



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 21-075

**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 Frank J. Lamonica, Esq.

Law Offices of Regina Skyer and Associates, LLP, attorneys for respondent, by Abbie Smith, 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 respondent (the parent) for his daughter's tuition costs at the Millbrook School (Millbrook) and the Beekman School (Beekman) for the 2018-19 school year. The appeal must be sustained.

#### II. Overview—Administrative Procedures

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

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

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

### **III. Facts and Procedural History**

The student received diagnoses of dyslexia and dysgraphia and a CSE found the student eligible for special education as a student with a learning disability in 2012 (Parent Ex. I at p. 2). A CSE convened on or around June 18, 2014 to develop an IEP for the student's 2014-15 school year and recommended integrated co-teaching (ICT) services, speech-language therapy, counseling, and testing accommodations (Parent Ex. I at p. 4).<sup>1</sup> According to the parent, no CSE convened subsequent to the June 2014 CSE meeting (see Parent Ex. C at p. 1; June 2020 Due Process Compl. Notice at p. 2). The hearing record indicates that the student attended nonpublic

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<sup>1</sup> The hearing record does not include a copy of the June 2014 IEP.

schools from preschool through eighth grade, including specialized nonpublic schools for students with learning disabilities (Parent Ex. I at p. 2, 9). During the 2015-16 and 2016-17 school years, the student attended the boarding school program at Millbrook (see id. at pp. 1-2; IHO Ex. I at p. 1).<sup>2</sup>

On March 5, 2017, the parent executed an enrollment contract for the student's attendance at the boarding school program at Millbrook for the 2017-18 school year (eleventh grade) (Parent Ex. G).

In a letter to the district dated August 21, 2017, the parent noted that a CSE had not convened to develop an IEP for the student for the 2017-18 school year (Parent Ex. A at pp. 1-2). Therefore, the parent notified the district of his intent to unilaterally place the student at Millbrook for the 2017-18 school year and seek tuition reimbursement from the district "if the district d[id] not offer the student an appropriate program" (id. at p. 1).

The student began attending Millbrook for the 2017-18 school year; however, according to the parent, by December 2017, the student began exhibiting symptoms of an eating disorder and was placed at a recovery center out of State for therapeutic support and treatment (see Parent Ex. B at p. 2).<sup>3</sup>

In a letter to the district dated May 1, 2018, the parent notified the district that he was placing the student at Beekman for the period of May 1, 2018 to June 30, 2018 and intended to seek district funding for the costs thereof (Parent Ex. B).

On June 1, 2018, the parent executed a contract with Millbrook for the student's attendance at the boarding school program during the 2018-19 school year (twelfth grade) (Parent Ex. N). For the 2018-19 school year the student returned to Millbrook; however, according to the parent, in or around Thanksgiving of 2018, the student was enrolled in an outpatient eating disorder program and, thereafter, returned to Beekman in order to continue to get credits toward her high school diploma and continue on the path to college (Tr. pp. 60-61; see IHO Ex. I). On January 2, 2019, the parent executed a contract for the student's attendance at Beekman for the second semester of the 2018-19 school year (Parent Ex. Q). The student returned to Beekman on or around February 4, 2019 (see Tr. pp. 42-43).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated June 13, 2019, the parent alleged that the district's failure to convene a CSE to develop an IEP for the student denied the student a FAPE for the 2017-18 school year (Parent Ex. C at pp. 1-2). For relief, the parent sought tuition reimbursement for the costs of the student's attendance at Millbrook from September 7, 2017 through December 15, 2017, and at Beekman from May 1, 2018 to June 30, 2018 (id.).

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<sup>2</sup> According to the parent, the district funded the student's attendance at Millbrook during the 2016-17 school year pursuant to a settlement agreement (see Parent Ex. A at p. 2).

<sup>3</sup> The parent did not seek district funding for the costs of the out-of-Sate therapeutic program.

In a second due process complaint notice dated June 5, 2020, the parent alleged that the district failed to convene a CSE to develop an IEP for the student for the 2018-19 school year and, therefore, denied the student a FAPE (June 2020 Due Process Compl. Notice at pp. 1-2). For relief, the parent sought tuition reimbursement for the costs of the student's attendance at Beekman for the 2018-19 school year (id. at p. 2).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened on June 30, 2020 for the limited purposes of determining whether the parent's June 2019 and June 2020 due process complaint notices should be consolidated (June 30, 2020 Tr. pp. 1-10). Neither party objected to the consolidation (see June 30, 2020 Tr. pp. 2, 4). In an interim decision dated June 30, 2020, the IHO consolidated the parent's June 2019 and June 2020 due process complaint notices (Interim IHO Decision).<sup>4</sup>

The impartial hearing continued on January 20 and January 28, 2021 (see Tr. pp. 1-159).

In a decision dated January 28, 2021, the IHO found that, as it did "not appear" that the district convened a CSE to review the student's educational placement to either offer a placement or determine the student was no longer eligible to receive special education, the district failed to meet its burden to prove that it offered the student a FAPE for the 2017-18 or 2018-19 school years (IHO Decision at pp. 45-46, 49).

Regarding the unilateral placements of the student during the 2017-18 and 2018-19 school years, the IHO found that "two years of steeply modified general education instruction provided [the student] with a sufficiently appropriate program" and that the student "was . . . able to benefit from that non-special-ed instruction and graduate and move on to college" (IHO Decision at p. 47). The IHO concluded that both schools were appropriate placements that provided "highly individualized instructional program[s]" that allowed the student "to benefit from academic instruction" (id.). As to the district's position that Millbrook and Beekman were general education programs, the IHO opined that some students may be "capable of benefiting from demanding and challenging general education coursework when it is delivered in a sharply modified setting (such as a residential or tutorial program, or even perhaps in very small class settings) by general education teachers, but who could not benefit from the same program delivered in classes of 30-35 students" (id.). The IHO further indicated that the district could not both argue that the student did not need special education (such that she was not entitled to a FAPE) and that "the family erred when they provided essentially the same academic curricula," namely general education (id.). Based on the foregoing, the IHO concluded that the unilateral placements were appropriate for both school years (id.).

