The University of the State of New York

The State Education Department
State Review Officer
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No. 20-062

Application by 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, Esq., Special Assistant Corporation Counsel, attorneys for petitioner, by Amy E. Fellenbaum, Esq.

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to pay for the tuition costs at Lyman Ward Military Academy (Lyman Ward) for the 2017-18 school year. 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

The student attended both general education public and parochial schools from kindergarten through the 2016-17 school year (seventh grade) (Tr. pp. 35-38; Parent Ex. A at p. 1). Psychiatric evaluations of the student were conducted in 2014, February 2016, and February 2017 related to his attention and behavioral difficulties (Dist. Ex. 1 at p. 7). In spring 2017, the student brought a knife to the parochial school he was attending, was subsequently expelled, and then began attending a district middle school where he completed the 2016-17 school year (Tr. pp. 38, 143-44, 153-54; Dist. Ex. 1 at p. 6). According to the parent, while at the public school the student "didn't want to go to school" and staff at the public school "were complaining about him" which led to an evaluation of the student by the CSE (see Tr. pp. 148-49; Parent Ex. A at pp. 2-3).

On May 19, 2017 the CSE convened (Dist. Ex. 1 at pp. 1-26). The May 2017 CSE determined that the student was eligible for special education services as a student with an emotional disturbance and for the 2017-18 school year, recommended a 10-month 12:1+1 special

class placement in a day program at a State-approved nonpublic school with related services consisting of two 40-minute sessions of individual counseling per week (id. at pp. 1, 21).[1] The May 2017 CSE also recommended supplementary aids and services to include daily, full-time individual use of a computer and testing accommodations of extended time (1.5), directions read aloud, and prompts for focusing (id. at pp. 21, 22). The IEP contained 19 annual goals in the areas of behavior, self-regulation, work completion, attention, organization, impulsivity, class participation, written expression, emotional regulation, socialization, frustration tolerance, decision making, problem solving, conflict resolution, and following instructions (see id. at pp. 10-20).

In summer 2017 the parent decided to enroll the student in a military school due to his behavioral difficulties (Tr. pp. 156-57; Parent Ex. A at pp. 2-3). The student attended Lyman Ward, an out-of-State nonpublic residential school, during the 2017-18 school year (eighth grade) (Tr. pp. 39-42; see Parent Exs. D; E).[2]

A. Due Process Complaint Notice

The parent disagreed with the May 19, 2017 IEP and as a result commenced an impartial hearing against the district (see generally Parent Ex. A; Dist. Ex. 1). In an April 26, 2018 due process complaint notice, the parent indicated that due to circumstances at home, delays and barriers to accessing services, and the lack of an available and appropriate in-State school, she enrolled the student in Lyman Ward, an out-of-State military academy for which she was seeking tuition reimbursement from the district for the 2017-18 school year (Parent Ex. A at pp. 2-3, 5).[3] After a prehearing conference was conducted on August 13, 2018, the parties proceeded to an impartial hearing on November 27, 2018, which concluded on July 12, 2019 after four days of hearing (Tr. pp. 1-257; IHO Decision at pp. 1-10).

B. Impartial Hearing Officer Decision

In a decision dated February 20, 2020, the IHO determined that the district did not offer the student an appropriate program for the 2017-18 school year, the parent met her burden of proving that Lyman Ward was an appropriate unilateral placement, and equitable considerations favored the parent (IHO Decision at pp. 1-10). Specifically, the IHO noted that the district did not

[1] The student's eligibility for special education as a student with an emotional disturbance is not in dispute in this proceeding. (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

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

[3] The April 2018 due process complaint notice sought tuition reimbursement for Lyman Ward for the 2017-18 and 2018-19 school years (Parent Ex. A at p. 3). During the impartial hearing the IHO determined that the hearing and his decision were limited to the 2017-18 school year, a finding that has not been appealed (IHO Decision at pp. 7-10; see Tr. pp. 11-12, 27-28, 185-86). Additionally, in January 2020 the IHO declined to consolidate the parent's December 2019 due process complaint notice regarding the 2019-20 school year with the instant case (January 10, 2020 Interim Order on Consolidation; December 19, 2019 Due Process Complaint Notice at pp. 1-2).

present a case at the hearing (id. at p. 7). The IHO determined that the district failed to provide the student with a FAPE because the IEP was "untimely" and there was no evidence that the district offered the parent a "school placement" where the IEP could be successfully implemented (id.).[4]

With respect to the parent's unilateral placement of the student at Lyman Ward, the IHO recognized that "[t]he question of the appropriateness of the parent's placement at Lyman Ward is problematic at first blush" because "[t]he school does not provide special education services in a traditional sense" (IHO Decision at p. 7). However, the IHO determined that because the student's needs were primarily behavioral and social-emotional, as opposed to academic, the social-emotional supports provided to the student at Lyman Ward rendered it an appropriate placement (id. at pp. 7-8). Specifically, the IHO found that the class size at Lyman Ward "was very small composed of 6-10 students" and that "there was considerable physical activity and sports, such as swimming, which [the student] is positively responsive to" (id. at p. 8). The IHO found that the most significant support provided to the student at Lyman Ward was a 1:1 "tactical officer" who functioned as a "'cross between personal sergeant and a social worker,'" and was certified in social work (id.). The IHO noted that the tactical officer acted as a "life coach, counselor, and enforcer of rules, which takes place by negotiating a solution with the offending student" (id.). The IHO further noted that the tactical officer also corresponded with a student's parent on a bi-weekly basis (id.). Additionally, the IHO found that while at Lyman Ward the student's attendance was perfect and his grades were significantly better than satisfactory (id.). Accordingly, the IHO determined that "Lyman Ward very effectively met [the student's] special education needs for the emotional and behavioral support he needed to succeed in school" (id. at pp. 8-9).

With respect to the issue of least restrictive environment (LRE), the IHO found that there was no evidence that the student could be educated in a day program "given his very substantial school avoidance and behavioral problems both at home and in school" (IHO Decision at p. 9). The IHO also opined that Lyman Ward was a general education school that "happen[ed] to effectively educate a special education student" (id.).

Finally, the IHO determined that equitable considerations weighed in favor of the parent because there was no evidence that she failed to cooperate with the district throughout the CSE process and the tuition for Lyman Ward was reasonable (IHO Decision at p. 10). The IHO awarded the parent reimbursement for her son's tuition at Lyman Ward for the 2017-18 school year (id.).

[4] Although he did not state it, the IHO's findings lead one to infer that he concluded that the district denied the student a FAPE.

IV. Appeal for State-Level Review

The district appeals from the IHO's determination that the parent's placement of the student at Lyman Ward was appropriate and that equitable considerations favored the parent.[5, 6] The district's specific objections include that Lyman Ward did not provide specialized instruction to the student because its program consisted of general education and did not provide any special education services or supports to address the student's extensive social/emotional needs, and the student did not make academic progress or demonstrate progress with respect to his behavioral needs during the 2017-18 school year. The district also argues that equitable considerations do not favor the parent because the parent did not provide proof concerning the tuition at Lyman Ward or her payment of the tuition during the impartial hearing. Accordingly, the district requests reversal of the IHO's decision to grant tuition reimbursement to the parent.

The parent did not respond to the district's request for review.

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

[5] In its request for review, the district does not allege that the IHO erred by finding that the district denied the student a FAPE for the 2017-18 school year. As such, the IHO's FAPE determination is final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[6] As discussed further below, the district also requests that certain service irregularities be excused by the SRO.

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]).[7]

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. Preliminary Matters – Service by the District

As an initial matter, the district requests that it be excused for failing to file an affidavit of service for the notice of intention to seek review in this proceeding. By letter dated March 12, 2020, an SRO granted the district's request to effectuate alternate service on the parent by affixing the notice of intention to seek review to the door of her last known residence. The district asserts that alternate service was completed on March 12, 2020 by a process server, but it has not been able to secure the resultant affidavit of service due to business disruptions caused by the current coronavirus pandemic which have impeded the process server from providing the district with the affidavit (see SRO Ex. 1 [consisting of emails between the process server and counsel for the district regarding difficulties with the transmission of the affidavit of service to the district]).

In addition, the district requests that its service of the request review on the parent by certified mail, as opposed to personal service, be deemed sufficient. On March 24, 2020, the district emailed the parent to request permission to serve her with the request for review by email but did not receive a response. On the same day, the district served the parent via certified mail, return receipt requested, and has filed a declaration of service to that effect.

Pursuant to the undersigned's Revised General Order dated March 22, 2020, the current coronavirus emergency was deemed good cause for all parties appearing before the Office of State

[7] 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).

Review to suspend the personal service requirements codified at 8 NYCRR 297.4 and authorizes that alternate service methods be utilized. Accordingly, pursuant to the Revised General Order, the district's service of the request for review upon the parent on March 24, 2020 by certified mail, return receipt requested, is hereby deemed sufficient service, especially in light of the fact that the district also attempted to communicate with the parent via email. With respect to service of the notice of intention to seek review, under the particular circumstances of this case and with due regard to the unprecedented disruptions to the due process system posed by the coronavirus emergency, I will exercise my discretion to allow the district to proceed with its request for review despite the district's violation of the procedural regulations requiring it to file an affidavit of service accompanying the notice of intention to seek review. There is no indication that the parent was prevented from responding to the request for review in this matter and service of the request for review was proper pursuant to the General Order issued by this office and in effect at the time service was effectuated. However, in the event the district is ultimately able to obtain the affidavit of service for the notice of intention to seek review, it is directed to file it with the Office of State Review to complete the administrative record.

Notwithstanding the parent's failure to answer,[8] I have conducted an independent review of the entire hearing record before reaching an independent decision in this matter and determined that the impartial hearing comported with the requirements of due process.

B. Unilateral Placement

As noted above, the district did not present a case and it cannot be concluded that the district offered a FAPE. Thus, the next substantive issue to be determined is whether the parent's unilateral placement of the student at Lyman Ward during the 2017-18 school year was appropriate. For the reasons that follow, the evidence in the hearing record does not support a finding that Lyman Ward provided the student with instruction specially designed to meet his unique needs or that the student made progress in his areas of greatest need during the 2017-18 school year. Therefore, the IHO erred in finding that Lyman Ward was an appropriate unilateral placement for the student.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; 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

[8] Were it permissible, I would delay this matter on my own authority and require the district to engage in more exhaustive efforts to serve the parent, but in light of the pandemic and the time limitations imposed upon me by federal law, I am constrained to proceed with rendering the decision, especially in light of the fact that several reasonable methods to obtain the parent's response were attempted. To do any less would unduly infringe upon the district's right to seek review of the IHO's determination.

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. Student's Needs

While the accuracy of the student's needs as described in the present levels of performance of the May 2017 IEP is not being challenged on appeal, a brief review is necessary to determine the appropriateness of the parent's unilateral placement of the student at Lyman Ward. According to the IEP the student had received diagnoses of an attention deficit hyperactivity disorder (ADHD), an oppositional defiant disorder, major depression, and an adjustment disorder (Dist. Ex. 1 at pp. 6, 7). The student's overall cognitive and academic skills as measured by standardized assessments were in the average range, including a full-scale IQ of 104 (average) and standard

scores of 94 to 112 (average/high average) in reading, mathematics, and written language (id. at pp. 1-4). However, teacher reports included in the IEP indicated that the student struggled to complete and turn in work, start tasks without prompts, recall information, focus in class, and organize his work (id. at p. 4). The student's teachers had also reported that the student exhibited problems with inattention, hyperactivity, and related executive functions "that reflect[ed] a significant problem" and manifested in performance and production problems at school (id. at pp. 6, 9). Additionally, the IEP reflected that the student required frequent prompting and redirection from his teachers (id. at p. 4). His deficits in executive functions including organization, planning, time management, and initiation of tasks all contributed to his academic difficulties and negatively affected his ability to complete classwork (id. at pp. 4-6). Academic needs identified in the IEP included that the student needed to improve focusing and sustained attention, improve executive functioning, increase completion and submission of assignments, and increase group and whole class participation (id. at p. 5). The CSE recommended numerous classroom and instructional accommodations and modifications to assist the student, including preferential seating, repetition and clarification of directions and assignments, extra time for classwork and assessments, preview of new information, assistance with monitoring the steps of and timeline for projects, and use of graphic organizers, checklists, computer and models when completing academic work (id. at p. 8).

