



The University of the State of New York

The State Education Department

State Review Officer

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No. 21-160

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

Appearances:

Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondents, by Sonia Mendez-Castro, Esq., and Linda A. Goldman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondents (the parents) for their son's tuition costs at the Lindamood-Bell Learning Center (LMBLC) for the 2019-20 school year. 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

In a letter to the district dated May 11, 2018, the parents requested an initial CSE meeting to discuss the student's needs, indicating that the student demonstrated "anxiety and delays" and required "a full time special education program" and that the parents were obtaining an evaluation

of the student, which they wanted the CSE to consider (Parent Ex. C).¹ The parents placed the student at the Aaron School where he attended for the 2018-19 school year (see Dist. Ex. 3).

On April 9, 2019, the parents accepted the terms set forth in an electronic copy of an enrollment contract and handbook for the student's attendance at LMBLC for the 2019-20 school year (see Parent Ex. F).²

In May 2019, the district conducted evaluations of the student in the areas of occupational therapy (OT) and speech-language therapy and, in June 2019, obtained a report of the student's progress from his teacher at the Aaron School (Dist. Exs. 1-3).

In a letter to the district dated August 21, 2019, the parents indicated that, as of that date, a CSE had failed to convene to consider the student's eligibility for special education and develop an IEP for the 2019-20 school year (Parent Ex. B at pp. 1-2). The parents notified the district of their intent to unilaterally place the student at LMBLC for the 2019-20 school year and seek public funding for the costs of the student's tuition (id.).

A CSE convened on September 9, 2019 to conduct the student's initial review (Dist. Ex. 5; see Dist. Exs. 4 at p. 1; 7 at p. 1). The CSE found the student eligible for special education as a student with a speech or language impairment and recommended that the student attend a 12:1 special class at a district non-specialized school and receive related services of OT and speech-language therapy (Dist. Ex. 5 at pp. 1, 20-21, 24).³

On September 16, 2019, the parents also enrolled the student in additional "sensory-cognitive instruction" at LMBLC (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated December 9, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year (see Parent Ex. A).⁴ The parents asserted that the district failed to develop an IEP for the student prior to the beginning of the 2019-20 school year and that the September 2019 CSE was not timely held so as to allow the parents "sufficient notice at the time they had to make a decision about the education of their child" (id. at p. 2).

¹ The evidence in the hearing record indicates that a neuropsychological evaluation was conducted in January 2019 (see Dist. Ex. 5 at pp. 1-3, 7-8); however, the hearing record does not include a copy of this evaluation report.

² The Commissioner of Education has not approved LMBLC as a school with which school districts may contract for the instruction of students with disabilities (8 NYCRR 200.1[d], 200.7).

³ The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

⁴ The parent also alleged that the district violated section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a) (Parent Ex. A at p. 3).

In addition, the parents alleged that the district had not conducted or relied on sufficient evaluative measures, the September 2019 CSE was not duly constituted, and the district impeded the parents' ability to participate in the CSE process (Parent Ex. A at p. 2). As for the September 2019 IEP, the parents alleged that the present levels of performance, management needs, and annual goals were vague and inadequate and the recommended 12:1 special class was insufficiently structured and supportive (id. at pp. 2-3). The parents also argued that the CSE failed to recommend a behavioral intervention plan (BIP) or positive behavioral interventions for the student, failed to include promotion criteria on the IEP, and refused to recommend 12-month school year services (id.). Finally, the parents contended that, "to date, they had not received a placement" for the student to attend for the 2019-20 school year (id. at p. 3).

For relief, the parents requested district funding of the costs of the student's attendance at LMBLC for the 2019-20 school year including transportation (Parent Ex. A at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened on April 23, 2021 and concluded on May 18, 2021 after the second day of proceedings (see Tr. pp. 1-81). During the impartial hearing, the district conceded that it failed to offer the student a FAPE for the 2019-20 school year (see Tr. pp. 3-4, 15).

In a decision dated June 15, 2021, the IHO found that the district failed to offer the student a FAPE for the 2019-20 school year (IHO Decision at p. 13). Next, the IHO found that the parents met their burden to prove that LMBLC was an appropriate unilateral placement for the student for the 2019-20 school year (id. at pp. 12-13). The IHO opined that, although LMBLC was "not a traditional school," it provided the student with 1:1 and small group instruction, as well as "individualized and differentiated instruction" specially designed to meet the student's unique needs (id. at p. 12). The IHO noted that LMBLC evaluated the student frequently, communicated with outside related services providers, provided a language-based program, and developed a behavior plan for the student (id. at pp. 12-13). The IHO also noted that the student had made "some progress" during the 2019-20 school year while attending LMBLC (id. at p. 13). As for equitable considerations, the IHO found that the parents participated in the CSE process and communicated their concerns to the district (id.).

Based on the foregoing, the IHO ordered the district to reimburse the parents for the costs of the student's attendance at LMBLC for the 2019-20 school year (IHO Decision at p. 14).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that LMBLC was an appropriate unilateral placement for the student for the 2019-20 school year. In particular, the district notes that the evidence in the hearing record indicated that LMBLC used a general education curriculum to instruct the student that lacked a special education component and there was no evidence as to how the structure of the curriculum program addressed the student's specific delays in reading, writing, and math. The district also argues that the LMBLC progress reports in the hearing record did not reflect that the teachers addressed the student's needs. The district contends that the evidence did not reflect that the student's teachers at LMBLC were State-certified in special education. While the district acknowledges that teachers at a unilateral placement need not be

State-certified, it argues that the hearing record also lacks objective evidence that the teachers had reasonable qualifications related to the student's deficits. Concerning related services, the district argues that the parents did not show how LMBLC addressed the student's documented speech-language needs, fine motor deficits, or social/emotional needs. The district asserts that the IHO erred in finding that the lack of related services at LMBLC did not preclude a finding that the unilateral placement was appropriate. Finally, the district argues that the hearing record lacks evidence of the student's remote learning plan for that portion of the 2019-20 school year when the student received instruction remotely.

In an answer, the parents respond to the district's allegations with admissions and denials and argue that the IHO's decision should be upheld in its entirety.

V. Applicable Standards

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

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

§ 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Andrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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" (Andrew F., 137 S. Ct. at 1000).

70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

As neither party has appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year or that equitable considerations weighed in favor of the parents' request for relief, those findings have become final and binding on the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). Therefore, the only issue to be addressed is whether the IHO erred in finding that LMBLC was an appropriate unilateral placement for the student for the 2019-20 school year.

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

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

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

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

A. Student's Needs

Although not in dispute on appeal, a discussion of the evidence of the student's special education needs is necessary to evaluate the appropriateness of the parents' unilateral placement of the student at LMBLC for the 2019-20 school year.

The student's September 9, 2019 IEP included results from a January 9, 2019 neuropsychological evaluation (Dist. Ex. 5 at pp. 1-2). According to results of an administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V), the student's full-scale IQ of 82, which fell in the low average range, reflected "highly variable" performance across skill areas (id. at pp. 1, 3). The student exhibited average skills on the verbal comprehension and visual spatial indices, skills in the low average range for working memory, and in the very low range on measures of fluid reasoning and processing speed (id. at p. 3). To mitigate the effects of the student's low working memory and processing speed on the test results, a General Ability Index (GAI) was calculated, and his score of 91 fell in the low average range (id.). In addition, on the Test of Nonverbal Intelligence-Fourth Edition (TONI-4), which measured nonverbal intelligence and removed the impact of language difficulties from the assessment results, the student received a score of 96, which fell in the average range (id.). The September 2019 IEP also included results from administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Woodcock-Johnson Tests of Achievement-Fourth Edition (WJ-IV), and the Gray Oral Reading Test-Fifth Edition (GORT-5) (id. at pp. 1-2). The results indicated that the student exhibited "significant" academic delays in reading, writing, and math (id. at p. 3). According to the IEP, the student received diagnoses of specific learning disability with impairments in reading, written expression, and mathematics (id.).

At the time of a May 22, 2019 OT evaluation, the student was nine years old and in third grade (Dist. Ex. 1 at p. 1). The May 2019 OT evaluation consisted of the Test of Visual Motor

Integration Skills, the Jean Ayers Sensory Motor Processing Checklist, clinical observation, a fine motor assessment, a functional mobility assessment, the One Minute Word Sentence Copying Test, a record review, and an interview with the student's mother (id. at p. 2). According to the OT evaluation report, the student exhibited "poor" eye contact and did not consistently respond to his name, but "worked hard" and completed all tasks (id.). The occupational therapist reported that the student's self-regulation skills were "very poor," and he was "constantly" moving (id.). Additionally, the report indicated that the student had difficulty following multi-step directions, required verbal repetition and modeling, was easily distracted, required "constant" verbal cues, and was unable to work independently (id.). The occupational therapist reported that the student displayed "poor" postural control during writing tasks, difficulty with balance, and while he was able to complete gross motor tasks such as jumping jacks and skipping he had difficulty "stopping his body" when he had completed the task (id.). Assessments of the student's sensory motor processing indicated that the student exhibited hyperactivity, difficulty with localizing objects in his visual field, and "dysfunctional" coordination of eye movements and motor planning skills (id. at p. 3). Additionally, the occupational therapist reported that the student's vestibular awareness was "not intact," but also that he did not have difficulty "tuning out background noises when working" (id.). The student used an "inefficient quadruped grasp" when writing, and his sentence handwriting was illegible due to deficient spacing and improperly formed letters (id.). According to the report, the student was able to draw most of the designs presented during the Test of Visual Motor Integration, but they lacked detail and were drawn "immaturely" as he omitted some lines and drew the designs disproportionately (id.). The student's life skills were described as "functional" as he was able to perform age-appropriate fine motor dressing skills such as using Velcro, zippers, snaps, and buttons (id. at p. 4). Overall, the occupational therapist concluded that the quality of the student's work was below grade level given his age, and he had "poor" sensory motor integration/processing skills which impacted his behavior (id.). The occupational therapist recommended that the student receive OT and assistive technology to improve his written communication skills (id.).

A May 26, 2019, bilingual speech-language evaluation was conducted to assess the student's current abilities and his need for speech-language therapy (Dist. Ex. 2 at p. 1).^{6, 7} At the time of the evaluation, the parent expressed concern regarding the student's "weak" language skills, academic performance, impulsivity, articulation, and difficulty processing information which required needing to have "everything broken down," and noted that he was receiving private speech-language services (id.). The speech-language evaluation consisted of a teacher interview, behavioral observation, an oral peripheral examination, measures of decoding, reading comprehension and articulation skills, and administration of The Clinical Evaluation of Language Fundamentals-5 (CELF-5) and the Crowley and Baigorri School-age Language Assessment Measures (SLAM) (id. at p. 2). The evaluator reported that during the evaluation the student was "well-behaved," transitioned appropriately, and responded to questions; however, he was also

⁶ District exhibit 2 is not correctly paginated, and in this decision the pages of the report will be referred to in consecutive order beginning with page 1 (see Dist. Ex. 2 at pp. 1-6).

⁷ According to the bilingual speech-language evaluation report, the student had "exposure to Hebrew in his home" and although he conversed in "basic Hebrew" his receptive and expressive language skills were stronger in English, and he preferred to converse in English (Dist. Ex. 2 at p. 1).

impulsive and had difficulty staying still, such that he needed redirection, modeling, cuing, breaks, support during conversations and play, and support with reading comprehension tasks (id.).

The May 2019 speech-language evaluation report indicated that the student exhibited "moderate-severely" diminished receptive and expressive language skills, pragmatic language deficits, "mildly reduced" decoding and reading comprehension skills, and a "mild" articulation disorder (Dist. Ex. 2 at pp. 1-2). Specifically, on a bilingual administration of the CELF-5, the student exhibited severely below average skills on the word classes and semantic relationships subtests; below average skills on the following directions, formulated sentences, recalling sentences, understanding spoken paragraphs, and sentence assembly subtests; and average skills on the word definitions subtest (id. at pp. 2-3).⁸ The resultant CELF-5 language indices showed that the student demonstrated a mild deficit in language content, a moderate deficit in language memory, and a moderate to severe deficit in receptive and expressive language, with an overall moderate to severe deficit in his core language abilities (id. at p. 4). According to the evaluator, receptively, the student had difficulty remaining focused, processing and understanding information presented orally, following multi-step directions, analyzing auditory information, recalling details and sequence of events based on stories, and making inferences and predictions (id. at p. 2). Expressively, the student formulated short, syntactically simple sentences, exhibited limited vocabulary, used limited amounts of detail and descriptive language, and exhibited difficulty establishing eye contact and maintaining topics during conversation (id.).

During an informal language sample, the student demonstrated the ability to put five out of six sequencing picture cards in correct order, indicating average sequencing skills (Dist. Ex. 2 at p. 4). He was able to form a narrative based on the pictures, but his sentences and vocabulary were simplistic and limited (id. at p. 5). When asked questions regarding the picture cards, the student was able to answer only two out of six, indicating weakness in making inferences and with "theory of mind" (id.). According to results of the Goldman-Fristoe Test of Articulation the student's intelligibility during conversation was about 70 percent (id.). The student exhibited slow reading fluency and difficulty decoding multisyllabic words (id.). On measures of the student's decoding and reading comprehension, the student decoded most words accurately, but had difficulty with multisyllabic words and his overall reading fluency was slow (id.). The evaluator reported that the student correctly answered three out of five comprehension questions based on the passage he read, exhibiting difficulty identifying the main idea and making an inference (id.).⁹

At the time of the June 3, 2019 teacher's progress report, the student was in third grade, and attending a 12:1+1 special class at the Aaron School (Dist. Ex. 3 at p. 1). According to the parent, while at the Aaron School her son struggled academically and socially, as he had difficulty forming new friendships, asking his teachers for help, and with fine motor skills such as holding a pencil correctly (Tr. pp. 66-67). She described the student as "sensitive" and indicated that the size of his 12:1+1 special class was "overwhelming" (Tr. p. 67).

⁸ The speech-language pathologist's report included a disclaimer that the student's bilingual/bicultural background may have affected the validity and reliability of formal assessment results (see Dist. Ex. 2 at p. 1).

⁹ Additionally, the evaluator concluded that the student's oral peripheral exam, and hearing, voice, and fluency skills were all within normal limits (Dist. Ex. 2 at p. 5).

Regarding academic skills the June 2019 teacher's report indicated that the student was functioning at a 2.5 grade equivalent in decoding, reading comprehension, and listening comprehension (Dist. Ex. 3 at p. 1). His reading fluency and math computation skills fell at a 1.5 grade level, and his writing and math problem-solving skills fell at the first-grade level (id. at pp. 1-2). In the area of reading, the student was reportedly able to decode but struggled with fluency, identified key elements of a story with support, and was working on inferencing and making predictions (id. at p. 1). In writing, the student was working on completing sentences without supports, needed "maximum support" to add details to his written work, and he had difficulty with spelling and using correct punctuation and tenses (id. at pp. 1-2). In the area of math, the student was able to add numbers one through ten using manipulatives, tell time, and create bar graphs (id. at p. 2). The student had difficulty with subtraction, identifying correct operations, understanding the "language of math," and combining math skills (id.). According to the teacher report, the student struggled to retain previously learned concepts and with starting and completing independent work (id.).

Socially, the June 2019 teacher report reflected that the student was a hard worker and self-confident (Dist. Ex. 3 at pp. 2-3). He had one close friend in the classroom, and struggled to make connections with peers and to express his needs to teachers (id. at p. 3). The teacher report indicated that the student was not able to insert himself into conversations or play with peers (id.).

With respect to physical development, the June 2019 teacher report indicated that the student's endurance during gross motor activities had improved as he was now able to engage in physical activity for 15 minutes before needing a break (Dist. Ex. 3 at p. 3). The student struggled to hold a pencil correctly, manipulate objects appropriately, and maintain an upright posture at his desk due to core muscle weakness (id.). Finally, the June 2019 teacher report noted concerns about the student's personal hygiene (id.).

Parental concerns as of September 2019 included that the student was shy and kept to himself, he did not self-advocate, and that his difficulty with expressive language negatively affected his ability to socialize with peers (Dist. Ex. 5 at p. 7). The parents also expressed concerns regarding the student's stress level which impacted the frequency of tics he exhibited (id. at p. 6). Additionally, the parents opined that the student needed a 12-month program, that a 12:1 special class in a community school was too large for him, and that he needed more support (id.).

During the impartial hearing, the parent provided direct testimony by affidavit in which she described the student as "highly distractible, impulsive, and sensitive" to noise and texture (Parent Ex. Y at p. 2).¹⁰ The student reportedly displayed "idiosyncratic behavior, tics, and uncontrolled behaviors" (id.).

¹⁰ The parent's May 2021 direct testimony is relevant to the issue of whether the unilateral placement is appropriate to the extent it described the student's experience at LMBLC during the 2019-20 school year.

B. Academic Instruction

With regard to the parties dispute over whether LMBLC was appropriate to address the student's needs, the evidence in the record as described herein shows that instruction provided by LMBLC was reasonably calculated to provide the student with educational benefit.

The evidence in the hearing record described that LMBLC employed an "interactive, balanced approach" which benefitted "many types of students" including advanced students, and students with needs such as a flexible environment or schedule, school anxiety, a non-traditional school setting, and diagnoses such as dyslexia and autism (Parent Exs. D at p. 1; X at p. 3). According to the program description, LMBLC utilized sensory-cognitive instruction as well as a "full curriculum" to "develop the imagery-language foundation that underlies learning and literacy" (Parent Ex. D at p. 1). The student's March 23, 2020 learning ability evaluation report indicated that the LMBLC instruction included "Visualizing and Verbalizing for Language Comprehension and Thinking" which provided "sensory-cognitive development of concept imagery" to increase "the ability to create an imaged gestalt (whole) from oral and written language" to support the development of students' "oral vocabulary, oral language comprehension, reading comprehension, written language expression, ability to follow directions, and critical/analytical thinking" (*id.*). In addition, the "Seeing Stars" program provided "sensory-cognitive development of symbol imagery" to increase "the ability to visually image sounds and letters within words" which supported the development of "phonemic awareness through the multisyllable level, visual memory, word attack, word recognition, spelling, contextual reading (both accuracy and fluency), and reading comprehension" (*id.*). The program reportedly developed the "imagery-language connection for spontaneous self-correction and accurate, fluent contextual reading" (*id.*).

The director of LMBLC provided testimony by affidavit in which she described the program, and the student's performance and progress at the school (*see* Parent Ex. X). The director was responsible for implementing the "Seeing Stars, Visualizing and Verbalizing, On Cloud Nine, and Talkies" programs (*id.* at p. 1). The director's responsibilities included implementing and recording the recommended instruction plan and recording the student's progress (*id.* at p. 3). LMBLC provided one on one and small group instruction which was differentiated based on a student's abilities (*id.*). Instruction at LMBLC emphasized the stabilization of underlying processes of phonemic awareness, memorization of sight words, and language comprehension (*id.* at pp. 3-4). The students were evaluated using eight to twelve different standardized measures which assessed vocabulary, receptive and expressive language, reading fluency, comprehension, phonemic awareness, symbol imagery, spelling, math, sound symbol relationships, sight words and sounding out nonsense words (*id.* at p. 4). Weakness in phonemic awareness, symbol imagery or integration of the two indicated a recommendation for the "Seeing Stars" program (*id.*). Weakness in language comprehension, including mathematics, indicated a need for the "Visualizing and Verbalizing" program (*id.*).

During the 2019-20 school year the student's instruction was provided in both one-to-one sessions and small groups of three students (Tr. pp. 29-30). His needs were addressed at LMBLC through the "Seeing Stars" program which focused on his ability to visually image sounds and letters in words through sensory-cognitive development of symbol imagery (Parent Ex. X at p. 5). The student also participated in the "Visualizing and Verbalizing" program which supported the

development of his oral vocabulary, oral language comprehension, reading comprehension, written language expression, ability to follow directions, and critical/analytic thinking (*id.*). The student participated in the "On Cloud Nine" math program which improved his understanding of mathematical concepts and computation through sensory-cognitive development of numeral imagery and concept imagery (*id.*; *see* Tr. pp. 44-45).

Initially, on appeal, the district notes that the student's teachers at LMBLC were not required to be State-certified in special education (*see* Tr. pp. 28, 29). As the district acknowledges, a unilateral placement need not employ certified special education teachers (*Carter*, 510 U.S. at 13-14). Further, the LMBLC director testified that the school required teachers to have a bachelor's degree and to go through a screening process that included language and spelling assessments, as well as an interview process (Tr. p. 27). After a teacher was hired by LMBLC, he or she was required to complete a two-week training in the Seeing Stars and Visualizing and Verbalizing programs and participate in "extensive mentoring programs," which consisted of observations and written feedback (*id.*). In light of this evidence, there is no basis for a finding that the qualifications of staff at LMBLC would contribute to a finding that the school was not an appropriate unilateral placement.

Turning to the district's argument on appeal regarding the use of a "general education" curriculum, the evidence in the hearing record shows that LMBLC used a "recognized and proven" curriculum through Pearson, which included "standards-aligned courses" and an online learning management system for progress tracking, grading, and record keeping (Tr. p. 38; Parent Ex. D at p. 1). The curriculum was expanded by the school's "curriculum management team" and was presented using "traditional" textbooks and workbooks; as well as with hands-on activities such as acting out stories, science experiments, drawing, visuals, word walls, and manipulatives (Tr. pp. 40-42; Parent Ex. D at p. 1). The LMBLC director could not identify what standards the courses were aligned to, and she acknowledged that the LMBLC curriculum was not a "special education" curriculum (Tr. pp. 38-39). However, the director stated that based on the learning ability evaluation conducted through the enrollment process, the curriculum advisors determined accommodations or modifications to the curriculum for each individual student to address needs in reading, writing, and math (Tr. pp. 39, 63-64). Examples of the modifications provided included "retries" on tests, having material read aloud, use of a scribe, and extra time for assignments (Tr. p. 39). She confirmed that those types of modifications to the curriculum were used with the student (Tr. pp. 39-40). According to the LMBLC director, the student's deficits were addressed during the entire 2019-20 school year by individualized lesson plans, goals, and objectives developed to target and address specific areas of concern (Tr. pp. 61-62).

Special education is defined by federal and State law as "specially designed instruction" (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]) and specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . , the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; *see* 34 CFR 300.39[b][3]). Thus, the district's argument is based upon a flawed premise that academic curricula must be categorized into two separate categories—one for nondisabled students and another for disabled students. However, by definition, specially designed instruction is the adaptation of instruction to allow a student to access a general curriculum and, as such, there

is no merit to the district's argument that the program at LMBLC was inappropriate because it used a general education curriculum, particularly in light of evidence that the school provided the student with accommodations and modifications to allow him to access the curriculum.

Next, the district asserts on appeal that the IHO erred because the hearing record lacked evidence, including in the progress reports, of how the teachers addressed the student's needs.

According to an October 4, 2019 LMBLC progress update, the student was developing his ability to understand and "process" short stories at the fourth-grade level, to increase his speed of "processing" stories, and to develop "imagery" for new vocabulary words (Parent Ex. W at p. 2). The student was working on maintaining "pictures throughout the entire story" to verbalize accurate summaries and "picture longer stories" at his grade level (id.).

The October 30, 2019 progress update indicated that the student had continued to "work at the multiple sentence and whole paragraph level with fourth grade texts" (Parent Ex. W at p. 4). The student reportedly had improved his ability to develop imagery for the "gestalt of the text (the main point)" and was working on developing verbalizations matching his "imagery in a specific and complete manner" (id.). The student's teachers were reportedly highlighting his verbalizations by having him compare what his words communicated to what he was picturing (id.). As the student developed automaticity, he was expected to work on longer fourth grade-level texts (id.). According to the report, the student was applying symbol and concept imagery to math (id. at p. 6). Initially, the student was instructed on using a number line and at that time was working on addition and subtraction facts up to ten (id.). The student had improved his understanding of how addition made numbers larger, subtraction made numbers smaller, and how this related to the number line (id.). The student was reportedly practicing his facts daily to improve automaticity and was learning to apply imagery to word problems in order to determine what information was necessary to solve them, next learning about place value (id.).

According to the November 27, 2019 progress update, the student continued to work on applying "symbol imagery to sight words and reading in context" (Parent Ex. W at p. 8). The student was "reading paragraph-long stories" at a fourth grade-level in order to improve his decoding skills and was developing his reading rate with third grade-level text (id.). The progress update indicated that the student had "reached 700 on our list of 1,000 high-frequency words" and next was expected to work on developing his rate at the fourth grade-level (id.). The student had progressed from developing his concept imagery generation to being able to verbalize what he understood (id. at p. 10). Additionally, the student was able to act out what he was picturing but had difficulty with being able to "use language with adequate specificity and completeness to convey his meaning" (id.). The progress update indicated that the student's ability to follow two-step instructions was developing, and he was working on picturing and verbalizing instructions prior to implementation (id.). In math, the student had continued to "stabilize" addition and subtraction facts up to ten and was working hard to "stabilize a wide range of facts in his math box" (id. at p. 12). The student was focusing on learning the relationship between addition and subtraction and benefitted from picturing concrete objects (id.). The student had begun learning the concept of place value, to picture the difference between the ones and tens values, and would later be introduced to double digit addition (id.).

According to the January 17, 2020 report card the student had "demonstrated strength in grasping the gestalt of curriculum content," his verbalizations had improved, and he had made "good progress with learning his addition and subtraction facts up to 10" (Parent Ex. H at p. 1). The goal for the student was to increase independence with his work, as he required support with most tasks (id.).

According to the March 5, 2020 progress update, the student had increased his ability to process longer text by "picturing stories" and was developing his "stamina of processing" to transition back to curriculum material (Parent Ex. W at p. 14). The student was working on becoming more independent with critical thinking and exhibited strength with this when his "imagery for the story" was strong (id.). The student was working on "stabilizing imagery," increasing "self-monitoring of accuracy of imagery," and would next work on processing third grade level stories with "strong critical thinking" (id.). In math, the student had "stabilized" his simple addition and subtraction facts and was working on "jumping over the tens place" when solving addition problems, applying the concept of place value, and completing problems in his head by using a mental number line (id. at p. 16). The student was working on practicing addition problems with carrying and applying his "imagery" to word problems (id.).

At the time of the April 28, 2020 progress update, the student continued developing "symbol imagery to apply to contextual reading and spelling" and increasing his sight word recognition (Parent Ex. W at p. 18). The student's reading accuracy and rate at a third grade-level had improved, and he was now reading at a fourth grade-level (id.). The student was working on increasing his base of high frequency spelling words and next was going to be introduced to fifth grade reading material (id.). The student had "continued to develop his symbol and concept imagery for math," and practiced building up speed and automaticity with addition and subtraction facts, and the carrying and borrowing processes (id. at p. 20). He was instructed to "verbalize his process" to "stabilize this skill" as well as "picturing and solving word problems" using the skills and operations he had learned (id.). Next, the student was expected to be introduced to multiplication (id.).

According to the May 13, 2020 progress report, the student was more consistent and accurate when solving math problems requiring carrying and borrowing and was expected to increase his automaticity (Parent Ex. W at p. 22). To help him understand the concept of multiplication the student used a strategy of grouping "(digital) cubes" which was expected to improve his ability to carry and borrow more independently (id.).

As reflected on the 2019-20 report card, the student had continued to exhibit growth across all curriculum areas, and he met or exceeded expectations in all classes during the 2019-20 school year (Parent Ex. N). The student had developed a "good grasp" of science concepts and demonstrated an understanding of history during social studies (id.). In language arts, the student's vocabulary had improved, but he required support to review and edit his work for completeness and accuracy (id.).

Additionally, the student regularly engaged in task avoidance behavior during instruction (Tr. pp. 52-53; Parent Ex. W at pp. 4, 6, 8, 10, 12). The LMBLC director testified that the program generally addressed behavior issues "in a positive way" using "motivators" and specific plans LMBLC staff developed "in-house" (Tr. p. 46). To address the student's task avoidance LMBLC

utilized a behavior plan created by the LMBLC director (Tr. p. 54). Further, the student required and benefitted from frequent breaks during instruction (Tr. pp. 56-57).

As such, given the above information, the district's position that the hearing record lacked evidence regarding how the LMBLC program addressed the student's specific delays in reading, writing, and math, as well as task avoidance behavior must be rejected because it is not supported by the evidence in the hearing record.

C. Related Services

On appeal, the district argues that despite the student's "well documented" need for speech-language therapy, LMBLC did not provide the student with individual speech-language therapy from a licensed speech-language provider during the 2019-20 school year. Likewise, the district argues that LMBLC did not address the student's fine motor deficits as described in the May 2019 OT evaluation report. Finally, the district argues that the parents did not present evidence that LMBLC addressed the student's social/emotional needs.

As the district argues, the student was not provided any related services at LMBLC to address his speech-language, fine motor, or behavioral/social/emotional needs (Tr. pp. 43-44, 67-68). However, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of a student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877-78 [2d Cir. 2016] [citations omitted]).

Further, according to the hearing record, the student received some OT outside of school (Tr. p. 68), which is permissible, since a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). The parents do not seek district funding of the costs of the related services they obtained separate from LMBLC; however, the district points to no authority for the proposition that the student's receipt of outside services should be disregarded in evaluating the totality of the circumstances relevant to determining whether LMBLC reasonably served the student's individual needs (see Gagliardo, 489 F.3d at 112).

In addition to outside related services, the evidence in the hearing record also shows that LMBLC addressed some of the student's language and fine motor needs. To address the student's language needs, and particularly his "deficit[s] in . . . symbol imagery processing, phonemic awareness processing, reading fluency [and] concept imagery," the LMBLC director testified that the program at LMBLC was "based in research validated to develop the sensory-cognitive functions needed to process language and text" (Tr. pp. 44-45). As summarized above, instruction at LMBLC addressed underlying processes of phonemic awareness, memorization of sight words, and language comprehension (Parent Ex. X at pp. 3-4).

The student's fine motor difficulties were addressed at LMBLC in consultation with the student's outside occupational therapist, who provided pencil grips, writing paper, sensory toys, and a special chair for use during instruction (Tr. pp. 45-46, 58). The student reportedly responded positively to the tools and techniques (Tr. p. 58).

To address the student's behavior dysregulation and attention deficit, the LMCLC director testified that the program offered "motivators," and "breaks within lessons and activities" (see Tr. pp. 46, 56-57). The LMBLC director indicated that the school used a behavior plan for the student and alluded to the use of a printout and laminated behavior chart (Tr. p. 54). The director indicated that if a student exhibits anxiety, the school could provide a break or the opportunity for the student to speak with a trusted person such as herself or the center director (Tr. p. 57). Further, the student's mother testified that the student demonstrated progress in his ability to socialize with peers, which the mother attributed to the support and environment at LMBLC (Tr. p. 78).

Based on the foregoing, there is insufficient basis in the hearing record to disturb the IHO's finding that LMBLC was an appropriate unilateral placement for the student for the 2019-20 school year notwithstanding that the parent obtained some supportive services elsewhere and the program itself did not offer related services to address the student's speech-language, fine motor, of social/emotional needs.

D. Remote Learning

Finally, on appeal, the district alleges that the hearing record does not include evidence of a remote learning plan for the student notwithstanding that LMBLC transitioned to remote instruction at the onset of the pandemic during the latter portion of the 2019-20 school year.

The evidence in the hearing record shows that, during the 2019-20 school year, instruction was provided in person until March 12, 2020, when remote instruction began due to the COVID-19 pandemic (Tr. pp. 26-27). While the evidence in the hearing record does not include a formal written "remote learning plan," the district has pointed to no authority for the proposition that such a plan was required for the student's instruction at LMBLC. The district's argument that LMBLC should have made a formal written plan for the student during spring 2020 at least approaches, if it does not cross into frivolity, given that State and federal authorities did not require public school districts to amend student IEPs when switching to remote learning during the school closures and instead, the State Education Department provided guidance, in conformity with federal guidance, that school districts would be provided as much flexibility as possible factoring in the health and safety of students and faculty (see "Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," Office of Special Educ. [March 27, 2020], <http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf>). Further, there is sufficient evidence in the hearing record to show that the student continued to receive specially designed instruction while attending LMBLC remotely.

According to the hearing record, the student followed the same schedule during remote instruction as he had previously during in-person instruction (Tr. pp. 54-55, 75). The student was provided with a laptop and document camera with which the student could show his desk on

camera, allowing "for a shared workspace between the teacher and . . . the student" (Tr. pp. 42, 75). In addition, the student was provided materials previously used in his classes including word boxes for learning and practicing words and math facts, Visualizing and Verbalizing materials, and worksheets, which were emailed to the parents to print out for the student to complete under the document camera (Tr. p. 42). Remote classes took place live and the LMBLC director and parent ensured that the student was present during online instruction (Tr. pp. 55, 76). Online instruction for the student was reportedly individualized and differentiated in the same way that it was in person (Tr. pp. 55-56). The LMBLC staff addressed the student's behavior of task avoidance through a digital version of the behavior plan previously utilized during in-person instruction (Tr. pp. 53-54). The student's mother testified that the student made progress during online learning (Tr. p. 76).

Based on the foregoing, the hearing record shows that the LMBLC continued to provide the student with specially designed instruction for the portion of the 2019-20 school year when the student received remote instruction.

VII. Conclusion

As noted above, the IHO's determinations that the district denied the student a FAPE for the 2019-20 school year and that equitable considerations weighed in favor of an award of tuition reimbursement are final and binding. In addition, the evidence in the hearing record supports the IHO's finding that LMBLC was an appropriate unilateral placement for the student for the 2019-20 school year.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
September 10, 2021**

**JUSTYN P. BATES
STATE REVIEW OFFICER**