As for equitable considerations, the IHO concluded that, "given the paucity of clinical support for a residential program" the district would be liable for the reasonable costs of the student's unilateral placement "capped, for each of the two years in question, by the cost of th[e]

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<sup>4</sup> Although the cover page of the IHO's decision references hearing dates of August 9, 2019 and July 23, 2020, email correspondence between the IHO and the parties included in the hearing record reflect that those dates were rescheduled.

student's 2014-15 non-public school program," which was the last year that the student attended a day program at a nonpublic school for students with learning disabilities (IHO Decision at p. 50).<sup>5</sup>

#### **IV. Appeal for State-Level Review**

The district appeals, arguing that the IHO erred in finding that Millbrook and Beekman were appropriate unilateral placements for the 2018-19 school year. The district requests that the IHO's order requiring it to reimburse the parent for the costs of the student's attendance at Millbrook and Beekman for the 2018-19 school year be reversed.

Specifically, the district argues that the parent failed to meet his burden to prove that Beekman and Millbrook were appropriate unilateral placements for the student for the 2018-19 school year.<sup>6</sup> The district notes that the majority of the testimony received at the impartial hearing concerned the appropriateness of the unilateral placements during the 2017-18 school year only. The district asserts that, even after the IHO allowed the parent to supplement the record, he offered only evidence of the student's attendance at and the parent's financial obligations to both schools during the 2018-19 school year.<sup>7</sup> However, the district argues the parents did not offer evidence that either Beekman or Millbrook offered the student specially designed instruction. The district further contends that the testimony of the witness from Beekman established that the Millbrook was not an appropriate placement given that the student ultimately left Millbrook since the school was not comfortable with the student's continued attendance. As for Beekman, the district argues that evidence that the school was not a special education school and did not have a program designed to meet the student's needs belies any conclusion that the school was an appropriate unilateral placement for the student.

In an answer, the parent responds to the district's allegations and argues 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

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<sup>5</sup> In a footnote, the IHO further detailed that amount of tuition eligible for reimbursement included the total charged by both schools "for the period of time that the student actually attended each school," including "any penalty" charged for the student's early withdrawal, the cost of the tuition insurance obtained by the parent, and any enrollment fees, but not including any amount that was already reimbursed to the parent by the tuition insurance policy (IHO Decision at p. 48 n.29).

<sup>6</sup> Although the district references in the request for review that the parent's June 2020 due process complaint notice did not request tuition reimbursement for the student's attendance at Millbrook, it does not allege that the IHO erred in granting the parent relief on this basis (see Req. for Rev. ¶¶ 3, 6; see also June 2020 Due Process Compl. Notice at p. 2).

<sup>7</sup> Although the district notes that it objected during the impartial hearing, on appeal, it does not argue that the IHO erred in allowing the parent to supplement the hearing record (see Req. for Rev. ¶¶ 6-7).

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]).<sup>8</sup>

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. Scope of Review**

As an initial matter, the district has not appealed from those portions of the IHO's decision that found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2017-18 and 2018-19 school years, or that Millbrook and Beekman were appropriate unilateral placements for the 2017-18 school year (see IHO Decision at pp. 45-47). In addition, neither party

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<sup>8</sup> 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).

has appealed from the IHO's determination that capped the amount of tuition that the district would be responsible to fund at the costs of a nonresidential specialized school (see IHO Decision at p. 50). Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). The only issue to be addressed on appeal is whether the IHO erred in finding that the parent met his burden to prove that Millbrook and Beekman were appropriate unilateral placements for the student for the 2018-19 school year.

## **B. Unilateral Placements**

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. 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. The Student's Needs**

The hearing record contains only one exhibit that identifies the student's educational needs, a May 16, 2017 neuropsychological evaluation report (Parent Ex. I). The student was referred for the evaluation by her parents and the educational testing coordinator at Millbrook for the stated purpose of "provid[ing] an up-to-date assessment of [the student's] cognitive and academic skills so as to assist with differential diagnosis and educational planning" (id. at p. 2).

The May 2017 neuropsychological evaluation report included a relevant background history (based in part on interviews with the student and her father), behavioral observations of the student during standardized testing, a review of previous psychological testing, and the results of then-current testing and completed behavior rating scales (Parent Ex. I).

According to the evaluating psychologist, the student had a history of language-based learning difficulties and was reportedly diagnosed with dyslexia in 2009 and dysgraphia in 2010; in 2012 the district found her eligible for special education services as a student with a learning disability (Parent Ex. I at pp. 1-2, 4). The background history indicated that the student attended a private parochial school from kindergarten through fourth grade where she received small-group and individual tutoring to address difficulties with reading, writing, and math (id. at p. 2). However, the student continued to struggle, and in fifth grade she transferred to a school for students with learning disabilities after updated testing revealed broad weaknesses in her development of academic skills (id.). The student found the school for students with learning disabilities insufficiently challenging and subsequently transferred to a second school that specialized in working with students with language-based learning disabilities where she remained for sixth through eighth grade (id.). For ninth grade (2016-17 school year) the student transferred to Millbrook School (see Parent Ex. I at pp. 1-2; IHO Ex. I at p. 1).

The evaluating psychologist reported that the student was positive about her experiences at Millbrook and enjoyed her teachers and classes (Parent Ex. I at p. 2). The student reported finding foreign language challenging, as well as algebra II in which she struggled with the many steps involved and had difficulty organizing her thoughts and transferring her ideas to paper in a clear manner (id.). According to the psychologist, the student reported studying for about two and a half hours per day and, when asked directly, did not report any problems with attention, forgetfulness, or organization (id.). In contrast, the student reported making many careless errors in her work, reading very slowly and needing to re-read things in order to understand them, and having problems with spelling (id. at pp. 2-3). The psychologist reported that the student "attend[ed] tutoring twice weekly at Millbrook for support with math/science and history/French/English" (id. at p. 3). The student also received accommodations consisting of extended time (1.5),

use of a calculator, and testing in a quiet, separate location (id.). According to the psychologist, the student reported that it would be helpful to her to have fewer problems per page, print in a bigger font, and the ability to answer directly on the questions form instead of completing a bubble sheet (id.).

The psychologist indicated that the student had done very well at Millbrook and earned above average grades (Parent Ex. I at p. 3). Although the student struggled with Spanish in ninth grade, she otherwise earned high marks (A- in algebra I and English, B in conceptual physics, and B- in geography and culture) (id.). For tenth grade, the student earned first semester grades of As and B+s and above average marks for effort (id.). In addition, the student made honor roll several times in both ninth and tenth grades (id.).

The psychologist noted that the student's teachers described her as motivated and hard-working and indicated that she placed a lot of pressure on herself to perform and therefore worked under a lot of stress and pressure (Parent Ex. I at p. 3). They characterized the student as anxious, insecure, lacking confidence in her work and worried about grades and teacher approval (id.). However, the teachers also described the student as having well-developed work habits, engaged in class, and generally asking good questions in class (id.).

With regard to the student's behavior during testing, the psychologist reported that the student was "polite and cooperative with the demands of the assessment and came across as a friendly, cooperative and achievement oriented adolescent who functioned against a backdrop of self-doubt which she verbalized often" (Parent Ex. I at pp. 3, 4). According to the psychologist, the student remained attentive, motivated, and task-focused throughout their meetings, even after several hours of testing (id. at p. 3). He noted that the student was not hyperactive or unusually restless but that she did twirl her hair and jiggle her legs on occasion (id.). The psychologist reported that the student had difficulty with planning that seemed to originate from rushing and emotional pressure, and further noted that the student had some difficulty perceiving part-whole relationships (id.). He noted that while the student's language expression was appropriate in form and content, and without gross syntactic error, semantic or paraphasic errors, the student was slow to formulate her thoughts and express her ideas during formal testing (id. at pp. 3-4). The psychologist indicated that the student did not have consistent difficulties with comprehension or receptive language but noted that she needed directions repeated (id. at p. 4). The psychologist stated that neither his interview with the student nor informal interaction revealed any signs of a thinking disturbance or gross psychiatric symptomology (id.). He characterized the student's affect as "full range and appropriate to content" (id.). However, he noted that sometimes the student was so preoccupied with anxiety and self-doubt that it impacted her ability to solve problems effectively (id.).

To assess the student's intellectual ability and cognitive processing the psychologist administered the Wechsler Intelligence Scale for Children, Fifth Edition, Integrated (WISC-V) (Parent Ex. I at p. 5). He reported that the resultant WISC-V profile indicated that the student was well-rounded, with average to high average intellectual ability and relative strengths with verbal and fluid reasoning, along with mild weaknesses with working memory (id. at pp. 5, 9, 12).<sup>9</sup>

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<sup>9</sup> The psychologist reported that the student attained the following composite scores on the WISC-V indices:

Additional testing revealed mixed results on measures of auditory attention and language processing, working memory, and learning and memory and indicated that, in general, the student worked slowly and focused on details at the expense of the "big picture" (id. at pp. 5-7, 9). The psychologist reported that the student's visual perceptual and visual motor skills appeared to be appropriately developed but noted that in several instances the student demonstrated problems with complex attention and planning (id. at pp. 6, 9). The student's performance on a measure of sustained visual attention and impulse control suggested that she had generally good attention and impulse control when tasks were straight forward (id. at pp. 7, 9).

According to the psychologist, the student's performance on formal tests of executive skills were mixed and highlighted the student's mild difficulties with component and "higher-level" concept formation skills" (Parent Ex. I at p. 7). He reported that the student's verbal fluency was weaker on tasks that were phonemically-based than on category-based tasks, and opined that the contrast suggested at least mild difficulties with spontaneous strategy generation, phonemic processing, and more effortful types of mental searching (id.). He further reported that the student's performance on inhibition tasks suggested the presence of core weaknesses with rapid retrieval and processing speed (id.). The psychologist stated that the student struggled on a "20 questions" test which highlighted her weaknesses with concept formation, hypothesis testing, working memory, and self-monitoring (id.).

The psychologist reported that the student's reading skills were mixed, and she demonstrated evidence of difficulties with reading speed, accuracy, and fluency (Parent Ex. I at pp. 7, 9).<sup>10</sup> He noted that the student's performance on untimed tests of sight word vocabulary fell in the high end of the average range, but the student worked very slowly and was actively decoding by the end (id. at p. 7). Similarly, the psychologist indicated that the student's performance on an untimed phonemic decoding task was average, but she again worked "incredibly slowly" (id.). On a comprehensive measure of oral reading skills, the student's reading rate was borderline, accuracy was below average, and overall fluency fell in the low-average range (id.). The psychologist noted that the student's errors were noteworthy for frequent repetition of words and phrases as she slowly decoded and made sense of individual sentences (id.). According to the psychologist, the student's reading comprehension fell in the low-average range but improved dramatically with extended time (id.). He noted the implication was that the student's slow reading rate limited what she was able "to get to" and therefore she needed additional time to compensate (id.).

Turning to the student's math skills, the psychologist reported that the student's written computational skills and applied quantitative reasoning skills fell in the average range but she

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comprehension 116, visual spatial 102, fluid reasoning 112, working memory 85, and processing speed 95 (Parent Ex. I at pp. 5, 12). The student's full-scale IQ was 105 (id.).

<sup>10</sup> Administration of the Wechsler Individual Achievement Test, Third Edition (WIAT-III) yielded standard scores of 110 on the word reading subtest, 105 on the pseudoword decoding subtest, and 103 on the basic reading composite (Parent Ex. I at p. 13). On the Gray Oral Reading Test – Fifth Edition (GORT-5) the student's standard (scaled) scores were as follows: rate 5, accuracy 7 and fluency 6 (id.). The student's performance on the Nelson-Denny Reading test (NDRT) placed her reading comprehension at the 13th percentile, comprehension given extended time at the 64th percentile, and reading rate at the 2nd percentile (id. at p. 14). The results of several other reading tests were also reported (id. at pp. 13-14).

"struggled tremendously with tests of math fluency" (Parent Ex. I at pp. 7-8).<sup>11</sup> With regard to computational skills the psychologist reported that the student worked slowly but consistently through entry level material but began to struggle as testing wore on and missed items involving long division, simplifying fractions, ordering operations, and more complex algebra and geometry problems (*id.* at p. 8). With regard to problem solving, the psychologist reported that the student confused the formulas for area and perimeter, was unsure of the total number of degrees in a triangle, and made procedural areas on several multi-step problems (*id.* at pp. 8, 9). He indicated that the student scored below average on speeded tests of simple written arithmetic designed to emphasize processing speed and the retrieval of over-learned information (*id.* at p. 8).

With regard to written expression, the psychologist reported that the student's writing skills varied across subtests and indicated weaknesses in spelling and processing speed (Parent Ex. I at p. 8, 9-10).<sup>12</sup> The psychologist reported that the student's written spelling score fell at the bottom of the average range and struggled with irregular exception words and double consonants (*id.* at p. 8). He further reported that problems with phonological analysis became more noteworthy as the subtest progressed (*id.*). He indicated that on untimed tests of sentence combining and construction the student's performance was "secure" but that the student ran out of time on a timed essay writing task (*id.*). The psychologist further noted that, although not formally scored, the student demonstrated problems with sequencing ideas, writing mechanics, and spelling (*id.*).

To assess the student's "perceived psychiatric symptoms, learning and attentional difficulties, and levels of adjustment across social and educational contexts" the psychologist had the student complete a behavior rating scale (Parent Ex. I at p. 8). According to the psychologist, the resultant profile was "entirely within normal limits" and "in an overall sense" suggested that the student had fewer symptoms and problems and was better functioning than average (*id.*). The psychologist suggested that, "[g]iven [the student's] history, current presentation and other informant reports, this appear[ed] to be the result, at least partly, of socially desirable responding and possibly a lack of insight and psychological-mindedness on her part" (*id.*). He reported that ratings provided by the student's father revealed isolated elevations on scales tapping anxiety, worry, tension, and somatization tendencies (*id.*). Other signs of internalizing behavior such as depression and withdrawal were within normal limits and the student was noted to be mature and possessing good social skills (*id.*). Ratings provided by the student's teachers suggested normal-to-mild levels of inattention, hyperactivity, and impulsivity (*id.* at pp. 8-9). Ratings related to the student's classroom behavior suggested that the student was "incredibly hard-working and seeking of approval" but lacked independence in her thinking and struggled with abstract concepts and foundational skills in several areas (*id.* at p. 9). In math, the student demonstrated mild difficulties understanding/following directions and retaining information over time (*id.*). The teachers' rating indicated that the student's effort and study skills were above average "if not rigid" and the

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<sup>11</sup> Administration of the WIAT-III yielded the following standard scores on math subtests: numerical operations 105, math problem solving 108, math fluency-addition 78, math fluency-subtraction 90, math fluency multiplication 80 (Parent Ex. I at p. 13). The student's standard score on the mathematics composite was 108 and 81 on the math fluency composite (*id.*).

<sup>12</sup> Administration of the WIAT-III yielded the following standard scores on writing subtests: sentence composition 115, essay composition 96, and spelling 91 (Parent Ex. I at p. 13). The student's standard score on the written expression composite was 100 (*id.*).

psychologist noted that the student had some difficulty working in a group (id.). The teachers who rated the student all reported that she used her extended time and the French teacher noted that the student had difficulty with phonological and orthographic skills that the psychologist reported were prototypical of dyslexia (id.). According to the psychologist, most of the student's teachers noted signs of tension, anxiety, worry, low self-esteem, and appearing discouraged in the student (id.).

The psychologist concluded that taken together with the student's history and prior evaluations the student's performance continued to be consistent with a specific learning disorder in reading (Parent Ex. I at p. 10). He stated that, in addition, the student's performances on neuropsychological tests indicated that she had generalized problems with processing speed and mild difficulties with working memory, executive skills, and learning and memory (id.). The psychologist opined that the "data" was consistent "in some respects" with the inattentive subtype of attention deficit/hyperactivity disorder (ADHD) or sluggish cognitive tempo (id.).

With regard to recommendations, the psychologist opined that the student was apt to function best in environments that provided challenge and support and that it would be important to consider this when planning for the next two years and beyond (Parent Ex. I at p. 10). He noted that, when scheduling, it would make sense to think carefully about the full array of courses the student was taking in any one semester and what teachers she was apt to work best with (id.). He further suggested that the student should continue to receive tutoring for help with specific subjects and general assistance with executive coaching, planning, guidance in seeing the "big picture" and how to assemble "the parts" (id.). The psychologist opined that the student was dyslexic and essential supports and accommodations for the student should include extended time for tests (1.5), testing in a quiet location, and access to assistive technology such as a word processor, four-function calculator, recorded books, word prediction software, and organizational tools for writing (id.). He noted that the student indicated it would be helpful to write her answers on a test booklet as opposed to filling in a bubble sheet and to have materials printed in a larger font size (id.).

In terms of remediation, the psychologist opined that the student would benefit most from efforts to improve her reading fluency and speed, as well as working on organization (Parent Ex. I at p. 10). With regard to auditory attention and memory skills, the psychologist indicated that the student's teachers should be aware she had difficulty taking in auditory information, holding it in short-term memory, and manipulating or actively processing it (id.). The psychologist suggested that to whatever degree possible the student would benefit from material being presented in writing, information being repeated and presented slowly with checks on her comprehension, and having material presented in smaller segments (id. at pp. 10-11). He suggested that the student's difficulties with working memory could be targeted directly through cognitive remediation techniques such as Cogmed (id. at p. 11). The psychologist further suggested that the student would benefit from direct instruction in critical thinking and applying logic to novel problems (id.). He noted that the student needed assistance seeing how to organize material and information at the outset of a task and thinking through the best strategy for tackling complex problems (id.). In terms of writing skills, the psychologist stated that the student needed help learning to execute essay-level work more efficiently and noted that she might benefit from learning to quickly generate outlines and being provided with information on scoring rubrics (id.). He opined that direct instruction in spelling, with an emphasis on rules and patterns that were not phonetically obvious, would be helpful (id.). He suggested that those instructing and grading the

student should weigh the content of her written work over spelling and punctuation in instances where the student "was forced to work" without a "spell-check" program or dictionary (*id.*). Lastly, the psychologist recommended engaging the student in non-academic and team-oriented endeavors to promote self-esteem, independence, and feelings of self-efficacy and mastery (*id.*). He suggested that the student resume counseling as she appeared to operate under a great deal of tension and stress (*id.*).

When asked if he agreed with the information contained in the May 2017 neuropsychological evaluation, the parent stated that he did not think that he was qualified to discredit anything in the report (Tr. p. 65). He testified that he spoke with the neuropsychologist and the information he provided him at the time was accurate (Tr. p. 66).

## **2. Millbrook**

Turning to the appropriateness of the parent's unilateral placements for the 2018-19 school year, although the IHO found both schools provided highly individualized instruction designed to address the student's special education needs, and that each was academically successful at doing so, there is no evidence in the hearing record to support this finding for the 2018-19 school year.

A Millbrook program description, that appears to be generated by the school, indicated that it offered a rigorous college preparatory education; an average class size of 12 students; advanced placement and honors courses, independent studies, study abroad and semester away opportunities; culminating experiences for seniors; an experiential learning program that provided students with out of the classroom opportunities to explore and practice stewardship, service and curiosity; and unique hands-on learning at the on-site zoo where students interacted daily with over 180 exotic and indigenous animals (Parent Ex. D at p. 3).

A second program description, of the Colhoun Academic Center at Millbrook, indicated that the academic center developed support programs that were tailored to each student's unique set of strengths and weaknesses (Parent Ex. E at p. 2). The program description pledged that "no two students w[ould] have the same experience, but every one will reach the same outcomes" (*id.*). The stated mission of the academic center was "to empower each student to take ownership of his or her educational experience by providing the compensatory skills necessary to be successful in the classroom and the confidence to learn to apply these skills, and to develop the self-confidence to advocate for themselves" (*id.*). The program description indicated that the center's tutors brought expertise in every subject: evaluation and analysis of learning differences, secondary math methods, executive functioning, critical reading and reading comprehension, writing mechanics, SAT and ACT preparation, math, biology, chemistry, physics, Spanish, French, and Latin (*id.*). The academic program description indicated that, if a student required more than extra help sessions with teachers or peer tutoring, he or she could enroll in the academic center (*id.*). According to the description, the academic center provided multiple levels of support across a wide spectrum of academic needs that included: subject specific conceptual review (single review session or regularly scheduled appointments), diagnosed learning differences (scheduled appointments once, twice or three times per week), and college entrance exam preparation (small group or one-on-one) (*id.*).

In an affidavit dated January 12, 2021, the chief operating officer and general counsel (COO) for Millbrook reported that Millbrook was an independent, co-educational college preparatory school that enrolled approximately 330 day and boarding students in grades nine through twelve (Parent Ex. J at p. 1).<sup>13</sup> According to the COO, the school offered "a rigorous, college preparatory course of study that featured and encouraged close relationships between students and faculty (id. at p. 2). The curriculum is design to allow students to develop and explore their own interests and sense of self while focusing on the acquisition of knowledge and skills (id.). The COO opined that "[t]he ability to read effectively, write clearly and think independently [we]re best developed when students were encouraged to challenge themselves, listen carefully to their classmates, test their own limits, and question their assumptions" (id.). The COO explained that Millbrook had an academic center, the purpose of which was to serve students with diagnosed learning differences in reading, writing, mathematics, and executive functions (id.). The goal of the center was to support students in a way that enabled them to be successful at Millbrook and that empowered them to take ownership of their educational experiences (id.). The COO further explained that "[f]rom an initial interview and a careful review of educational testing, [each] student is involved in a goal-oriented dialogue and assessment process that specifically identifies areas of need" (id. at pp. 2-3). He stated that the focus of all activities was the highest level of individual academic success and the development of compensatory and self-advocacy skills (id. at p. 3). In order to achieve these goals, a consistent degree of communication among faculty, staff, the academic center and the family was maintained (id.).

The COO reported that 80 percent of the teachers at Millbrook held advanced degrees and the average class size was 14 (Parent Ex. J at p. 1). The COO referenced the school accommodations policy which indicated that Millbrook made reasonable accommodations to otherwise talented students who demonstrated a need, as long as the accommodations were not inconsistent with school's curriculum (id. at pp. 3, 6). The policy indicated that the following accommodations were typically granted: extended time (50 percent) on in-class evaluations, separate testing location for major evaluations, preferential seating, audiobooks, smartpen, appropriate brief breaks during evaluations, and use of a laptop computer (id. at p. 6). The policy indicated that "in the interests of fairness, and of maintaining the integrity of the Millbrook curriculum," the following accommodations were typically not granted: reduced homework, teacher outlines provided a head of time, reader for instructions, scribe, more than 50 percent extended time, limiting number of exams in a given day, scheduling an exam over multiple days and providing an alternate format for evaluations (id.). The policy indicated that "under no circumstances will the total credit requirement be modified" (id.).

The COO reported that Millbrook provided mental health counseling through licensed clinical social workers and provided medical care through a medical center staffed by a doctor and several nurses (Parent Ex. J at p. 3). The school measured student progress through letter grades and effort scores issued four times per year and advisor letters issued three times per year (id.). According to the COO, residential students participated in study hall for two hours per night and had the option to engage with peer tutors one night per week (id.). He noted that, as was typical of a residential school, students had access to teachers throughout the day and evening (id.).

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<sup>13</sup> The COO confirmed that the affidavit constituted his direct testimony (Tr. p. 76).

With respect to accommodations, the COO confirmed that Millbrook did not alter the format of evaluations for students (Tr. p. 82). He indicated that Millbrook offered AP and honors classes and had partnerships with different organizations that had study abroad programs (Tr. p. 83). The COO indicated that students at Millbrook did not take Regents examinations (*id.*). He indicated that in order to graduate students were required to take a certain number of courses including four years of English, complete algebra 2, and complete a certain level in the school's language program (Tr. p. 84). In addition, students had to take two science lab courses and three years of history (*id.*). He could not recall whether Millbrook waived or modified the language requirement for the student (*id.*).

The CCO testified that Millbrook considered itself to be a traditional boarding school and prided itself on being a college preparatory school, among other things (Tr. p. 87). He indicated that most students graduated from Millbrook and moved on to college (*id.*). The COO indicated that the academic center was open to all students at Millbrook and that generally 25 to 30 percent of Millbrook students were enrolled in the academic center (Tr. pp. 77-78). However, he noted that the academic center put limits on the number of tutoring sessions that a student could take (Tr. p. 88). He explained that there were some classes, for example advanced placement calculus, where the school's preference would be to move a student to a different lower level class rather than provide tutoring if they were able to handle the lower level class on their own (Tr. pp. 88-90). However, he noted that as a general proposition the school did not turn students away from the academic center (Tr. p. 89).

The parent indicated that at time of his affidavit in January 2021 the student was attending college (Parent Ex. L at pp. 1, 3). He opined that the student's greatest strengths were her perseverance, strength, empathy, understanding and her sense of humor (*id.* at p. 1). He further opined that her greatest weaknesses were her diagnosed anxiety, dyslexia, and eating disorder (*id.*).

The parent testified that for the 2018-19 school year the student returned to Millbrook (Tr. p. 60). He reported that the student was desperate and all of her clinicians felt that it was extremely important for her eating disorder that she have a goal (*id.*). According to the parent, the student's goal was to graduate and go to the university of her dreams, where she was at the time of the hearing (*id.*). The parent testified that the student attended Millbrook from September 2018 to Thanksgiving of that same year (Tr. p. 61). The parent explained that when he re-enrolled the student in Millbrook for the 2018-19 school year he believed the school would be able to meet her needs (*id.*). He reported that he was being advised by the headmaster and medical clinic and asked as many people as he could to give him advice (Tr. p. 62). The parent stated that he wanted to make sure that he was doing the right thing at all times (*id.*).

The parent stated that Millbrook provided the student with the small classes with academic support that she needed, but also provided her with an academically vigorous, college preparatory curriculum (Parent Ex. L at p. 2). He confirmed that he knew Millbrook was a general education school but opined that the school could provide the student with very small classes and an individualized program along with the academic rigor she needed (*id.*). He noted that at Millbrook, the student was provided with support from the Calhoun Academic Center which was dedicated to meeting the needs of students with learning disabilities (*id.*).



According to the student's father the student was "very successful" as Millbrook evidenced in part by the fact that she made honor roll every semester that she was there (Parent Ex. L at p. 2).

The student's father acknowledge that Millbrook was a college preparatory school and the student wanted to go to college and he also wanted the student to go to college (Tr. p. 64). He testified that the student's twin sister also attended Millbrook and although she never had an IEP she benefitted from the Calhoun Center (id.). He indicated that the Calhoun Center was open to all students at Millbrook but that the school gave priority to student's with IEPs (Tr. pp. 64-65).

Although the Colhoun Academic Center program description indicated that the center developed support programs that were tailored to each student's unique set of strengths and weaknesses (Parent Ex. E at p. 2), there is no evidence in the hearing record that such a plan was developed for the student for the 2018-19 school year. Similarly, although the COO testified that the school measured student progress through letter grades and effort scores issued four times per year, and advisor letters issued three times per year (Parent Ex. J at p. 3), none of those reports, if generated for the student, were entered into evidence. Here, the student's father stated that Millbrook provided the student with small classes with the academic support that she needed, but also provided her with an academically vigorous, college preparatory curriculum (Parent Ex. L at p. 2); however, small class is the sort of support from which any student would receive benefit and, without more, is insufficient to establish that Millbrook offered instruction specially designed to meet the student's needs (see Gagliardo, 489 F.3d at 115 [noting that reimbursement for a unilateral placement should be denied if "the chief benefits of the chosen school are the kind of educational and environmental advantages and amenities that might be preferred by parents of any child, disabled or not"]; see also Frank G., 459 F.3d at 365 [declining to determine whether small class size alone constituted special education]; J.B. v. Bd. of Educ. of City Sch. Dist. of City of New York, 2001 WL 546963, at \*7 [S.D.N.Y. May 22, 2001] [finding that "[w]hile placement in small classes would provide [the student], or any other child, with an education superior to that available in public school, it is well established that the IDEA does not guarantee the best possible education or require that parents be compensated for optimal private placements"]). In addition, according to the Beekman head of school, the student returned to Beekman for the second semester of the 2018-19 school year "because staying at Millbrook was not conducive for her staying healthy" (Tr. p. 40). She recalled that, as reported by one of the student's parents, Millbrook "was not keen" on the student remaining there, given her past eating disorder (Tr. pp. 40-41). Although the Millbrook COO indicated that mental health counseling was available through the school, there is no evidence that the student was provided with this service.

The hearing record shows that when the parent enrolled the student in Beekman in spring 2018 it was with the hope that the student would do well at Beekman and be able to return to Millbrook (Tr. pp. 39-40; Parent Ex. K at pp. 3-4). The hearing record also suggests that the parent re-enrolled the student in Millbrook for the 2018-19 school year due in part to her success at the school the previous school year. According to the student's transcript, for the first semester of the 2017-18 school year the student received passing grades and made honor roll (see IHO Ex. I). However, the Millbrook COO was unaware of the level of support the student received from the academic center, as he testified that the he did not know if the student was there "once, twice, or three times a week" (Tr. p. 91). In addition, he testified that he did not know what accommodations

the student received (*id.*). When asked what goals were developed for the student in the academic center for the 2017-18 school year the COO responded, "I don't know what you mean" (Tr. p. 90).

In summary, the hearing records lacks the information necessary to determine what specific services Millbrook provided the student during the 2018-19 school to address her academic and social/emotional needs (see *Hardison*, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate]; see also *L.Q. v. Northeast Sch. Dist.*, 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; *R.S. v. Lakeland Cent. Sch. Dist.*, 2011 WL 1198458, at \*5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], *aff'd sub nom*, 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]). As a result, the parent has failed to meet his burden of establishing that Millbrook was an appropriate unilateral placement for the student for the first half of the 2018-19 school year.

### **3. Beekman**

The Beekman School program description indicated that the mission of the school was to give students the tools and the confidence to control their own destiny, to become life-long learners, and to give back to their community (Parent Ex. F at p. 1). The program description indicated that Beekman was a private high school for grades nine through twelve that delivered a traditional college preparatory program in a non-traditional manner (*id.*). The school was tailored to nurture the development of each individual student and to that end provided flexible scheduling, rolling admissions, classes of no more than ten students, and the option of private instruction and customized courses (*id.*). According to the Beekman program description, the school had a diverse student body and students played an active role in shaping their education, which instilled a sense of commitment and responsibility (*id.*). Students interacted with faculty on a daily basis that they came to know on a first name basis and when they graduated from Beekman they left the school with a solid academic foundation and keen sense of what laid ahead (*id.*).

By affidavit dated January 15, 2021, the Beekman head of school reported that she had worked for the school for 20 years, previously as the director of The Tutoring School at Beekman for 11 years (Parent Ex. K at p. 1).<sup>14</sup> As director of The Tutoring School she was responsible for meeting with students and parents to determine their needs within the program, as well as interviewing, scheduling, and coordinating communication between tutors, teachers, and parents

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<sup>14</sup> The Beekman head of school reviewed her affidavit and reported that there was nothing that needed to be added to the document or changed (Tr. p. 32). She confirmed that the affidavit was accurate and constituted what she wanted to say about the student (*id.*).

(id.). The head of school reported that she participated in a weekly faculty meeting where staff discussed techniques that were or were not working with the students in the building (id.).

The head of school described Beekman as a college prep high school program for grades 9-12 that prided itself on providing personalized and flexible education for individual students (Parent Ex. K at p. 1). She reported that classes were composed of no more than ten students and there were students who needed more help in some capacity, for example, a student diagnosed with ADHD might need to be engaged on a more frequent basis (id.). According to the head of school, Beekman enrolled students who were on the autism spectrum; had mild dyslexia; struggled with mild anxiety, depression or chronic medical conditions; or who hadn't been successful in a previous program or the previous program wasn't flexible enough to meet their needs (id. at p. 2). The head of school reported that The Tutoring School at Beekman generally took the school's same core class curriculum and delivered it in a more personalized manner (id.). She stated that the classes were made up of no more than three students and were often one-to-one (id.). By way of example she explained that, if a student could not keep pace with instruction in a Beekman class, they could take the same class in The Tutoring School where they could take additional time and extend the class into the summer (id.). A student would get the "same knowledge," "same curriculum," and "same credit" but be able to understand class material "in a way that wouldn't be possible if they were going at the pace of the Beekman classroom" (id.). The head of school noted that, if a student were out for a day or a week for medical or personal reasons, The Tutoring school would allow him or her to pick up where they left off and not be behind in class (id.).

According to the head of school, teachers often came to Beekman after working at other schools and Beekman sought teachers who could differentiate instruction based on students' "individual capacities" (Parent Ex. K at pp. 2-3). She explained that Beekman was looking for teachers who were able to detect that a student needed "a slightly different method of instruction than the student sitting next to them" and who could explain things "in two or three or five different ways" so that they could make sure that students were able to understand the lesson (id. at p. 3).

The head of school reported that Beekman staff wrote formal reports regarding the students eight times per year and parents received at least five of those reports (Parent Ex. K at p. 3). She explained that there were four quarter reports with comments, as well as a first quarter progress report for all students (id.). Additional progress reports were sent out for students who were new to class or students who were not doing as well as expected (id.). The head of school indicated that all teachers were responsible for responding to parent inquiries within 24 hours and noted that there was often a great deal of communication between parents and teachers (id.).

While it is unclear to what time frame she was referring, the head of school opined that based on her professional opinion, experiences and interactions with the student, she believed Beekman was an appropriate placement for the student (Parent Ex. K at p. 4). She opined that as a result of Beekman's tailor-made program for the student the school was able to support her and help her make progress (id.).

The head of school confirmed that Beekman was a day school and that the student graduated from the school with a local diploma in spring 2019 (Tr. pp. 32-33). She further confirmed that Beekman was a college preparatory school and offered a general education curriculum (Tr. p. 33). The head of school reported that Beekman did not offer Orton-Gillingham

but had "a number of items that have sometimes been found under the heading of special education" such as small class size including smaller student to teacher ratios, "as well as preferential seating, instructions noted in different capacities, working at the speed of the student, [and] offering extended time on testing" (Tr. pp. 33-34). With regard to extended time on tests, the head of school opined that there were some students who would get the same score regardless of the time allotted and that a student's performance depended on the student and "what the assessment looks like" (Tr. p. 34). The head of school indicated that Beekman offered flexible course schedules because some students were competitive dancers or on Broadway and others were training to be professional athletes and therefore had different schedules (Tr. pp. 35-36). The head of school acknowledged that Beekman was not a therapeutic school and did not offer any therapeutic services or related services (Tr. p. 36). The head of school indicated that prior to enrolling their child in Beekman parents were informed that it was a general education school that did not offer any therapeutic services (Tr. pp. 36-37).

The head of school confirmed that during the time the student was enrolled in Beekman the school only had one college counselor on staff; however, noted that there were only twenty graduates (Tr. p. 37). She indicated that in addition to advising student's regarding college, the counselor was a "registered guidance counselor" and "offer[ed] a sounding board and counseling services on an as needed basis" (*id.*). She recalled that the student would often have conversations with the college counselor and although she was not aware of their content, she knew that they were not solely college related (*id.*). The college counselor did not provide therapeutic counseling (Tr. p. 38).

The head of school testified that Beekman did not require formal assessments or entrance exams prior to acceptance (Tr. p. 38). The school's decision of whether or not to accept a student was based on information provided by the parent "as well as where they have previously come from in terms of their school" (*id.*). Students' academic programs were also determine based on information provided by the parents and the student's previous school (Tr. p. 39). She indicated that the school did not accept students with behavioral issues (Tr. pp. 38-39).

Based on the student's transcript, the head of school reported that the student returned to Beekman on February 4, 2019 (Tr. pp. 42-43). The student continued at the school until she graduated (Tr. pp. 43-44). The head of school confirmed that the goal of Beekman was always to make sure a student graduated but that, if a student was not at the point of graduation, then the school's goal was to work with the family and/or the school to which the student was returning to mutually decide what would be best for the student (Tr. p. 45). She reported that the goal for the student was to help her graduate and move on to college and that, beside getting her the credits she needed to get her diploma, there was no other plan (Tr. pp. 45-46). The head of school testified that at any given time 20 percent of the senior class might have either an IEP or a neuropsychological examination on file (Tr. p. 46).

With regard to the student's transcript, the head of school noted that the "graduation award senior speaker" designation meant that the student spoke at a graduation based on faculty consultation and her willingness to do so (Tr. p. 50; *see* IHO Ex. I). The student received a citizenship award, given to students who generally brought a good feeling to the school and modeled being a good citizen for the student body (Tr. p. 51). The designation of academic achievement in government, economics, and U.S. history signified that the student had received

"notable high grades in those three subjects" (Tr. p. 51). The transcript reflected the student's SAT scores (Tr. pp. 51-52; IHO Ex. I). The head of school was unsure whether or not the student received testing accommodations for the SAT (Tr. p. 52).

The parent testified that when he re-enrolled the student in Beekman in spring 2019 he felt that the school would be able to meet the student's needs (Tr. p. 62). He explained that around Thanksgiving 2018 he enrolled the student in an outpatient eating disorder program and she returned to Beekman in order to continue to get credits toward her high school diploma and continue on the path to college (Tr. p. 61). The parent reported that Beekman was the only place (in New York City) where the student could continue to get the credits to graduate from Millbrook and go to her preferred college (Tr. p. 60). He noted that the headmaster at Millbrook had recommended Beekman as being able to meet the requirements necessary for the student to get a diploma (Tr. p. 62). The parent opined that the student had excelled between April 2018 and June 2018 while she was at Beekman (*id.*). He noted that Beekman was "extremely hands on," in most instances classes were comprised of two to three students, and the student had come out of Beekman with "extremely good results" (*id.*). He reported that as a result he had no worries about reenrolling the student at Beekman, particularly knowing that she was also going to be getting clinical care from the outpatient program on a daily basis (Tr. pp. 62-63). The parent reported that he enrolled the student in an outpatient clinic because the eating recovery center she attended suggested that her recovery would be best if it took place at home with parental supervision (Tr. p. 104). The clinic was close to the student's residence and close to Beekman (Tr. pp. 104-05).

The parent testified that he did not recall Beekman staff telling him that Beekman was a general education school and in addition he was relying on advice from the eating recovery center and Millbrook (Tr. p. 105). He indicated that he did not ask if there was a psychologist on staff at Beekman because the student was "enrolled with many psychologists and psychiatrists" in the outpatient clinic (Tr. p. 106). He was also not aware if the only counselor on staff at Beekman was a college counselor (*id.*). The parent testified that "[he] knew that [the student's] health needs were being undertaken by [the outpatient clinic] and the plethora of [] doctors there" and that "[he] left the educational side to Beekman" which had been recommended to him by Millbrook (Tr. pp. 106-07). He stated that he did not inquire of Beekman as to their health support (Tr. p. 107).

Although the head of school described the instructional support available through The Tutoring School at Beekman, there is no evidence in the hearing record that the student received the "more personalized" instruction described during the time she attended Beekman from February 2019 to June 2019. In addition, while the head of school indicated that Beekman staff wrote formal reports and generated quarterly reports with comments, the parent did not submit any of these reports into evidence. The parent indicated that he was not made aware that Beekman was a general education school and also that he did not inquire as to the counseling and health support services available at the school because the student's needs in those areas were being addressed in the outpatient clinic (Tr. pp. 105-07). The head of school testified that the only "plan" at Beekman for the 2018-19 school year was to help the student get the credits she needed to earn her diploma and go to college (Tr. pp. 45-46). The hearing record shows that when the student previously attended Beekman between April 2018 and June 2018 she received at least 85 hours of tutoring but there is no indication that the student received tutoring at Beekman during the 2019-20 school year. Based on the above there is no evidence that Beekman provided the student with specially designed instruction to meet her unique academic and social/emotional needs and as a

result the parent has failed to meet his burden of showing that the school was appropriate as a unilateral placement for the student.

#### 4. Summary

A final word about the IHO's rationale is warranted. The IHO was justified in his ire with the district, particularly given the district's failure to convene a CSE to review the student's program for several years and given the district's rather delusional argument during the impartial hearing that the student should not be deemed eligible for special education, notwithstanding the obvious fact that the CSE never declassified the student (IHO Decision at pp. 45-46; see Tr. pp. 17-18). However, as frustrating as the district's conduct or lack thereof is, upon pursuing a self-help remedy through the Burlington/Carter framework, the parent was not absolved from his burden to demonstrate that the unilateral placements offered instruction specially designed to meet the student's unique needs.

In finding that the parent met this burden, the IHO opined that there are students such as the student in the present matter "capable of benefiting from demanding and challenging general education coursework when it is delivered in a sharply modified setting (such as a residential or tutorial program, or even perhaps in very small class settings) by general education teachers, but who could not benefit from the same program delivered in classes of 30-35 students" (IHO Decision at p. 47). "Specially-designed instruction" means "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]). The Second Circuit has acknowledged that "a resource that benefits an entire student population can constitute special education in certain circumstances"; however, a generally available resource (such as the residential setting or small class size cited by the IHO) must be specially tailored to a particular disabled student's needs in order to contribute to a finding based on the "totality of the circumstances" that a unilateral placement is appropriate (W.A. v. Hendrick Hudson Cent. Sch. Dist., 927 F.3d 126, 149 [2d Cir. 2019] [cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert denied, 140 S. Ct. 934 [2020]). Here, as discussed above, the evidence in the hearing record does not support the IHO's finding that either Millbrook or Beekman offered "steeply modified general education instruction" aligned with the student's unique needs (IHO Decision at p. 47).

Finally, the IHO deemed the student's graduation and continuation to college to be evidence that the student received benefit from the unilateral placements (IHO Decision at p. 47). Even assuming the student's academic transcript and the parent's testimony regarding the student's continuation to college (see Parent Ex. L; IHO Ex. I), was sufficient to demonstrate the student's progress at the unilateral placements for the 2018-19 school year, progress alone, while a relevant factor, is not dispositive of the appropriateness of a unilateral placement (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; 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"]). Here, without

evidence that Millbrook and Beekman offered the student specially designed instruction, the student's achievement of good grades and graduation is insufficient to establish the appropriateness of the unilateral placements based on the totality of the circumstances.

**VII. Conclusion**

Having determined that the parent did not establish the appropriateness of Millbrook or Beekman for the 2018-19 school year, it is not necessary to determine the issue of whether equitable considerations support the parent's requested relief, and the necessary inquiry is at an end (see M.C. v. Voluntown, 226 F.3d 60, 66 [2d Cir. 2000]).

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated January 28, 2021, is modified by reversing those portions which found that the parent met his burden to prove that Millbrook and Beekman were appropriate unilateral placements for the student for the 2018-19 school year and which ordered the district to fund the costs of student's tuition for the 2018-19 school year.

**Dated:**            **Albany, New York**  
                         **April 29, 2021**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**