Turning to the student's social/emotional development, according to the information reflected in the May 2017 IEP, the student presented with "serious emotional-social adjustment difficulties" related to both neurobiological factors including ADHD and other factors such as family characteristics and environmental stressors (Dist. Ex. 1 at p. 5). The IEP reflected reports that the student "exhibit[ed] a persistent pattern of defiant and disobedient behavior," disrespectful and disruptive behavior, angry outbursts, tantrums, and argumentative behavior that occurred primarily at home and was directed at his mother (id. at pp. 6-7). At the time the IEP was developed, the parent reported concerns about the student's behavior at school and home, in that the he acted aggressively towards her, he exhibited poor coping skills, and was unable to control his emotions (id. at p. 7). Additionally, the parent indicated that she would like to have the student receive counseling services at school (id.).

Although the student's acting-out behaviors occurred "especially in the home environment," teacher reports reflected in the May 2017 IEP further indicated that the student was "impulsive and ha[d] difficulty expressing his emotions in an age appropriate manner" and also that he was aggressive towards peers, used profane language, and violated classroom rules (Dist. Ex. 1 at p. 5). According to the IEP, the student's "availability for learning and engagement in learning tasks [was] variable and unpredictable and require[d] an intensive level of support" (id. at p. 9). The IEP also indicated that the student "may need to continue school counseling to address these issues" and the CSE recommended the implementation of a behavior modification program in the form of a daily report card (id. at pp. 5, 8). As noted previously, the CSE recommended a 12:1+1 special class placement in a State-approved nonpublic day school with counseling services to address the student's needs (id. at p. 21).

2. Specially Designed Instruction

The district challenges the IHO's finding that Lyman Ward "employed a number of strategies to support [the student's] social-emotional and behavioral functioning" and therefore was an appropriate unilateral placement under IDEA. As noted above, to qualify for reimbursement

under the IDEA, a parent must demonstrate that the unilateral placement provided educational 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). State regulation defines specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]).

The hearing record described Lyman Ward as a private military boarding academy for male students in sixth through twelfth grade (Parent Ex. B at pp. 1-2). According to information in the hearing record that was published about the school, Lyman Ward's purpose was to "prepare the cadet for the responsibilities of life" and the school provided academic instruction, the discipline of a military program, leadership opportunities, and athletic activities (id. at p. 1). Lyman Ward offered structure, enforced study hours to encourage academic achievement, small classes of 6-10 students, a "whole person learning environment," and student supervision by military personnel (Tr. p. 51; Parent Ex. B at p. 2).

In particular, Lyman Ward employed "tactical officers" and according to the school's job description, a tactical officers' "primary duty is to ensure the safety of all [c]adets under their charge and that [c]adet [r]egulations/school policies are adhered to" (Parent Ex. B at p. 3). As part of their job tactical officers train cadets on the facets of "the academy curriculum" including "instruction, inspection and on-the-spot corrections for such actions as cadet appearance, room/barracks cleanliness, and drill" (id.). In addition, the job description required tactical officers to supervise, sponsor, or participate in one or more after-school activities, mentor cadets, and inform parents of their son's progress (id.; see Tr. p. 164).

In her testimony during the impartial hearing, the parent opined that the tactical officer was "like a cross between your - - personal sergeant and a social worker" and served as "a life coach, a counselor, and an enforcer of rules" (Tr. pp. 52-56).[9] She further indicated that the tactical officer was the "go to guy" and that she was in contact with him "fairly often" through email, in which they discussed the student's state of mind, his behavior, how he was getting along with others, and how he was functioning at school (Tr. pp. 54-55). According to the parent, the tactical officer and the school nurse mentored the student by spending time with him after academic instruction and engaging in ongoing talks about his behavior and feelings (Tr. pp. 163-64, 228-33). The parent testified that if a student had "problems" the tactical officer could discuss it with the student 1:1, or in a "tribunal" setting to determine the consequences (Tr. pp. 52-54, 164).

Although the hearing record indicated that "mentoring" was one of the tactical officer's roles at Lyman Ward, it lacked specificity regarding what the mentoring entailed, including the frequency, length, and content of the discussions between the student and tactical officer, or the methodology and interventions employed by the tactical officer to meet the student's social/emotional needs (see generally Tr. pp. 1-257; Parent Exs. B at p. 3; C). Nor is there evidence

[9] In her testimony the parent refers to the "tac" or "tactical officer" and the "sergeant" interchangeably (see e.g. Tr. pp. 52, 54-56). For consistency, this decision will refer to the person in that role as the "tactical officer".

that the tactical officer served the role of a special education provider who could provide social work or counseling services, or that he functioned as individual aide for the student (see generally Tr. pp. 1-257; Parent Exs. B; C).[10] In addition, despite the IHO's finding that the tactical officer was the most significant support the student received at Lynman Ward, the hearing record also did not indicate that the tactical officer possessed the training or qualifications of a therapist or counselor. While a teacher at a unilateral placement need not be state-certified (Carter, 510 U.S. 7, 14 [noting that unilateral placements need not meet state standards such as state certification for teachers]), there must be objective evidence of special education instruction or supports that are specially designed by student's providers at the private school who have reasonable qualifications that are specifically related to the student's deficits (see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 387 [2d Cir. 2014] [noting that general evidence regarding a student's psychological progress from a student's private counselor with a master's degree but who lacked certification in New York or his home state regarding was insufficient to support tuition reimbursement). Specifically, the job skills requirement for a tactical officer included the status of a veteran with an honorable discharge, good verbal and written communication skills, experience working with children, experience being part of a team in a fast paced environment, self-transportation and personal phone, good driving record, and drug screening and background investigation (Parent Ex. B at p. 3). The desired job skills of a tactical officer included combat arms experience, a CDL license or willingness to attain one, first aid/CPR certification, basic computer skills, and an affiliation with a nationally accredited youth organization (id.).[11]

Aside from the mentoring role of the tactical officer the hearing record did not reflect that Lyman Ward provided the student with any type of behavioral assessment, or other types of therapy or counseling services (Tr. pp. 60, 198-99; see Parent Ex. C at p. 1). The parent's own evidence suggests that the student required more specific special education supports, insofar as a February 2018 email from the tactical officer to the parent indicated that he recommended "once again" that the student "be set up for an evaluation for his inability both within the classroom environment and outside of it to follow simple tasks/instructions, focus on what is going on around him and generally walking around aimlessly finding troublesome things to get himself into . . . " (Parent Ex. C at p. 1). The email also indicated that "therapy [was] available," and was a recommendation the tactical officer had made previously for the student, due to his "continuous

[10] Special education provider means "an individual qualified pursuant to section 200.6(b)(3) of this Part who is providing related services, as defined in paragraph (qq) of this section, to the student" (NYCRR 200.1[xx]). As discussed herein, a provider at a unilateral placement need not meet state standards, but must be able to adequately address the student's needs. Additionally, the student was not recommended for an individual aide in either the public or private school, but mention it as a conceptual approach insofar as individual aides have been used in other cases to assist in the implementation of a behavioral intervention plan developed for a student that is based upon a functional behavioral assessment.

[11] The parent described the tactical officers' qualifications to work with children as "like a minor social work degree," "certificate or credentials for social work," and a "certificate in counseling through the Armed Services," although she was unsure that these would "qualify" tactical officers to work as social workers in New York State (Tr. pp. 52-53, 235). When asked specifically about the tactical officers' license or lack thereof, the parent stated that the "job description" related to "things that I would call therapeutic" (Tr. pp. 233-34). However, further questioning by the IHO indicated that the "CDL" license referred to in the tactical officer job description was not related to counseling qualifications, but rather referred to a commercial driver's license (Tr. pp. 235-36).

inability to pay attention to what is going on around him" (id.).[12] This evidence tends to show that the tactical officer, while likely a positive influence who clearly had student's interests at heart, was not able to offer the specific therapeutic or counseling supports that the student required.[13] Thus, I do not find the IHO's reasoning persuasive with regard to the special education skillsets of the tactical officer.

According to the parent, the only reports she received regarding the student's behavior were related to an "incident" or "breaking the rules" (Tr. pp. 60; see Tr. p. 169). The parent testified that she had received three reports of the student's behavior characterized as "egregious" but that there were also other occasions when "punishment strategies" such as being asked to clean up the yard and placing restrictions on the student's leisure activities, screen time, and trips to the canteen (Tr. pp. 60-61, 169).[14] In the February 2018 email, the tactical officer notified the parent about a "pattern" the student had exhibited over the preceding weeks, in that he had "become somewhat destructive to property that belong[ed] to [Lyman Ward] in a way that [was] intentional and without remorse for consequences" (Parent Ex. C at p. 2). The tactical officer indicated that the incidents the student engaged in would be "logged into his records and he will receive punishment orders" for those incidents for which he was responsible for having committed (id.). Other than the "punishment" the student received, the hearing record does not otherwise describe any type of behavior modification strategy Lyman Ward used with the student to improve his behavior.

Lyman Ward provided students with numerous opportunities of physical activities and team sports (Parent Ex. B at pp. 1-2). The parent stated the student benefited from participating in extensive physical activities and sports while at Lyman Ward (Tr. pp. 51-56, 94, 230-33, 239). Although the IHO determined that the "considerable physical activity" available at Lyman Ward was one of the "strategies" used to support the student's social/emotional and behavioral needs, the hearing record lacked evidence that the physical activities and team sports were specially designed to address the student's unique needs related to his disability. While physical activities and team sports offered at Lyman Ward might provide a sensory based outlet, release of stress and anxiety, and enjoyment, in this instance, the evidence in the hearing record does not show that physical activity rises to the level of special education.

Turning to the student's executive functioning needs, the hearing record did not include a description of how Lyman Ward addressed those needs or any information related to the curriculum and how it was or was not modified. Specifically, the parent testified that she received information about the student's in-school performance through his report card and by speaking with one of his teachers, although they did not discuss the student's grades (Tr. pp. 55-56, 58). The parent stated that she did not know any information about the curriculum at Lyman Ward and

[12] The tactical officer indicated that therapy needed to be set up between the parent and the school nurse (Parent Ex. C at p. 1).

[13] As noted above, counseling was one of the items that the parent was specifically seeking for the student.

[14] The parent testified that the third time she was notified about the student's "egregious" behavior, he had jumped out of a window and been taken to the hospital, at which time he was evaluated by a psychiatrist and administered medication (Tr. pp. 61-62, 169-72). She further testified that emails between herself and the tactical officer and school nurse were not related to the student's "psychiatric symptoms" or "medication adjustments" (Tr. p. 231).

whether or not it was provided according to the Alabama state standards (Tr. p. 63). Review of the student's report cards shows they did not include comments from his teachers about his in-class performance or strategies implemented to address his organization and attention needs (see Parent Ex. D at pp. 1-8). Although the IHO determined that Lyman Ward's "very small" class size was one of the supports provided to the student that helped him achieve "a very successful educational result" the hearing record is devoid of information relating to how the student's executive functioning needs were met in the classroom. Moreover, in the unilateral placement context, small class size is often construed as the sort of support from which any student would receive benefit and, without more, is insufficient to establish that a placement offered instruction specially designed to meet the student's needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]; J.B. v. Bd. of Educ., 2001 WL 546963, at *7 [S.D.N.Y. May 22, 2001] [finding that "[w]hile placement in small classes would provide [the student], or any other child, with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or require that parents be compensated for optimal private placements."]).

Based on the foregoing, the evidence contained in the hearing record does not show that Lyman Ward provided the student with specially designed instruction to address his unique special education needs during the 2017-18 school year. Rather, Lyman Ward provided the student with the types of advantages—including a small class size, the opportunity to participate in sports and individual mentoring provided by his assigned tactical officer—"that might be preferred by the parents of any child, disabled or not" (Gagliardo, 489 F.3d at 115; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451-52 [2d Cir. 2015]).

3. Progress

The district appeals the IHO's finding that the student's attendance and grades were "significantly better than satisfactory" and that the improvement in either area was attributable to Lyman Ward. 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]; 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, 82 [2d Cir. Dec. 26, 2012]; 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 Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Here, the available limited evidence in the hearing record shows that the student grades improved while at Lyman Ward during the 2017-18 school year. According to the May 2017 IEP, the student was a "[r]ecent [a]dmit" to the public school during the second marking period of the 2016-17 school year and therefore grades in English language arts, math, science, and social studies for that time period were not recorded (Dist. Ex. 1 at p. 2). As of May 19, 2017—the date of the CSE meeting—the student had received third marking period grades of 61 in social studies,

53 in English language arts, and 70 in science (id. at p. 4).[15] The parent testified that one of the student's teachers at Lyman Ward informed her that the student performed well in her classes (Tr. pp. 64-65). The 2017-18 school year report card reflected the student's grades over four marking periods at Lyman Ward and he achieved the following grades: English/literature (96, 84, 94, 100), physical science (97, 73, 84, 92), world history I (89, 85, 85, 95), and pre-algebra (82, 82, 85, 80) (Parent Ex. D at p. 4). The student also achieved the following grades in reading skills (71, 97), journalism (100, 100), physical education (100, 100) recess (96, 100) (id.). However, the parent also testified that although the student's grades "seemed to be" good, she was "a little bit skeptical" because she had "the impression that New York schools were more rigorous than the school in Alabama" (Tr. p. 58). As stated previously, the parent testified that she did not discuss the student's grades with his teachers, and the hearing record does not include evidence about the curriculum that was implemented at Lyman Ward, how the student achieved those grades, or whether the curriculum or grades were modified to any extent (Tr. pp. 57-58, 63-64).

Also, although the IHO cited the student's improved attendance as a factor as to the appropriateness of Lyman Ward, the hearing record shows that the student completed the 2016-17 school year while attending a district middle school, and the May 2017 IEP indicated that one of the student's strengths was that he "comes to school regularly" (IHO Decision at p. 8; Tr. pp. 153-54, 157; Dist. Ex. 1 at p. 7).[16] Additionally, even if the student had exhibited special education needs around the issue of attendance, the parent's testimony that it was the "norm" for students to have perfect attendance at a residential military school does not in and of itself show that any social/emotional needs related to attendance issues had been addressed (Tr. p. 59-60). Rather, the parent testified that attendance at Lyman Ward was "mandatory" and that students were unable to refuse to go to school (Tr. pp. 174-75).

Next, with respect to the student's greatest area of need, the hearing record does not support a finding that during the 2017-18 school year the student made progress with respect to his behavioral challenges. Rather, during the course of the year the evidence tends to show that the parent received reports about the student's behavioral difficulties (Tr. pp. 60-62, 169-72, 197-98; Parent Ex. C). In particular, a February 25, 2018 email to the parent from the tactical officer at Lyman Ward indicated the student exhibited difficulties with behavior including destruction of property and throwing a chair, and that he was the "prime suspect" in the breaking of the latch to the door of a locked room (Parent Ex. C at p. 2). A February 26, 2018 email to the parent from the tactical officer indicated the student's problematic behavior included inattention, failure to follow instructions, and distractibility, and that the student's behavioral difficulties occurred both during class and leisure periods (Parent Ex. C at p. 1). Additionally, the parent testified that towards "the second part of the school year, towards the end" the student was caught jumping out of a window and at her request, was brought to the hospital for a psychiatric evaluation (Tr. pp. 169-72). The evidence in the hearing record does not indicate that the student exhibited progress

[15] The May 2017 IEP did not reflect a third marking period grade in math (see Dist. Ex. 1 at p. 4).

[16] The IHO's reference to the student's "significant absenteeism" appears to be related to his school attendance at the time of the July 2019 impartial hearing following the 2018-19 school year, and not the 2017-18 school year in question (IHO Decision at pp. 7-8; Tr. pp. 244, 247; see Tr. pp. 143-44, 155-56).

related to his behavioral needs during the 2017-18 school year at Lyman Ward, which was a significant area of deficit for the student.

4. LRE

To the extent the district also argues that the IHO erred in awarding tuition reimbursement for Lyman Ward because an out-of-state residential placement was too restrictive for the student (see Request for Review at p. 7 [stating that at the impartial hearing the district contested "the parent's assertion that the unilateral placement was appropriate because it failed to address the [s]tudent's special education and social-emotional needs and that a residential placement was too restrictive]), although the restrictiveness of a parental placement may be considered as a factor in determining whether parents are entitled to an award of tuition reimbursement (M.S., 231 F.3d at 105; Walczak, 142 F.3d at 122; see Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), parents are not as strictly held to the standard of placement in the LRE as are school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 830, 836-37 [2d Cir. 2014]; [noting "while the restrictiveness of a private placement is a factor, by no means is it dispositive" and furthermore, "[i]nflexibly requiring that the parents secure a private school that is nonrestrictive, or at least as nonrestrictive as the FAPE-denying public school, would undermine the right of unilateral withdrawal the Supreme Court recognized in Burlington"]; see Carter, 510 U.S. at 14-15; M.S., 231 F.3d at 105 [stating that parents "may not be subject to the same mainstreaming requirements as a school board"]) and "the totality of the circumstances" must be considered in determining the appropriateness of the unilateral placement (Frank G., 459 F.3d at 364). However, where the "only deficiency in the IEP was the LRE issue, the unilateral placement can only be regarded as proper, or appropriate, if the unilateral placement addressed that LRE deficiency" (A.S. v. Bd. of Educ. Shenendehowa Cent. Sch. Dist., 2019 WL 719833, at *9 [N.D.N.Y. Feb. 20, 2019]).

With respect to LRE considerations, review of the hearing record does not necessarily support the IHO's finding that there was "no evidence that [the student] could be educated in a day program given his very substantial school avoidance and behavioral problems both at home and in school" (IHO Decision at p. 9). Nevertheless, I find the district's argument related to the restrictiveness of Lyman Ward unpersuasive, as the district admitted it had failed to identify a nonpublic school placement for the student for the 2017-18 school year and the parent was facing escalating problems related to the student's behavior (Tr. pp. 87, 157-59; see Dist. Ex. 1 at p. 21).[17] However, as there was a lack of objective evidence in the hearing record showing that the student received specially designed instruction or made progress during the 2017-18 school year, the evidence is insufficient to find that Lyman Ward was an appropriate unilateral placement, even if it was not overly restrictive.

VII. Conclusion

Although I am sympathetic to the parent's good faith attempt to find an appropriate placement for her son after the district failed to provide the student with a placement for the 2017-

[17] The parent testified that she looked for other options but selected Lyman Ward for the student because of the circumstances at home, delays in school placement, barriers accessing services, and lack of an available and appropriate school in New York State (Tr. pp. 157-61; Parent Ex. A at pp. 3, 5).

18 school year, tuition reimbursement for a unilateral placement is only available where the private school objectively and demonstrably provides the student with specialized instruction designed to address his unique needs. Here, however, the hearing record supports a finding that the parent did not establish the appropriateness of Lyman Ward for the 2017-18 school year and, therefore, the IHO erred by granting the parent tuition reimbursement. Given this determination, I need not reach the district's challenge to the IHO's decision that equitable considerations favored the parent.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated February 20, 2020, is modified by reversing those portions that found Lyman Ward to be an appropriate unilateral placement and ordered the district to reimburse the parent for the costs of the student's tuition at Lyman Ward for the 2017-18 school year.

Dated: **Albany, New York**
May 4, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER