the student's progress—which, as noted above, is relevant but not dispositive to the analysis—the parent indicated that the student "did great" (Tr. pp. 93-94). According to his 2017-18 report card, the student was performing well on assessments and keeping up with assignments in algebra (Parent Ex. N at p. 1). Notes from the student's history teacher described the student as a "strong student" who liked to be challenged intellectually and indicated that the student's analytical skills had "steadily improved" (*id.*). However, the student was inconsistent in submitting complete assignments and homework in a timely manner in his English and Chemistry classes (*id.*). Overall, the student's final grades ranged from A minus to B minus for the school year (*id.*). The parent testified that, at the time of the hearing, the student was attending 12th grade in a general education classroom in a public school for the 2018-19 school year and no longer required an IEP (Tr. pp. 59, 96). In addition, the parent described the student as an "extraordinary success story," as he was doing well "across the board," managing his time, turning in homework, and demonstrating "enthusias[m] about learning" (Tr. pp. 59-60).

While a more fully developed hearing record regarding the particularity of the student's instruction at Soundview may have been preferable, courts have deemed evidence of the general educational milieu of a unilateral placement sufficient for purposes of tuition reimbursement (*see, e.g., T.K.*, 810 F.3d 878; *W.A. v. Hendrick Hudson Cent. Sch. Dist.*, 2016 WL 6915271, at *26-*36 [S.D.N.Y. Nov. 23, 2016]), in an apparent retreat from the standard, articulated in *Gagliardo*, that the unilateral placement must provide instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (*Gagliardo*, 489 F.3d at 112; *see Frank G.*, 459 F.3d at 364-65). Here, as described above, the hearing record supports finding that Soundview met the student's unique needs, specifically with respect to the student's academics and executive functioning needs. Additionally, although some of the supports provided at Soundview may be considered the sort of benefits that the parents of any student would prefer, such as a small class size, other supports, such as the "flexible support center" appear to fit within the purview of specially designed instruction. Considering the more relaxed legal standard as applied to a parents' burden of proving the appropriateness of a unilateral placement, the hearing record sufficiently shows that Soundview offered specially designed instruction to address some of the student's identified needs, and that the student demonstrated

progress at Soundview during the 2017-18 school year. Accordingly, Soundview constituted an appropriate unilateral placement for the student for the 2017-18 school year.

C. Relief

Having found that the unilateral placements chosen by the parents were appropriate, I must return to the manner in which the IHO arrived at his award for relief and the parties' arguments on appeal, which present some limitations.

Initially, as discussed above, compensatory education is not generally an available remedy when a student has been unilaterally enrolled in private school (see P.P., 585 F.3d at 739). As the parents have sought and are being awarded reimbursement for the cost of tuition at the unilateral placements as a remedy for the denials of FAPE for the 2016-17 and 2017-18 school years it would not be proper to allow the IHO's compensatory education award to remain.

Further, the district has only appealed those aspects of the IHO's decision—both legal and factual—which resulted in the award of compensatory education. Neither party has appealed the remaining aspects of the IHO's decision and, therefore, they have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). However, as discussed above, to the extent the IHO found, at least under some standard(s), that the parents' unilateral placements were appropriate, the parents were not necessarily aggrieved such that they were required to interpose a cross-appeal regarding the appropriateness of the unilateral placements. On the other hand, to the extent the IHO ordered the district to fund the costs of the student's tuition at the unilateral placements up to \$78,000—whether such amount be characterized as tuition reimbursement or compensatory education—the amount ordered does not represent the full amount paid or owed by the parent for the student's tuition for both school years (see Parent Exs. D; E; L; P). Accordingly, on this point, the parents were aggrieved and, since they did not interpose an appeal of this shortfall in the dollar amount, it is deemed waived at this juncture (see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

Because the IHO's award is less than the full cost of tuition at the unilateral placements, the district is directed to reimburse the parents for the cost of the student's tuition at Woodhall for the 2016-17 school year and Soundview for the 2017-18 school year, up to the amount of \$78,000.²⁰

VII. Conclusion

Based on the foregoing, the evidence in the hearing record shows that placement of the student at Woodhall and Soundview during the 2016-17 and 2017-18 school years, respectively, was reasonably calculated to meet his educational needs, and that equitable considerations warrant

²⁰ I also considered a further reduction in the award of tuition reimbursement for the residential portion of the student's attendance at Woodhall for the 2016-17 school year; however, even after removing the residential portion of the tuition, the tuition costs for the two unilateral placements are in excess of the amount awarded by the IHO (see Parent Exs. E; L).

reimbursement of the costs of the student's tuition up to the amount of \$78,000. I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 20, 2018, is modified by reversing those portions which awarded 1,040 hours of compensatory education services; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parents for the costs of the student's tuition at Woodhall for the 2016-17 school year and Soundview for the 2017-18 school year, up to the amount of \$78,000.

Dated: **Albany, New York**
 December 31, 2018

STEVEN KROLAK
STATE REVIEW OFFICER