



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-014

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

Appearances:

The Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, by Lauren Baum, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their requests to be reimbursed for their daughter's tuition costs at the Nord Anglia International School (NAIS), for the 2018-19 and 2019-20 school years and for compensatory education services. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of the case is presumed and will not be recited here at length. Briefly, the student lives in a bilingual home where she is exposed to Spanish and English (see Parent Ex. W at p. 2; Dist. Ex. 1 at p. 2). As a young child, the student attended preschool at Spanish Kids Club, and then Spanish All Year through the 2016-17 school year, which the parent described as "Spanish immersion" programs (Tr. pp. 651-52; Parent Ex. W at pp. 1, 2). She has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and an autism spectrum disorder, and the parents have expressed concerns about the student's speech-language and peer interaction skills (Parent Exs. U at p. 1; W at p. 2).

The CSE convened on August 25, 2017, determined the student was eligible for special education and related services as a student with autism, and developed an IEP for the 2017-18 school year (see generally Dist. Ex. 1).¹ According to the IEP, the student's dominant language at that time was Spanish, and "[h]er history of academic instruction has been in Spanish" (id. at p. 3). Recommendations were for a 6:1+1 Spanish special class placement in a nonpublic school (NPS) with placement in an interim 12:1+1 Spanish special class in a specialized school pending the NPS placement (id. at p. 36). The CSE also recommended that the student receive three 30-minute sessions per week of individual occupational therapy (OT) conducted in English, and five 30-minute sessions per week of individual speech-language therapy conducted in Spanish (id.). According to the parent, the district did not offer an appropriate interim placement or an approved NPS for the student by the start of the 2017-18 school year (Tr. pp. 642, 646-47, 649, 652).

At the end of September and the beginning of October 2017, the student completed a "trial week" at NAIS, after which time she was accepted into the school as a "Year 1" (kindergarten) student (Tr. pp. 434-35, 649-50).² According to the parent, English-speaking clinicians initially attempted to deliver the student's OT services during the 2017-18 school year but were unsuccessful, and a Spanish-speaking replacement was not found (Tr. pp. 647-48). Also, according to the parent, the district never arranged for the student to receive speech-language therapy during the 2017-18 school year (Tr. p. 648).

In a letter dated August 24, 2018, the parents advised the district that they intended to re-enroll the student at NAIS for the 2018-19 school year and seek payment of tuition and all other expenses related to that placement from the district (Parent Ex. J). The letter indicated that the CSE did not convene to formulate an IEP for the student or offer her a placement for the 2018-19 school year (id.). The student attended NAIS during the 2018-19 school year, where she repeated Year 1 (Tr. pp. 435, 653; see Parent Ex. HH).

On May 1, 2019 the CSE convened to develop an IEP for the student with an implementation date of May 15, 2019 (see generally Parent Ex. K). The May 2019 CSE made the same placement and related services recommendations as in the August 2017 IEP (compare Parent Ex. K at pp. 1, 28, with Dist. Ex. 1 at pp. 1, 36). In an August 24, 2019 letter, the parents notified the district of their intention to re-enroll the student in NAIS for the 2019-20 school year and seek payment of tuition and all other expenses related to that placement from the district (Parent Ex. F).³

¹ The student's eligibility for special education and related services as a student with autism is not in dispute (see 8 NYCRR 200.1[zz][1]).

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

³ In the August 24, 2019 letter, the parents summarized their experiences with the CSE (see Parent Ex. F). The letter indicated that the May 2019 CSE's recommendations included that the student "maintain her current placement" at NAIS (id. at p. 2). However, as previously noted, the May 2019 IEP reflects the same interim specialized school and NPS placement recommendations as in the August 2017 IEP (compare Parent Ex. K at pp. 1, 28 with Dist. Ex. 1 at pp. 1, 36).

A. Due Process Complaint Notice

The parents initially filed a due process complaint notice dated May 19, 2019 asserting that the district denied the student a FAPE for the 2018-19 school year (Parent Ex. H). The parents sought, among other things, reimbursement or direct payment for the cost of the student's tuition at NAIS, transportation of the student to and from NAIS, and compensatory education "for all time periods for in which she was unable to attend school due to lack of appropriate placement" (*id.* at p. 3). The parents filed a second due process complaint notice on June 8, 2019 asserting the same denial of FAPE for the 2018-19 school year and requesting the same relief as in the prior due process complaint notice (compare Parent Ex. D at p. , with Parent Ex. H). The parents submitted another due process complaint notice dated December 12, 2019 asserting that the district denied the student a FAPE for the 2018-19 and 2019-20 school years, for reasons including that the district has not found a school to implement the student's IEP and has not made an attempt to place the student in a school for the 2018-19 or 2019-20 school years (Parent Ex. B at pp. 1, 3). The parents requested reimbursement or direct payment of the cost of the student's tuition at NAIS as well as transportation (*id.* at p. 4). The parents then submitted two amended due process complaint notices, both dated May 4, 2020, in which the parents separated their claims for the 2018-19 and 2019-20 school years (Parent Exs. A; G). The parents continued to allege that the district denied the student a FAPE for both school years, asserting that the last IEP developed for the student applied to the 2017-18 school year (*id.*). The parents requested reimbursement or direct funding for the cost of the student's tuition at NAIS, as well as the "provision of speech/language and occupational therapy services to compensate for those services that should have been provided under pendency" (Parent Exs. A at p. 5; G at pp. 4-5).

B. Impartial Hearing Officer Decision

An impartial hearing convened on November 15, 2019 and concluded on September 14, 2020 after 14 days of proceedings (Tr. pp. 1-745).⁴ In a decision dated December 3, 2020, the IHO determined that the district "tacitly acknowledged" that it did not offer the student a FAPE for the 2018-19 and 2019-20 school years (IHO Decision at p. 4). With regard to the parents' burden of showing that the parents' unilateral placement of the student at NAIS was appropriate, the IHO found that the private school's monolingual program did not meet the full range of the student's bilingual, Spanish language-dominant special education needs (*id.* at pp. 7-11). The IHO noted that while she agreed that the parents need not establish that the private school provided every special education service to maximize the student's potential, in order to meet the burden of proving that the private school placement was appropriate, the parents needed to demonstrate the private school provided special instruction that was specially designed to meet the students unique needs, supported by such services that were necessary to permit the student to benefit from instruction (*id.* at p. 11). The IHO found the parents did not meet their burden of proof (*id.* at p. 11). Specifically, the IHO found that although the parent presented evidence that the school's curriculum and program could be appropriate for students with "special needs," the parent did not produce evidence showing how the school provided specially designed instruction to meet the

⁴ Although the IHO initially denied consolidation of the two matters in February 2020, the IHO reconsidered this decision during the May 28, 2020 hearing and issued an order of consolidation on May 30, 2020 (February 17, 2020 Order Denying Consolidation; May 30, 2020 Order of Consolidation).

student's special education needs (*id.* at pp. 8-9). The IHO noted that the parent did not produce testimony by the inclusion lead teacher, who the parents alleged had provided the student with special education instruction (*id.* at p. 9). Further, NAIS did not offer speech-language therapy or OT, services that the IHO noted were necessary for the student as shown by the parent requesting compensatory speech-language therapy and OT from the district (*id.* at pp. 9-10). The IHO referenced an email from the parent to NAIS, in which the parent told school staff that the school did not have to provide the student with related services (*id.* at p. 10; *see* Dist. Ex. 7 at p. 274). The IHO found that NAIS did not provide speech-language therapy or OT and did not sufficiently address the student's needs in these areas through phonics and handwriting instruction as alleged by the parent (IHO Decision at p. 10). In conclusion, the IHO determined that NAIS offered a monolingual, general education program and did not provide the bilingual programming the student required, did not provide special education instruction, and did not provide related services or otherwise meet the student's related service needs (*id.* at p. 11). With regard to the parents' claim seeking OT and speech-language therapy as compensatory education/services for the district's failure to provide the student's pendency program during the pendency of the proceeding, the IHO denied the request, finding that the hearing record did not warrant an award of compensatory education or compensatory services (*id.* at pp. 11-12).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review is also presumed and will not be recited in detail. The crux of the parties' dispute on appeal is whether the NAIS adequately addressed the student's bilingual special education needs, including her speech-language therapy and OT needs.

In an answer, the district responds to the parents' request for review and requests that it be denied in its entirety asserting that the IHO correctly determined that the NAIS was not an appropriate placement for the student and that the parents are not entitled to compensatory education. The district attaches the parents' May 2018 due process complaint notice, regarding the 2017-18 school year as additional evidence.

In a reply the parents assert that the additional evidence submitted by the district on appeal should not be considered because it is in support of an argument that is being presented for the first time on appeal and the evidence was available at the time of the hearing.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

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

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

(LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁵

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. FAPE

As noted above, the IHO found that the district "did not contest the [p]arents' contention that it had not offered the [s]tudent a FAPE for the 2018-2019 and 2019-2020 school years, and thereby tacitly acknowledged that it failed to do so" (IHO Decision at p. 4). The district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2018-19 and 2019-20 school years and, therefore, that determination has become final and binding on the parties and shall not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]).

⁵ 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).

B. Unilateral Placement

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

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

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

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

1. 2018-19 School Year

While the student's needs are not in dispute, a description thereof provides context for the discussion regarding whether or not NAIS addressed the student's special education needs. Evaluative information in the hearing record dated prior to the 2018-19 school year included an August 2016 OT evaluation report, an October 2016 speech-language therapy evaluation report, and a May 2017 bilingual psychoeducational evaluation update report (Parent Exs. W; X; Y).⁶

Turning to the student's needs related to OT, the hearing record included an August 11, 2016 OT evaluation report that described the student as a bilingual child who spoke both Spanish and English but was dominant in Spanish (Parent Ex. Y at p.1). The Peabody Developmental Motor Scales (PDMS-2) was administered to the student to assess grasp and visual motor skills and the Short Sensory Profile was also conducted (id. at pp. 2, 4). The OT evaluation report indicated that according to results of the PDMS-2, the student—who was 58 months old at the time of the evaluation—had immature grasp patterns equivalent to a child 34 months of age (id. at p. 5). At the time of the OT evaluation, the student had not developed the fine motor skills (tripod grasp or quadruped grasp), which were required for writing/constructing letters or numbers (id.). The student's visual motor skills were average and equivalent to a 55 month-old child as she was able to imitate images using blocks, draw simple shapes using a pencil, cut simple shapes and patterns with minimal errors using a standard scissor held in an appropriate grasp, and insert shapes on a form board with no assistance (id.). Furthermore, the student's eye-hand coordination was below average (id.). As per the parent report on the Short Sensory Profile, the student had some sensory modulation issues, especially with oral-motor sensation in that she sought certain sensation within her oral cavity (id.). The OT evaluation report indicated that OT services were recommended for the student (id.).

With regard to speech-language skills, the hearing record included an October 13, 2016 bilingual speech-language evaluation report which indicated, at that time, the student's dominant language was Spanish (Parent Ex. X at p. 5). According to the report, throughout the evaluation the student required rewording, scaffolding, and repetition to follow instructions and answer questions (id.). Expressively, the student typically spoke in two to four word utterances during spontaneous speech; however, during structured activities the student often required prompts to expand her thoughts (id.). In addition, the student displayed several phonological processes that interfered with her overall speech intelligibility, which was calculated to be 70 percent (id.).⁷ Results from the assessment indicated that the student presented with a severe delay in her receptive and expressive skills in her native language, and the bilingual speech-language pathologist determined that the student qualified for speech-language services because her overall

⁶ The May 2017 psychoeducational evaluation report noted, "[c]onsistent with the chancellor's regulations for Limited English Proficiency students, results are presented in a descriptive, qualitative manner and should be interpreted with caution because of the absence of appropriate local norms and deviations from standard procedures to accommodate bilingual issues" (Parent Ex. W at p. 5).

⁷ The bilingual speech-language evaluation report indicated that according to the Weiss Intelligibility Scale, the student should have been 100 percent intelligible (Parent Ex. X at p. 5).

speech and language delays were negatively affecting her ability to communicate in an age-appropriate manner, and "there [was] both the presence of a disability and an adverse education effect" (*id.*). Based on the findings in the evaluation report, speech-language therapy in Spanish was recommended (*id.*).

Over two sessions in May 2017, a bilingual school psychologist conducted a bilingual psychoeducational evaluation of the student (Parent Ex. W). According to the report, the evaluation was conducted bilingually in Spanish and English, stimuli presented in Spanish appeared to increase the student's performance, and based on clinical observations, assessment results, and parent report, the bilingual school psychologist concluded that the student's "language of dominance" was Spanish (*id.* at pp. 3-4). At the time of the evaluation, one of the student's two teachers from her Spanish immersion program indicated the student's academic skills were appropriate for a preschool grade (*id.* at p. 4).⁸ Specifically, the student followed instructions and completed her work without hesitation, needed prompts and redirection to focus her attention to presented tasks, and needed 1:1 guidance when working on graphomotor skills, such as tracing letters and numbers (*id.*). According to the report from the student's other teacher at the Spanish immersion program, the student made great progress, as she demonstrated well-developed pre-academic skills and she was able to label the letters of the alphabet, numerals, shapes, and colors (*id.*). At the time, the teacher expressed concerns about the student's social/emotional functioning because the student tended to engage in isolated play, and although she was able to interact appropriately with her peers, she did not initiate interactions (*id.*). The same teacher reported the student demonstrated limited attention span and required frequent prompts to redirect her attention to presented tasks (*id.*).

Administration of the Woodcock-Munoz Pruebas de Habilidades Cognitivas (Batería III) revealed the student's overall cognitive ability was "probably" within the low average range (Parent Ex. W at pp. 5, 9). The May 2017 evaluation report indicated it was important to note that the student's "summary score was misleading as it failed to reflect wide variability across areas tested" (low to very superior) (*id.* at pp. 5-6, 9). The student demonstrated significant weaknesses in the areas of language comprehension and attention skills (*id.* at pp. 5-6, 9). Her ability to learn, store, and retrieve a series of rebuses (pictographic representations of words) fell within the very superior range and was deemed a relative strength (*id.* at pp. 5-6, 9).

The bilingual school psychologist assessed the student's academic functioning in Spanish through administration of the Bateria III Woodcock-Munoz – Pruebas de Aprovechamiento (Parent Ex. W at pp. 6-9). The student "demonstrated well developed academic readiness skills such as identification of letters and numbers, alphabet writing, and understanding basic directions" (*id.* at pp. 7-9). Her performance on the letter word identification subtest was in the average range, and she was able to match rebus symbols to the pictures of objects, although she struggled to match words in print to their corresponding picture (*id.* at p. 7). In math, the student did not complete simple single-digit addition and subtraction calculation tasks, but solved problems that required her to count items and identify the quantity of items presented (*id.*). For spelling, the student was able to write orally-presented words correctly and her performance on the spelling subtest was

⁸ Information from the student's teachers is also reflected in a classroom observation report dated May 31, 2016, which appears to be a typographical error (compare Parent Ex. W at p. 4, with Parent Ex. AA).

comparable when compared to same age peers (id.). She demonstrated appropriate pre-writing skills such as drawing, tracing letters, and writing upper and lower-case letters (id. at p. 7).⁹ The student struggled with higher order thinking tasks, such as reading comprehension, analyzing math problems, and recalling verbal information (id. at pp. 8-9).

Administration of the Childhood Autism Rating Scale-2 (CARS-2), which the May 2017 psychoeducational evaluation described as a "15-item behavior rating scale" that is "designed as a screening tool to identify children with autism and help identify possible signs of autism (or autism spectrum disorder)" (Parent Ex. W at p. 8). The CARS-2 ratings were comprised of behavioral observations, parental reports, and a review of relevant records (id.). The student's score on the CARS-2 indicated mild-to-moderate symptoms of autism spectrum disorder (id. at pp. 8-9). Specifically, the report indicated that when relating to people, the student demonstrated social interest more with teachers and less frequently with peers (id. at p. 8). She responded to her name, demonstrated joint attention, initiated conversations with adults with regard to her interests, and responded when others interacted with her (id.). According to the report, the student might need prompts when greeting adults she was unfamiliar with, and infrequently initiated interactions with peers (id.). In school, the student tended to play by herself and needed prompts to interact with peers (id.). The parent reported the student had difficulties understanding social cues, which affected her ability for social negotiations (id.). Also, according to the parent, the student had not yet developed the ability to assert herself during social interactions with peers (id.).

In terms of imitation skills, the May 2017 psychoeducational evaluation report stated that the student was able to imitate sounds, words, and movements appropriate for her age, although she might have difficulties with memorizing and repeating short sentences (Parent Ex. W at p. 8). With regard to emotional response, the student showed pleasure during activities of high interest for her—smiling and dancing animatedly in class; during testing, the student demonstrated little change in facial expressions (id.). The student did not demonstrate unusual body movements, but tended to bump into things when not paying attention to her environment (id.). Although the student showed appropriate exploration of toys, she needed prompting to play with toys that required a certain level of imagination, such as blocks or Legos (id.). According to the report, the student might have some difficulties when transitioning in between activities and needed prompts to redirect her attention (id.). Overall, the student was observed to adapt well to major changes in her school routine; however, the parent reported the student did not respond well to changes in her routine at home (id.). For example, she needed to eat the same thing every day and got upset when everyday plans were changed without anticipation (id.).

Regarding visual response, the May 2017 psychoeducational evaluation report indicated that the student might need prompts to attend to presented tasks (Parent Ex. W at p. 8). At times the student might stare into space, but she provided appropriate eye contact during 1:1 interactions and demonstrated age-appropriate listening response (id.). The student responded to her name and reacted appropriately to human voice sounds and other day-to-day sounds in her environment (id. at pp. 8-9). The bilingual school psychologist reported that in regard to the student's response to

⁹ The May 2017 psychoeducational evaluation report indicated that upon informal assessment, the student was able to write the first four letters of her name correctly, demonstrating well-formed letters with appropriate spacing and horizontal alignment (Parent Ex. W at p. 7).

stimulation of taste, smell, and touch senses, atypical behaviors were not directly observed (id. at p. 9). As per her parents, the student had difficulties with certain food textures, which had limited her food options (id.). The parent also indicated the student liked to mouth things and responded well to sensory stimulation from hugs or having pressure on her body (id.). The student did not demonstrate atypical fears or unexplained nervousness during observations, but the parent indicated that the student had developed a fear of sleeping in her room and at that time had recently become very agitated when alone in a car (id.).

Next, regarding verbal communication, the May 2017 psychoeducational evaluation report indicated that the student demonstrated some pronoun reversal and had "a tendency to discuss self rather than others" (Parent Ex. W at p. 9). At times, her speech was noted to be monotone and the parent indicated that the student demonstrated echolalia (id.). For nonverbal communication, the student was noted to point to things nearby when responding to a question, and spontaneously pointed to things at a distance when excited about seeing animals (id.). At times she did not provide eye contact when gesturing (id.). The student demonstrated moderate activity level in both structured and unstructured settings (id.). She tended to fidget in her seat and needed frequent prompts to redirect her attention to presented tasks (id.).

The bilingual school psychologist concluded that during testing, the student appeared to be "a happy and well-adjusted girl" who was "currently experiencing difficulties regarding her speech/language functioning and attention" that affected her daily functioning (Parent Ex. W at pp. 9-10). The student demonstrated a limited attention span, but favorably responded to prompts when her attention was redirected to presented tasks (id. at p. 9). The student was able to initiate conversations with her teachers appropriately and enjoyed expressing her likes and interests (id.).

Additionally, the August 2017 CSE determined that the student's language of instruction was Spanish; however, if no provider was available she should receive an interim monolingual placement with bilingual paraprofessional services (Dist. Ex. 1 at p. 10). The CSE also determined that her management needs at that time included: frequent water and bathroom breaks; pre-teach vocabulary—supplement verbal instruction with visual aids; repeat/paraphrase/shortened verbal instructions; provide additional context and background; simplify language of instruction (to the degree that teacher deems acceptable); model more elaborate language use when conversing with the student (e.g., respond to her statements by repeating her utterances with revised vocabulary and sentence structure that is more age-appropriate); check-in for understanding (e.g., confirm she understands the lesson/activity before beginning); small group instruction; multi-media and multi-sensory approach to learning; positive reinforcement/verbal praise; repetition and clarification of verbal input; scaffolding of new material to be learned; assignments broken down into smaller segments; brief routine movement breaks (e.g., get a drink of water, move from desk to rug area, stretch), approximately every 30 minutes; connect new concepts to be learned with previous knowledge, and provide visual, verbal, and kinesthetic stimuli when learning new concepts (Dist. Ex. 1 at p. 10).

Turning to the unilateral placement, the head of inclusion and phonics at NAIS during the 2018-19 school year (head of inclusion) described the school as a general education school that prided itself on being "very inclusive," accomplished by offering "small class sizes" of between 7

to 16 students (Parent Ex. CCC pp. 1, 4, 8-11).^{10, 11} The school followed the British National Curriculum, a curriculum that included special subjects such as art, music, physical education, and drama, taught by specialist teachers (*id.* at pp. 15, 34). NAIS had "Nursery" classes for students as young as two years of age through grade eight (*id.* at p. 10). The age-group after Nursery was "Reception," equivalent to pre-kindergarten, followed by "Year 1" equivalent to kindergarten, and "Year 2" equivalent to first grade (Parent Ex. CCC at p. 10; *see* Parent Exs. FF at p. 1; GG at p. 1; HH at p. 1; II at p. 1; JJ at p. 1). The school also used a behavior management system called "Dojo Points," an on-line program; the lower school used a "traffic light" behavior system whereby students could monitor and change/improve their own behavior (*see* Parent Ex. CCC at pp. 20-21).

With regard to the head of inclusion's training, he held degrees and certifications obtained in the United Kingdom (UK), including a post graduate certificate in education entitling him to be a "mainstream" teacher (Parent Ex. CCC at pp. 5-6). His testimony indicated he also had received "a little bit of training in special education working with children with special needs" and received training in "the different strategies and approaches that work with the students with autism" (*id.* at pp. 6-7). According to the head of inclusion, he had five years of work experience as a special needs teacher and special needs coordinator (*id.* at p. 7). He also received training by a speech-language therapist "for a qualification in speech and language" (*id.* at p. 8). The majority of the teachers at NAIS were from the UK and held a post graduate certificate of education (PGCE) or they had a degree in teaching (*id.* at p. 40).¹² According to the head of inclusion, as part of their teacher training, most students would have completed some level of "special educational need training" in one of their placements, which might have been in a special needs school (*id.* at p. 41). He also indicated that "a lot" of schools in the UK had children with special needs in their classes, "so [it was] very likely that you [would] have a child in one of those classes with special educational needs" (*id.* at pp. 41-42). In that situation, it would be necessary for the teacher to become familiar with the "educational healthcare plans," a document the inclusion head noted was similar to an IEP (*id.* at p. 42). Part of the teacher training in that situation required learning to teach a student with a particular learning style, and meeting with the speech-language therapist, occupational therapists, or any other person that worked with that student (*id.*). In addition, the teacher in training would be responsible for the progress and assessment of the child while the teacher was in that placement (*id.*).

¹⁰ The sworn affidavit testimony of the head of inclusion at NAIS was admitted at the impartial hearing although he was not available to appear at the impartial hearing (Parent Ex. CCC). The head of inclusion at NAIS also testified on September 18, 2019 in a case not involving the student in the instant matter, and offered a description of his role as a phonics teacher and as the inclusion specialist in the student's class at the time (Tr. pp. 168-69; Parent Ex. CCC at pp. 1, 4, 8). As the witness was unavailable to testify at the impartial hearing, the IHO allowed the head of inclusion's testimony from the other hearing to be entered into evidence with the proviso that all information identifying the other student be redacted (*see* Tr. pp. 165-66, 169-71, 258-59).

¹¹ The hearing record included a document that described NAIS; however, as noted by the IHO, the document was "largely illegible" (IHO Decision at p. 7; Parent Ex. CC).

¹² The head of inclusion testified that none of the teachers at NAIS had New York State special education teacher certification, and that he was not aware of any teachers at NAIS who had New York State general education teaching certification (Parent Ex. CCC at pp. 30-31).

The head of inclusion testified that his responsibilities at the school included meeting with parents, teachers, and therapists working with students in school and out of school (Parent Ex. CCC at pp. 8-9). He also "deliver[ed] interventions with individual children and groups of children," provided "some mainstream teaching to support the mainstream teaching staff," conducted observations and lessons, and trained and worked with mainstream staff to support them in their support of children with special needs (id. at p. 9). As head of inclusion, he was also involved with English as an additional language, and with gifted and challenged students (id.). Further, as the head of phonics, he oversaw the phonics screening, assessment, and teaching from pre-K to grade one, and trained all the staff (id.). With regard to phonics, the head of inclusion noted he and all the staff had been trained in "rewriting" (id. at pp. 9-10). Further, approximately six times per year a trainer went into the school and met with the head of inclusion to go through data, plan, and review how they would support children and staff (id. at p. 10). In addition, the head of inclusion noted staff received various regular in-house trainings; however, aside from his training in special education, there was no other special education training at NAIS (id. at pp. 27-28).

The head of inclusion indicated that the school "plan[ned] to meet the needs of each individual child in the school" (Parent Ex. CCC at p. 11). He testified that his role at NAIS was created in August 2018 to help create an inclusive environment where learning was "really personalized," and where he could assist class teachers in making sure they were meeting the needs of all students, whether it was supporting children who had a special education need or challenging students who were different and talented in a particular area (id. at pp. 8-9, 11-12). In September 2018, NAIS had 144 students enrolled, approximately ten of whom had an IEP (id. at pp. 12, 31). In addition, the head of inclusion reported that he created a "special educational needs register" that included approximately 22 students who staff had expressed concerns about and were "suspected" of having special education needs or who had an IEP (id. at pp. 12, 31-32).

In his description of the staff at NAIS, the head of inclusion testified that teachers were generally responsible for all of the instruction, and that "learning systems" were there to support the teachers in various ways (Parent Ex. CCC at p. 14).¹³ He reported that classes grade one and below had at least one learning system per class, who had different levels of training, although all had received phonics training (id. at p. 13). Some of the learning systems delivered interventions including 1:1 phonics in the afternoon (id.). Some learning systems were bilingual and the former head of inclusion noted NAIS had students who were Spanish with limited English (id.). The head of inclusion reported particular students had privately funded outside providers who went into the school and for whom the school provided space to work with the students and the opportunity to consult with the class teacher, noting that he frequently facilitated how this kind of support would work for a student (id. at pp. 13-14).

The student's classroom teacher during the 2017-18 and 2018-19 school years (Year 1 teacher) testified about her training, and that she had achieved a postgraduate certificate in education and qualified teacher status (QTS) in the UK (Tr. pp. 190-92, 194, 435-36; Parent Ex. AAA at pp. 2, 3). In her description of her teaching experience, the Year 1 teacher testified that

¹³ The head of inclusion's use of the term "learning system" appeared to refer to "learning assistants" (see Tr. pp. 195-96; Parent Ex. CCC at pp. 13-14).

she had "[a] lot" of experience working with students with disabilities; every year since she started teaching she had a student with various disabilities in her class, including students with autism, Down Syndrome, and global developmental delay (Tr. p. 193).¹⁴ She reported that her responsibilities at NAIS involved delivering all lessons, planning the curriculum, and assessing, reporting, making reports on, and ensuring that all students made progress (Tr. pp. 193-94).

Specific to the 2018-19 school year, the Year 1 teacher testified that her class consisted of 12 students, two of whom, including the student, were on the autism spectrum (Tr. pp. 194-95). The other student with autism had "specific support that came from the state," and there was a learning assistant that worked with the teacher in the classroom (Tr. pp. 195-96).¹⁵ The Year 1 teacher testified she did not consider her classroom to be bilingual because she assumed bilingual to mean that she would spend part of the day teaching in English and Spanish and she did not speak Spanish (Tr. pp. 486-87). Rather, she testified that her instruction was in English and students conversed and responded to her in English (Tr. p. 487). The Year 1 teacher stated that she was not certified in bilingual education, but had taught many other bilingual students and the learning assistant in her class was fluent in Spanish (Tr. pp. 409-10, 487). Regarding the learning assistant's role, the Year 1 teacher testified that she would converse with the assistant about the day's activities, specifically how the teacher would be teaching it, the language she would be using, and how she would deliver instruction to the students, so the learning assistant could "echo it" (Tr. pp. 196-97). The Year 1 teacher had planned specific activities and focus points to enable the learning assistant to support the children (Tr. p. 197). The learning assistant worked with all the students in the class daily, and she had experience working with students with special education needs at the school (Tr. pp. 411, 486).

The Year 1 teacher provided testimony about instruction at NAIS in general. With regard to reading and phonics, the Year 1 teacher testified that NAIS assessed all students at the beginning of the year across four different year groups, and then "stream[ed]" students into groups according to their ability so that they learned at the correct pace and according to the correct starting point (Tr. p. 198). Phonics instruction—which included learning new sounds, reading, comprehension skills, writing—occurred for one hour daily and was "backed up" in the classroom with further English work (Tr. pp. 198, 212; see Parent Ex. QQ). Phonics instruction also entailed choosing "a story a week" from books in the Read Write Program, the phonics program NAIS used (Tr. pp. 205, 423). Over the course of the week, a series of activities "buil[t] up" understanding of the story, reading with fluency and expression, and writing in response to questions about the book (id.). Students were assessed regularly for progress or for determining who was having difficulty,

¹⁴ The Year 1 teacher indicated that in the UK, all schools used an "inclusive curriculum" and students with special needs attended traditional public school, unless a student had "extreme really specialized needs" (see Tr. pp. 408-09).

¹⁵ The Year 1 teacher reported that all classes up to age seven had a learning assistant whose role was to support the students in their learning (Tr. p. 196). The teacher noted that NAIS was "particularly focused on personalized education, so the more adults in the classroom, the more support you c[ould] provide" (id.). The learning assistant accompanied students to every lesson so that there was the element of continuity as some lessons were taught by other teachers (id.). The Year 1 teacher supervised the learning assistant in her class, and at times instructed her to do small group work if there were any areas that students were finding particularly challenging, so that they would have more one-on-one support (Tr. pp. 196-97).

at which time, groups would be rearranged accordingly (Tr. pp. 198-99). Basic comprehension skills were addressed through reading a story aloud followed by Wh- questions about the story, writing as a class using modeling, and having the students read to themselves and answer a series of questions (Tr. pp. 227-29). The Year 1 teacher also worked on the beginning, middle, and ending parts of stories (Tr. p. 226).

According to the Year 1 teacher, writing concerns were addressed "mainly" through phonics; ensuring students knew all the sounds, and giving students the tools to spell out words (i.e., "Fred Fingers"), and repetition (Tr. pp. 203-05). Using "Kung Fu Punctuation," students were encouraged to physically show use of a capital letter and a full stop, and to "talk[] through sentences" (Tr. p. 204). The Year 1 teacher testified that she used "[l]ots of modeling" with the students, asked them to repeat the sentence out loud and reminded them that they were "going to need their capital letters and full stops" (*id.*).¹⁶ Additionally, she worked on vocabulary with students through use of "vocabulary maps" that matched pictures with the words and encouraged them to talk about the different elements of the vocabulary map (i.e., adjectives, synonyms) (*see* Tr. pp. 225-26). The Year 1 teacher also worked on labeling skills through, for example, first asking students to label their own body parts and then labeling pictures in non-fiction books (*see* Tr. pp. 229-30). Directions in class were multi-step depending on the activity (Tr. p. 227).

When asked how she addressed math needs in the classroom, the Year 1 teacher testified that math activities "would be differentiated," and instruction focused on the skills students needed before moving on to something else (Tr. p. 203). The class used "lots of manipulatives," to encourage the children to show what they were doing rather than just seeing it written down on paper (*id.*). The class also used "lots of number lines" and "small group work," consisting of one to three students working with the teacher or the learning assistant through a particular activity, as well as math games (*id.*). As support to the British National Curriculum NAIS also used the International Primary Curriculum (IPC), a curriculum that teaches by theme and supported history, geography, science and English (Tr. pp. 215-19).

According to the Year 1 teacher, although NAIS did not provide speech-language therapy, if there was an area that needed to be focused on, such as "being able to talk using correct sentences," the teacher addressed it by modeling and encouraging students to use language accurately (Tr. pp. 223-24; *see* Tr. p. 460). For students who had articulation difficulties, the Year 1 teacher provided "warm-up exercises," rhymes, and encouragement to "make the right sound" (*see* Tr. pp. 492-93). NAIS did not provide OT, but the Year 1 teacher stated that she taught students proper formation of lower- and upper-case letters, using rhymes for each sound in the phonics program to help students remember how to write letters and words (Tr. p. 224). Students were gradually introduced to lines and writing correctly sized letters on the lines (Tr. p. 225). Additionally, the Year 1 teacher testified that to support handwriting and fine motor skills, she used finger activities, art-based activities using Play-Doh, threading, and "finger warmup[]" exercises prior to writing activities to develop finger strength (Tr. p. 206).

¹⁶ The hearing record did not define the use of the phrase "full stops." Presumably, within the context of the teacher's testimony, full stops referred to the use of periods at the end of a written sentence.

Turning to the student in this matter, the Year 1 teacher testified that during the 2018-19 school year the student had difficulty understanding the concepts of addition and subtraction, and wrote some numbers the wrong way (Tr. p. 202). She had difficulty with comprehension skills, and using capital letters and "full stops" accurately (Tr. pp. 202-03). The student was inconsistent in forming friendships with peers (Tr. p. 203). The Year 1 teacher testified that her expectations for the student were not the same as for the other students in the class, and from the student's IEP she could see what the student's specific objectives were, her areas of strength, and what she needed to develop (Tr. pp. 208-09). The Year 1 teacher reiterated that the focus at NAIS was a personalized approach, so expectations for every student were somewhat different (Tr. p. 209). She testified that her instruction was different for the other students in the class; for example, if the class was moving on to higher numbers, she stayed focused on working with the student on slightly lower numbers, or if the rest of the class was moving on to mental methods, the teacher continued working with the student to ensure her independent use of a number line (Tr. pp. 207-08). Additionally, there was opportunity for collaboration among the staff who worked with the student during the 2018-19 school year (see Tr. p. 230). At the beginning of the school year, once she knew what worked for the student, the Year 1 teacher spoke with all of the student's specialist teachers about what had been recommended in the student's IEP, what was done in the classroom, and ensured the routines would be kept the same (Tr. pp. 230-31).¹⁷ Also, the learning assistant went to all of the special classes with the class, knew how the student was taught in her Year 1 class, and was able to replicate how the student was taught with the other teachers (Tr. p. 231).

With regard to how the Year 1 teacher addressed the student's comprehension, she indicated that the student enjoyed reading so they chose books that particularly interested her and that she would focus on (Tr. p. 204). The Year 1 teacher also worked on the beginning, middle, and ending parts of stories, providing the student with a prompt (Tr. pp. 226, 505). The student was encouraged to talk about the events in the story, specific to settings and the characters, and to apply it to other books they were reading as well (Tr. p. 204). According to the Year 1 teacher, she provided the student's phonics instruction for the bulk of the 2018-19 school year (Tr. pp. 197-98, 412, 419).

To address the student's needs pertaining to forming relationships, the Year 1 teacher testified that some class activities involved paired work or work in a small group of up to three students whereby conversations occurred (Tr. p. 206). Also, the class had "play times on the roof" where staff led "small activities with small groups," gave students the vocabulary to play the game, and modeled how to talk to peers and form friendships (Tr. pp. 206-07). Students received adult support in taking turns and in using correct language (Tr. p. 207). Homework encouraged projects and students bringing things of interest into school, which enabled the rest of the class to ask questions as "a friendship starting point" (Tr. p. 207). The Year 1 teacher's testimony indicated that, during the 2018-19 school year, the head of inclusion taught social skills to students in need of support in finding the right language with regard to interactions and building friendships with

¹⁷ In addition to the classroom teacher and the learning assistant, during the 2018-19 school year, the student had a Spanish teacher, a physical education teacher, as well as teachers for dance, drama, and music (Tr. p. 197). The Year 1 teacher testified that the staff was "close-knit," therefore, if anything arose throughout the school year, they were quick to communicate with each other (Tr. p. 231).

others (Tr. pp. 413-14). The student was highlighted to need this kind of support and had access to this instruction about once or twice per week (Tr. pp. 415-16).

Behaviorally, the student responded very well to the "traffic light system," described as a visual method of monitoring students' behavior (Tr. pp. 231-32).¹⁸ The Year 1 teacher indicated the student understood the system and responded well to it (id.). The student also did well using the Dojo Points system, which entailed the student and her classmates participating in role play to understand and reenact scenarios about behavioral habits and explain what each habit meant (see Tr. pp. 232-35). With regard to the student's attention difficulties, the Year 1 teacher testified that if the student needed it, she would give her "a little breather" or "time-out" from whatever the focus was at the moment (Tr. pp. 502-03). Other times, the Year 1 teacher would redirect the student, offer encouragement, or ask her questions to ensure her attention was directed (Tr. p. 503). If the student found something funny or if she got excited and went to "that next level," the teacher might have needed to calm the student down a bit more (id.).

With regard to Spanish, the Year 1 teacher testified that the 2018-19 school year was the student's second year at NAIS and that she "made a lot of progress" in English during her first year at the school (Tr. p. 209). By the time of the 2018-19 school year, the student was "very good" at communicating in English and understanding what was said to her (id.). The Year 1 teacher stated that NAIS taught Spanish as another language, and the Spanish teacher was available to support the student with understanding (Tr. pp. 209-10). Also, although the Year 1 teacher was not proficient in Spanish, the learning assistant in the class spoke Spanish and did so with the student to make sure she understood everything (Tr. p. 210). The learning assistant would also translate what the student said in Spanish to English for the others (id.). The Year 1 teacher reported that during the 2018-19 school year the student needed translation services from the learning assistant at a reduced rate from the previous school year, and by the end of the 2018-19 school the student's need for translation was greatly reduced (Tr. pp. 411-12, 487-88). The Year 1 teacher indicated that Spanish being the student's first language did not prevent her from making progress (Tr. p. 488).

During cross examination, the Year 1 teacher affirmed that the Read Write phonics program, the IPC, the traffic light behavior system, and the Dojo Points system were not special education programs and were used by all students in the classroom (see Tr. pp. 423-27, 430). However, the teacher stated that in her experience, those programs worked well with students who exhibited special needs (Tr. pp. 496-97). Additionally, she opined that her use of visuals, practical resources, and presenting material in different ways, role playing, and acting things out in her class were methods that also worked well with special needs students (Tr. pp. 497-98). The Year 1 teacher testified that although these strategies were used with all students, she differentiated material for the student using "lots of visuals; lots of practical resources so that she could kind of see hands-on; presenting, when appropriate, a scenario in different ways," "lots of small group work," role-play and acting things out, and finding topics of interest to the student "so that she

¹⁸ According to the Year 1 teacher, each student starts the day on green; if they engage in a behavior, receive a warning and do not change the behavior they "go down to yellow;" if the student continues to repeat the behavior they reach red, at which point parents are called (Tr. pp. 231-32). Students have the option of changing colors during the day, and if they do something "amazing" they are designated "gold" (Tr. p. 232).

would be really motivated to engage in it" (Tr. pp. 430-31). The Year 1 teacher also testified about how she used "a heavy amount of scaffolding" instruction in her class (Tr. pp. 471-72).

When the Year 1 teacher was asked questions about the annual goals included in the May 2019 IEP, she indicated she had already worked with the student on the speech-language goals, including reading aloud a grade-level story and identifying parts of the story, having the student tell a story with a beginning, middle, and end with a prompt, following conversational rules, asking and responding appropriately to questions, and staying on topic (Tr. pp. 504-05; see Parent Ex. K at pp. 13, 15-16, 26). She had also worked on the other speech-language therapy goals involving sharing ideas and thoughts orally, and describing objects, pictures and paintings using attributes (Tr. pp. 505-06; see Parent Ex. K at pp. 16, 17). The teacher noted she worked on vocabulary with the student "[a]ll the time," as well as correct use of word order or sentence structure and categorization (Tr. p. 506; see Parent Ex. K at pp. 18-20).

2. 2019-20 School Year

Regarding the student's needs prior to the 2019-20 school year, according to the May 1, 2019 IEP the student made "excellent progress in reading" as she was able to accurately read words using the sounds she had been taught and she made a good attempt with words she was less familiar with (Parent Ex. K at pp. 2, 32). According to the IEP, the student found independent comprehension slightly harder and needed support as she struggled to respond to a direct question from text and with sequencing (id. at p. 2). In writing, the student wrote independently using her knowledge to spell words, she could write at length, and was working on using punctuation accurately (id.). The student found math a little harder; she struggled to understand what the question was asking, particularly if presented in a different way, she did not always see the relationship between numbers, and found it difficult to problem solve multi-step problems (id.). She used manipulatives to help solve problems and needed initial guidance before becoming independent but was getting better at using a number line to add and subtract (id.). The May 2019 IEP also noted that the student could get easily distracted by other children around her, that her dominant language at the time was Spanish and she received in-class support in Spanish from the class teacher assistant (id.). According to the IEP, the parent requested that the student's speech-language therapy provider be bilingual in Spanish and English, and that the student would benefit from support in Spanish (id.). The parent further reported to the CSE that the student did not receive the recommended speech-language therapy or OT services this school year (id.).

Socially, the May 2019 IEP indicated that it could take time for the student to form friendships and find common ground with peers, although she did have friends in her class and had "common issues" with peers (Parent Ex. K at p. 2). The student had self-confidence, responded to and interacted with adults well, was funny and loved to laugh, and enjoyed active games during playtime (id.). She needed reminders to be calm and could find it hard to understand when others said "No," as well as telling others "No" when she did not want to do something anymore (id.). The student could get over excited and struggled to calm down (id.). Physically, the May 2019 IEP noted that the student had received diagnoses of ADHD and ASD, and also some of the information the parent reported that was reflected in the August 2017 IEP (Parent Ex. K at p. 3; see Dist. Ex. 1 at p. 9). Physical needs included following instructions in games during physical education class and taking part in team activities (Parent Ex. K at p. 3).

The May 2019 IEP included many of the same management needs as were in the August 2017 IEP, including that the student's "language of instruction is Spanish," and that if there was no provider available in Spanish, the student "should be placed in an interim monolingual class with a bilingual paraprofessional" (compare Parent Ex. K at p. 3, with Dist. Ex. 1 at p. 10). Newly added management needs strategies were for 1:1 support, regular behavior reminder about what was important in the classroom, support to calm down when she became over excited, and "manipulatives for months" (compare Parent Ex. K at p. 3, with Dist. Ex. 1 at p. 10). The May 2019 IEP continued to reflect that the student "demonstrate[d] significant speech/language and social delays that impede[d] her access to [the] general education curriculum without support" (compare Parent Ex. K at p. 3, with Dist. Ex. 1 at p. 10).

Turning to the 2019-20 school year at NAIS, the hearing record included testimony from the student's teacher for 2019-20 school year and the head of the lower school at NAIS (head of lower school) (see Tr. pp. 269-389, 519-621). Their testimony was consistent with the head of school's description of NAIS, teacher training in the UK, the types of degrees and/or certificates required for teachers in the UK to receive QTS as well as the ways NAIS provided instruction (see Tr. pp. 269, 271-289, 302-304, 307-08, 311-312, 327-28, 330-32, 340, 346-47; Parent Ex. CCC at pp. 5-8, 41-42).

The student's teacher for 2019-20 school year (Year 2 teacher) testified that she had worked with a wide range of students with special needs throughout her teaching experience in the UK and at NAIS, including students with emotional needs, attachment disorders, autism spectrum disorder, ADHD, and students with physical disabilities (Tr. pp. 346-48). At one point while employed at a different school, the Year 2 teacher was the special education "lead" for three Year 1 classes, to help develop resources and programs with the special needs coordinator (Tr. p. 544). She noted that at NAIS, staff received weekly professional development trainings that included some elements of special education training throughout the school year (Tr. pp. 545-46).

During the 2019-20 school year, the Year 2 teacher was responsible for the curriculum for math, English, science, and IPC (history and geography) (Tr. pp. 348-49, 354, 548). She delivered the Year 2 classes' instruction in phonics, math, and IPC, and the head of school, who was also the special needs coordinator, taught her class science because the Year 2 teacher also taught dance to the entire school (Tr. pp. 349, 354). The teacher noted that the head of school also taught the personal, social, and health education class (PSHE), which covered friendship skills and emotional intelligence, using a lot of role play with different social situations (Tr. p. 352).

The Year 2 teacher stated that she was familiar with the student because in addition to being her teacher for the 2019-20 school year, she taught her dance for a number of years (Tr. pp. 349, 543). During the 2019-20 school year, there were 11 students in the Year 2 class ranging in age between six and eight years old, the teacher, and a teaching assistant (Tr. pp. 349-51).¹⁹ The Year 2 teacher described the teaching assistant's role as a "para-teacher" whom she supervised, and who taught alongside her with supervision and guidance, after the Year 2 teacher had planned and introduced the lessons (Tr. pp. 350-51). The teaching assistant supported students and worked

¹⁹ The Year 2 teacher testified that during the 2019-20 school year there were two students with disabilities in the class, including the student in this matter (Tr. p. 350).

with students in small groups, rotating among groups with the Year 2 teacher (Tr. pp. 351-52). She also accompanied the class when the students went to their special classes taught by other teachers (Tr. pp. 354, 548).

Testimony by the student's Year 2 teacher indicated that during the 2019-20 school year students had one hour of phonics instruction in the morning that incorporated reading, writing, handwriting, spelling, grammar, vocabulary, and "anything that you would be put under the umbrella term of English" (Tr. p. 353). During grammar instruction, the Year 2 teacher stated that students received instruction in different parts of speech, verb tense, plural and singular forms, all following the English National Curriculum (Tr. p. 354). The class also had one hour of math every day (*id.*). In math, the Year 2 teacher testified that instruction focused on addition and subtraction, initially reviewing single-digit numbers and then moving on to double-digit numbers through the use of physical manipulatives before moving on to more written and abstract methods (Tr. p. 355). The class also worked on division and multiplication skills, moving from manipulatives to the more abstract mental methods, and received instruction in time and shape, lengths and weights, and fractions (Tr. pp. 355; *see* Tr. pp. 595-97). Students also received science, physical education, Spanish, music, art, IPC, dance, and drama instruction (Tr. p. 353). The Year 2 teacher described the IPC curriculum as "theme-based" instruction that included the main elements of history education such as sequencing on a timeline, being able to understand time in relation to past or more recent events, studying historical figures, and working with maps for geography (Tr. pp. 355-56).

The Year 2 teacher also reported that the English National Curriculum was "not specifically a special needs curriculum," but was "a skills-based curriculum" that progressed from year to year and incorporated review and repetition (Tr. p. 356). According to the Year 2 teacher, that curriculum in conjunction with NAIS' ability to create personalized learning environments for its students allowed her to adapt and "cater" to different learning styles and needs (Tr. pp. 356-57). The Year 2 teacher testified that she differentiated materials in three ways; providing different levels of challenge, for example, creating three different levels of worksheets; easier, medium, harder (Tr. pp. 357, 581-82).²⁰ The Year 2 teacher stated that the student was successful with the differentiated instruction she received within her ability group, the teacher did not need to differentiate beyond that, and the student was getting the same material as the others in her ability group (Tr. p. 582).

With regard to multisensory instruction in the classroom, the Year 2 teacher used a program called "Small Steps" for math which used different manipulatives as well as visual models that linked with the manipulatives (Tr. p. 374). The Year 2 teacher reported that "little by little," she moved away from the manipulatives, just using the visual model, and then using that model to support the written method, going step by step, connecting everything together (*id.*). During phonics instruction, students were able to see the words as they were hearing them being said, all the while getting a lot of repetition (*id.*). For IPC and science, the Year 2 teacher used real-life

²⁰ The Year 2 teacher described personalized learning as meeting a learner's needs in different ways, based on who they are, what support they need or the "push" or challenge they need in certain areas (*id.*). She noted that personalization "incorporate[d] lots of different elements," including creating different levels of challenge, but that it was also a "wraparound whole child approach" (Tr. pp. 357-58).

objects, and there were centers in the classroom for self-directed play (i.e., building sets, role-play) (Tr. pp. 374-75).

According to the Year 2 teacher's testimony, during academic instruction the student needed support paying attention during whole class learning sessions (Tr. p. 358). To address this need, the Year 2 teacher reported the student always received check-ins to make sure she understood what was being done, provided repetition during small group instruction, and closely monitored how well the student was doing and if she was comprehending everything (*id.*). The Year 2 teacher testified that some of the student's main areas of need were in communication and understanding social situations, as well as attending during her group lessons, ensuring that she followed along (Tr. pp. 553-54). The Year 2 teacher indicated that for the most part the student listened, but she checked in with her to make sure, as well as that vocabulary was understood (Tr. p. 554). After checking in with the student, if the student required further explanation and in different ways, such instruction was provided to her (*id.*).

The Year 2 teacher testified that she spoke Spanish, and if she was not available there were other staff close by who could help with translating for the student (Tr. p. 361). When asked if she thought it would be important for the student to have a bilingual paraprofessional in the classroom, the Year 2 teacher testified that it would be an "interesting thing to try out to see what impact it ha[d]" for the student because the student was able to follow along very successfully with the vast majority of lessons and communicate with friends (Tr. pp. 555-57). The Year 2 teacher was aware that sometimes the student's Spanish to English translation might be a challenge for her, and she indicated she had "Google Home" in the classroom, which she described as technology that the student sometimes used to help her translate a word, particularly when she was writing (Tr. pp. 360, 618). If the Year 2 teacher was not sure whether the student's lack of understanding was due to a language translation issue, the teacher ensured staff were checking with the student to see if she needed something translated (Tr. pp. 372-73). In addition, the Spanish teacher's classroom was nearby, and the Spanish-speaking learning assistant from Year 1 was "just next door" (Tr. pp. 361, 549). Also, there were two other children in the classroom whose first language was Spanish (Tr. pp. 360-61). The Year 2 teacher did not observe the student needing extra time to respond to things on a regular basis (Tr. p. 620).

Additionally, the student always told the Year 2 teacher if she did not understand something, or the teacher recognized the student's lack of understanding because the student's face reflected a certain expression, which occurred "maybe once during one lesson per week" (Tr. p. 557). However, she would "continually be checking in with [the student] that she understands what she's being asked to do and everything that's involved in the activity... perhaps we were preempting that as well" (*id.*). With regard to math, one target was moving from physical manipulatives to written and mental methods (Tr. p. 554). The Year 2 teacher opined that the student's difficulty at those times was not due to a language barrier, rather, it was due to the complexity of what was being taught that day (Tr. pp. 557-58). For example, math instruction was the time the student would express that she didn't understand, but that did not happen during phonics instruction (Tr. p. 558). As a result, the student received 1:1 math instruction with the teacher assistant, always trying something different until the connection was made for the student (Tr. pp. 359, 558, 561).

In describing the student's reading and writing skills, the Year 2 teacher testified the student did "very well" with both subjects (Tr. p. 362). The Year 2 teacher testified that she went over new vocabulary to make sure it was "embedded" and understood through repetition and different games (*id.*). She described the student's handwriting skills as "really great" and testified that the student loved writing and could write very well independently (*id.*). During the 2019-20 school year, the Year 2 teacher also used the Read Write phonics program that, as described above, incorporated the writing, comprehension, vocabulary, grammar, proofreading, and spelling instruction (Tr. pp. 205, 362-63, 423, 592-95).

As previously noted, in math, the student needed support in moving from manipulatives into written or mental methods (Tr. p. 358; *see* Parent Ex. K at p. 2). To address this area, the student worked in small groups of three or four where staff could see everything the student was doing at all times during the lesson, providing support or encouragement to move forward as appropriate (Tr. pp. 358-59). Further, the Year 2 teacher reported she gave the student breaks in the classroom to help her be "super focused" when she was sitting down (Tr. p. 359). When given a break, the student was allowed to "dictate" what she needed (i.e., stand up, get a drink, stretch, or go to a play-directed (i.e., role play, dress up, construction building) area in classroom for five minutes (Tr. pp. 359-60, 573-74).

When asked how the Year 2 teacher's instruction differed from the instruction of the other students in the classroom, the teacher indicated that at the end of every day she repeated concise, bulleted instructions for what the students needed to do (Tr. pp. 372, 572). While she acknowledged that was good for the entire class, it was especially good for the student (Tr. p. 372). The Year 2 teacher then watched, checked, and monitored that the student understood the instructions and that she was being successful (*id.*). The Year 2 teacher also indicated if the student did not understand something, she checked with the student to see if it was related to a need for translation of a word (Tr. pp. 372-73).

Socially, the Year 2 teacher testified that NAIS did a lot of work with the student to make sure she understood the intent behind interactions with friends during play that she might have misinterpreted (Tr. p. 366).²¹ Staff worked to make sure peers used clear dialogue with the student, talked with her, and provided her with different models for play in which she could still be active but not to the point where someone was going to get hurt (*id.*). The Year 2 teacher stated that she tried to be "concrete" with the student so that she understood she was not in trouble but rather staff was trying to keep the student safe, and that she made sure to communicate that approach with all of the staff to ensure it was used with the student in a consistent manner (Tr. p. 367). Further, the Year 2 teacher testified that she made sure staff understood that if the student appeared upset for some reason it may be due to a misinterpretation, and that the student needed staff to "investigate" the situation for purposes of making sure the student clearly understood the situation rather than thinking something bad happened (Tr. p. 368). Or, if something bad did happen, taking steps to clear up and take care of the situation (Tr. pp. 368, 568-70).

²¹ During playtime, the Year 2 teacher testified that the student received a "fair amount of support" to ensure her play did not become too rough, as she was physically developed, with excellent gross motor skills (Tr. p. 365).

In the classroom, the Year 2 teacher worked with the student on conversational or social skills (Tr. p. 369). During quieter times (i.e., snack time) if the Year 2 teacher saw the student sitting alone, she would check with the student to see if she needed a break or talked with her about initiating conversations (Tr. p. 369). If the student indicated she wanted to sit with other people, the Year 2 teacher provided sentence starters or questions the student could use with her friends to join their group (Tr. pp. 369-70). The Year 2 teacher indicated the student used the suggestions provided, had nice conversations, and did well when given direct instructions when working with a partner (Tr. pp. 369-70, 567-68). The hearing record referred to "SEN" time, something the Year 2 teacher described as the group instruction the student received from the special needs coordinator for the purpose of working on her communication skills (Tr. pp. 536, 575-76; Dist. Ex. 6 at p. 40).

With regard to the student's management needs included in the May 2019 IEP, the Year 2 teacher testified that those strategies were appropriate for the student and were provided to her (Tr. pp. 524, 527-28). Specifically, the student was provided with one-to-one support with new material, particularly in math (Tr. p. 527). The Year 2 teacher also indicated she used reminders of expectations, repetition, paraphrasing, shortening of verbal instructions and simplifying language of instructions; checking in for understanding; small-group instruction; multimedia and multisensory approach; positive reinforcement and verbal praise; repetition and clarification of verbal input; brief, routine movement breaks; breaking down multistep instructions; alternative seating, and fading use of manipulatives in math once mastery was achieved (Tr. pp. 527-28). The Year 2 teacher further testified that collaboration with staff working with the student was a "must," and that she and her teaching assistant collaborated on an ongoing basis throughout the day (Tr. p. 528). If a particular issue arose or something became clear that the student should be supported in a specific way, communication between all staff in the school "would be immediate" about what should be done going forward (*id.*). Communication with the student's parents occurred via meetings scheduled at regular intervals, as well as at any time as needed, and through email (Tr. pp. 528-29, 585-86).

3. Progress

The parent also asserts that the IHO should have found that the NAIS school was appropriate because the student made progress during the 2018-19 and 2019-20 school years. The Second Circuit has noted 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

In this case the evidence of progress in the hearing record included report cards for the 2018-19 and 2019-20 school years and testimony as discussed herein by the student's classroom

teachers for both school years and other individuals from NAIS that were familiar with the student (see Parent Exs. FF; GG; HH; II).

In her description of the student during 2018-19 school year, the Year 1 teacher indicated the student was "much more settled at school" (Tr. p. 201). The student made "great progress" in phonics; recognizing phonemes, learning digraphs, beginning to accurately segment and then blend a word, which she was also able to use in writing (id.). Also, the student was starting to write sentences (id.). She was able to read books at the appropriate level and recognized a "good amount" of high-frequency words (i.e., was, the) (Tr. pp. 201-02). The student was becoming more confident with recognizing and writing numbers (Tr. p. 202). The student improved in her ability to make transitions as she was able to understand and follow a visual timetable, and was becoming more confident at forming friendships with her peers and beginning to take part in social games (id.). The student was able to follow multi-step instructions with support (i.e., reminders), demonstrating more comfort and confidence following multi-step instructions at the end of the school year (Tr. p. 227).

Testimony by the student's Year 1 teacher for the 2018-19 school year indicated the student was able to fully participate in each subject the teacher taught and that the student made progress (Tr. p. 220). She indicated the Year 1 program met the student's needs; that she made progress, and that by the end of the 2018-19 school year, the student was ready to move on to "Year 2" (Tr. p. 236; see Tr. p. 467). The teacher tracked students' progress through subject assessments to obtain a "snapshot" of how they were doing (Tr. pp. 220). With regard to the student, the Year 1 teacher noted she conducted a teacher assessment, as she was able to observe what the student was doing in the classroom, how she interacted with other students, how she completed her work, and how independent she was (Tr. pp. 220, 464). Progress reports included in the hearing record reflected the progress the student made during the 2018-19 school year (Tr. p. 221-22; Parent Exs. GG; HH; II). In reading, the teacher reported that at the beginning of the 2018-19 school year the student was segmenting (sounds in words) for blending (i.e., /k/ /a/ /t/ for cat), but at the end of the school year she read books that were progressively harder and with fluency and expression (Tr. p. 222-23). In math, the student was much more confident with numbers and able to form them accurately (Tr. p. 223). She was able to add and subtract using her fingers, a number line, or objects (Tr. p. 223). The student might have experienced difficulty in math with recognizing higher numbers 31 to 100, but she was very confident working with numbers one through 30 (Tr. pp. 478-79). Word problems were still "tricky" for the student at the end of the school year, but she made a substantial amount of progress from the beginning of the school year (Tr. p. 223). During cross-examination, the teacher testified that by June 2019 the student made progress with "all of the sequencing" relating to comprehension (see Tr. pp. 467-69; see also Parent Exs. II; SS; TT). The teacher confirmed the student was expected to finish the 2018-19 school year with "typically developing end of Year (1) progress in reading" (Tr. pp. 481-82; Parent Ex. II at p. 4). Review of the student's report cards for 2018-19 reflect her progress over the course of the 2018-19 school year (see Parent Exs. GG; HH; II).

Turning to the 2019-20 school year, when looking at the goals included in the May 2019 IEP, the Year 2 teacher testified that the student did not receive OT or speech-language therapy at NAIS, but that the skills in the goals were addressed at NAIS (see Tr. pp. 375-385, 519-232; see also Tr. p. 585-86). Her testimony further noted the student met several of the goals included in

the IEP prior to the start of the 2019-20 school year, or subsequently, as the goals were addressed at NAIS and/or the student made progress working on them and the teacher moved on from there (see Tr. pp. 375-76, 520-23, 587; Parent Ex. K at pp. 4-26).

Testimony by the Year 2 teacher indicated with regard to grading criteria, the British government published the curriculum that included a set of skills students working at average and beyond average levels were expected to achieve by the end of the school year (Tr. pp. 580-81). The student's progress was measured by how many of the different skills in the list she was able to achieve at different points in the school year (Tr. p. 581). According to the teacher's testimony during cross examination, the student had difficulty with making more complex inferences when reading a story, but that was something the teacher noted was "quite typical of a student in the (Y)ear 2 class to be working on" (Tr. p. 590). Toward the beginning of the 2019-20 school year the teacher saw "great improvement" in the student's spelling, something that continued throughout the school year and was reflected in the student's (at least average) performance on weekly spelling tests (Tr. p. 591). Additional testimony about the student's progress revealed that at the beginning of the 2019-20 school year, the student had no issues describing the beginning, middle, and end of the story (Tr. p. 592).

According to the Year 2 teacher's testimony, the student made expected progress consistent with age expectations (Tr. pp. 538-59).²² She achieved "very well" in phonics and literacy, and in math, she was "right where we would expect her to be" (Tr. p. 539). The teacher reported that the student improved her spelling, her handwriting, wrote longer sentences, acquired new forms of punctuation, and was able to apply adjectives to her writing, and learned new vocabulary, applying it in her work (Tr. p. 539, 588). The student's writing pieces were much longer toward the end of the (school) year, and she was able to express herself very well in written form (Tr. p. 539). In math, the student was able to pick up on new subjects, learned new skills, and moved from needing manipulatives to phasing them out and using more mental and written methods (Tr. p. 539). Socially, the teacher indicated NAIS targeted needs for the student, particularly in helping her develop an understanding of social interactions (an ongoing process) whereby the student made progress throughout the year (Tr. p. 540). The student also made progress in organizing herself and in having conversations in small work groups and with partners (Tr. p. 540). Even when the NAIS moved to online schooling in March (2020) the student was able to work with a partner online (Tr. p. 540). The student did well with live lessons online as the teacher still focused on communication targets during virtual learning (Tr. p. 540). The teacher reported she saw no negative differences in the student's performance from the start of virtual learning towards the end

²² Review of the student's report cards for the 2019-20 school year revealed in the category of "Performance Against Age Related Expectations," the student ended the school year "meeting expectations" in reading, writing, math, IPC, PE, music, and art (see Parent Exs. FF; EEE). The student exceeded expectations in science, Spanish, and dance (see Parent Exs. FF; EEE). I note that by the end of the 2019-20 school year, the year summary comment about the student's performance in Spanish class included in the report card stated, "[Student] always uses the Spanish to communicate in class and enjoys engaging in learning games, often volunteering to lead the class by calling out the pictures, reading the words, and giving instructions" (Parent Ex. EEE at p. 1).

of virtual learning (for 2019-20) (Tr. pp. 588-89). For math, the teacher assistant called the student to give her extra support for particular topics other than calculations (Tr. p. 610).²³

Overall, the Year 2 teacher testified that the program at NAIS was "very much so" appropriate for the student during the 2019-20 school year (Tr. pp. 540-41). She indicated that the small classes, familiarity with multiple teachers, the school-wide community, and being in a class with non-disabled peers benefitted the student (Tr. pp. 541-42). The student was able to check-in with classmates if she was unsure of an instruction and had the support of various partners in class (Tr. p. 542). In addition, whatever the context (i.e., working on a project, snack time chat), talking with peers was helpful to the student (Tr. p. 542).

During the impartial hearing, the student's mother's testimony indicated that due to the help the student received at NAIS (over the years), the student grew in her reading ability and at the time of the impartial hearing, the student was an avid reader, and she read in both Spanish and English (Tr. pp. 727-28, 730).

In determining that the parents failed to demonstrate that NAIS was an appropriate unilateral placement for the student for either the 2018-19 or 2019-20 school years, the IHO found that the school "did not provide the bilingual programming that the [s]tudent required, did not provide special education instruction, and did not provide related services or otherwise meet the [s]tudent's related service needs" (IHO Decision at p. 12). In support of her determination, the IHO noted that although the student had undisputed bilingual language needs, communication and social-emotional needs, and expressive and receptive language delays and OT needs, NAIS did not employ therapists qualified to provide speech-language or OT services and the school provided solely general education classes with monolingual instruction in English (*id.* at p. 12). The IHO also noted that the parents had consistently asserted that the student required bilingual instruction in Spanish and English and speech-language and occupational therapy to meet her special education needs; in addition, the parents sought compensatory education from the district for speech-language therapy and occupational therapy services they contended were owed to the student through pendency, while acknowledging that NAIS did not provide either service to the student as part of its program (*see id.* at pp. 8, 9-10, 13-14).

I substantially concur with the IHO's reasoning and agree that the parents have failed to demonstrate that NAIS was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years. Although NAIS utilizes an educational model based on identifying each student's unique strengths and weaknesses and tailoring instruction to their individual learning style and functional level, evidence in the record reflects that NAIS applied this "inclusion model"

²³ The hearing record reflects that, with regard to closings because of the pandemic, NAIS began remote learning instruction on March 18, 2020 (Parent Ex. EE at p. 1). The student fully engaged in 26 out of 29 days of remote instruction, as there were issues with technology and logging on and signing in to connect to NAIS (Tr. p. 602; Parent Ex. EE at p.1). Instruction was primarily synchronous during live lessons led by teachers, support groups in online calls, and work was provided to students in a variety of ways (Parent Ex. EE at p. 1). Students received feedback on their work (*id.*). Lessons were also recorded as needed, so students could access lessons asynchronously to ensure access to all learning throughout each day (*id.*). Attendance was documented (*id.*). The student performed well, particularly in science and IPC, as she enjoyed researching topics of interest at home to enrich her curiosity; she worked independently, and she used the remote platform to talk about her research (*see* Tr. pp. 599-604).

to the student, there is also a dearth of evidence as to how NAIS provided the student with individualized instruction and related services to address the nexus of her bilingual, expressive and receptive language, communication and social-emotional needs given that the school provided a general education environment without any related service providers in the areas of speech-language or OT, an additional need presented by the student. Although the student's teachers were admirably attuned to difficulties the student encountered as she navigated the general education curriculum and utilized the school's educational philosophy to provide her with some curriculum modifications and academic and social supports that allowed her to progress in several academic areas, the opinion of the student's teachers that the school's methodology, structure and environment worked well for some special education students because it was based on an "inclusion model" – a UK pedagogical practice which focuses on assessing individual student needs without a strict delineation between general education needs and special education needs - is not sufficient to demonstrate that the unilateral placement was appropriate for the student. While some courts have recently 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), the hearing record in this case is insufficient to support a finding that NAIS met the student's educational needs, including her social-emotional, speech-language, OT and communication needs, even in light of the more relaxed "general educational milieu" standard. Indeed, the danger of applying a more liberal standard in unilateral placements is that an educational environment which might be deemed desirable for any student – such as individualized attention to the unique learning profile of each student and collaboration between teachers to address the students' individual needs - may improperly become conflated with specially designed instruction which addresses the unique needs of a student who has been classified and found eligible for special education and related services (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]). In this matter, the evidence in the hearing record concerning the inclusion model utilized at NAIS, and the strategies and interventions stemming from that model, are insufficient to overcome the lack of evidence of specialized instruction and related services with respect to several areas of significant need for the student.

Additionally, although a unilateral placement need not provide every service necessary to maximize a student's potential in order to be found appropriate (see M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens, 2010 WL 1005165, at *9), here, as discussed above, the lack of bilingual, speech-language and OT services for the student, who indisputably presents with significant needs in these areas, precludes a finding that, under the particular circumstances of this case, NAIS was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years. Accordingly, there is no basis to disturb the IHO's determination finding that the parents failed to prove NAIS was an appropriate unilateral placement for which they were entitled to tuition reimbursement.

C. Pendency

The parent asserts that the district should have provided the student with speech-language therapy and OT services pursuant to pendency after the parent filed the initial due process complaint notice in this matter on May 19, 2019. In her post hearing brief, the parent asserted that the district was required to provide the student with speech-language therapy and OT pursuant to pendency, further alleging that because "the parents agreed with the first IEP created for [the student] it should be deemed to establish the pendency placement" (IHO Ex. I at pp. 4-5). According to the parent's amended due process complaint notices, the parent challenged the district's failure to recommend a specific program to implement the student's IEP for the 2017-2018 school year, but did not challenge the related services, or the special transportation mandated by the IEP (Parent Exs. A at p. 2; G at p. 2).²⁴ Accordingly, the parent alleged that the district "was responsible for providing speech/language therapy and occupational therapy, as well as specialized transportation, pursuant to [] pendency" (*id.*).

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency

²⁴ As part of its answer on appeal, the district submits a copy of the parent's May 7, 2018 due process complaint notice challenging the district's provision of FAPE to the student for the 2017-18 school year (SRO Ex. 1) as support for an argument that the August 2017 IEP should not be the basis for the student's pendency in this proceeding. However, it is not necessary to accept this document for review as even accepting the parent's assertion that the August 2017 IEP was the last agreed upon IEP, as discussed herein, the parent is not entitled to separate the recommended related services from what would have been the student's pendency program. Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The August 2017 IEP recommended that the student be placed in a 6:1+1 Spanish special class in an NPS with placement in an interim 12:1+1 Spanish special class in a specialized school pending the NPS placement (Dist. Ex. 1 at p. 36). The CSE also recommended that the student receive three 30-minute sessions per week of individual OT, and five 30-minute sessions per week of individual speech-language therapy (id.). Rather than seeking this program as a stay-put placement for the student—which is understandable considering the parent asserted that the district never offered a school placement—the parent is seeking to split the related services apart from the student's program and compel the district to implement those services at the parent's chosen school as part of pendency. However, pendency is not a divisible, a-la-carte program that may change at any given time as such a practice would undermine the "status quo" concept so prevalent in stay-

put jurisprudence (see Application of the Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 18-139). When the parent unilaterally enrolled the student at NAIS, the parent did so at her own financial risk and can only obtain retroactive reimbursement for the cost of the student's tuition and related services from the district after the IEP dispute is resolved 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 (Ventura de Paulino, 959 F.3d at 526; see Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70). As the student was not entitled to pendency related services to be delivered at NAIS, as requested by the parent, there is no basis for awarding compensatory education services for any such services missed.

VII. Conclusion

Having determined that the parents failed to prove that NAIS was an appropriate unilateral placement for the student for the 2018-19 and 2019-20 school years, the necessary inquiry is at an end and there is no basis to disturb the IHO's determination that the parents were not entitled to tuition reimbursement for the unilateral placement or compensatory education based on an alleged failure by the district to implement pendency.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
 March 4, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER