



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-053

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

Appearances:

Law Offices of Adam Dayan, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's tuition at the Manhattan Children's Center (MCC) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination, which ordered the district to provide the student with compensatory educational services for any missed pendency services and which ordered the district to provide the student with a home-based program consisting of applied behavioral analysis (ABA) services and related services. The appeal must be dismissed. The cross-appeal must be sustained to the extent indicated.

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[a]). 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 in this case began attending MCC in 2014 (see Tr. p. 84; Parent Ex. P ¶ 10). However, overall, the hearing record is sparse with respect to the student's educational history, other than including a previous IHO decision, dated December 30, 2019 (December 2019 IHO decision), which resolved the parents' due process complaint notice concerning the 2019-20 school year (see Parent Ex. G at pp. 1, 4, 23; see generally Tr. pp. 1-99; Parent Exs. A-F; H-Q; Dist. Exs. 1-4). According to the December 2019 IHO decision, when the student was enrolled at MCC for the 2019-20 school year, she also received "afterschool services including ABA," occupational therapy (OT), physical therapy (PT), and speech-language therapy provided by "Manhattan

Behavioral Center (MBC) and [another] agency" (Parent Ex. G at p. 5). The 2019 IHO decision also revealed that, during the 2019-20 school year at MCC, the student attended a classroom with 10 students, 1 lead teacher, and 6 "ABA instructors" (for a total of 7 adults in the classroom), and she received "1:1 and 1:2 instruction"; in addition, the student received related services of OT, PT, and speech-language therapy at MCC (id. at p. 6).

The 2019 IHO decision also reflects that the student had received an "afterschool program" at MBC throughout her attendance at MCC (Parent Ex. G at p. 6). During the 2019-20 school year, the student received approximately 13.5 hours per week of ABA services from MBC, which was divided between 6 center-based hours of ABA with the remaining 7.5 hours of ABA delivered to the student on weekends (id. at p. 7). As relief sought related to the parents' challenges to the 2019-20 school year, the parents had requested the following: funding for the costs of the student's tuition at MCC and for home-based services, "including ABA, speech[-language therapy], OT, and PT, . . . , [and for these] services to be provided over 52 weeks, including weekends, holidays, and vacations" (id. at p. 5). Based on the evidence presented, the IHO found that MCC was an appropriate unilateral placement for the student and awarded funding for the student's tuition costs at MCC (id. at pp. 14-15). However, with respect to the afterschool and home-based services delivered by MBC, the IHO found that "areas of overlap" existed with the services provided by MCC; as a result, the IHO concluded that while the parents believed the student required additional services at home, the district was not "responsible for all of them" (id. at pp. 15-18). The IHO awarded the parents two hours of home-based ABA services to be delivered "on the weekends and during times [that] MCC" was not in session (id. at p. 18). The IHO also denied the parents' request for supervision by a Board Certified Behavior Analyst (BCBA) (id.).

On March 9, 2022, a CSE convened to conduct the student's annual review and to develop an IEP for the student for the 2022-23 school year (see Dist. Ex. 2 at pp. 1, 53). Finding that the student remained eligible for special education as a student with autism, the March 2022 CSE recommended the following: a 12-month school year program in a 6:1+1 special class placement; related services consisting of OT, PT, and speech-language therapy; parent counseling and training services; and the services of a full-time, individual paraprofessional (behavior) (id. at pp. 47-48).

On or about May 2, 2022, the parents executed an enrollment contract with MCC for the student's attendance during the 2022-23 school year from July 2022 through June 2023 (see Parent Ex. I at pp. 1-2, 5).

Subsequent to executing the enrollment, the parents privately obtained an evaluation of the student over the course of two days in May 2022 (May 2022 autism evaluation) (see Parent Ex. C at p. 1). As part of the evaluation, the clinical psychologist administered the following to the student: the Childhood Autism Rating Scales, Second Edition (CARS-2); the Child Behavior Checklist (CBCL); the Differential Ability Scales, Second Edition (DAS-2); the Stanford Binet Intelligence Scales, Fifth Edition (SB-5); and the Vineland Adaptive Behavior Scales, Third Edition (VABS-3) (id.). As reported by the evaluator, the parents presented the student for an evaluation "due to regression in developmental and adaptive skills, and for the onset of emotional-behavioral challenges" (id.). The evaluator noted that the student's "school programming [at MCC had been] significantly disrupted due to the COVID-19 pandemic," and the student had participated in remote instruction from March 2020 through September 2020, when MCC resumed in-person instruction (id.). However, the evaluator also noted that the student continued to "participate in school remotely [two to three] days per week due to significant challenges with

transportation," as the student could not be safely transported by car "without 1:1 supervision" (id.). Consequently, the student attended school "only when her father c[ould] drive her . . . while her mother s[at] in the back to ensure that [the student] d[id] [not] exit the car or significantly distract the driver" (id. at pp. 1-2). According to the May 2022 autism evaluation report, the student "remove[d] her seatbelt, bang[ed] her head on the car window, and flail[ed] her body around the backseat" (id. at p. 2). The evaluator noted that, at that time, the student did not receive "any in-home services other than some remote 1:1 instruction from [MCC]," and she did not "receive any local center-based services" (id.).

The evaluator noted in the May 2022 autism evaluation report that the parents were "currently concerned about [the student's] behavior and emotional functioning, in combination with concerns for regression in developmental skills" (Parent Ex. C at p. 2). The evaluator further noted that, at that time, the student "experience[d] episodes of acute upset, characterized by screaming and crying uncontrollably, thrashing her body, throwing, jumping to the point of injuring her feet and rocking the house to the point of items falling from the walls and shelves, head banging, hitting her own head with her hands, and knocking her knuckles together to the point of bruising" (id.). In addition, it was noted that the student hit her body, "asking for certain feelings to go away, such as feeling like someone ha[d] touched a part of her body" (id.). The evaluator indicated that the student's behavioral episodes occurred "multiple times per day" and could "last for up to 2-3 hours, and create[d] a significant safety risk" (id.). Additionally, it was reported that the student was "inconsolable during these episodes" and her parents had "padded the walls and remain[ed] close to [the student] to keep her physically safe" (id.). The student reportedly awoke regularly during the night "in one of these episodes" (id.). According to the May 2022 evaluation report, the student's mother could calm her by "holding her tightly and singing to her" (id.). The evaluator indicated that these behavioral episodes began on "September 13, 2020," and the "only notable antecedent was that [the student] returned to in-person school in the same week following the onset" (id.). As reflected in the evaluation report, the student's behavioral episodes "ha[d] since increased in frequency since the initial onset, with periods of mild reduction and no return to previous baselines" (id.).

At the time of the May 2022 autism evaluation, the student's mother reported that the student demonstrated "significant regression in [her] language and developmental skills" that coincided simultaneously with her increased behaviors (Parent Ex. C at p. 2). More specifically, the evaluator noted that the student had "stopped communicating at the level she did prior to September 2020," when the student "consistently spoke at the phrase to sentence level"; currently, however, the student spoke "primarily in single words with periodic shorter phrases" (id.). Similarly, the evaluator reported that the student—who "previously had made gains in play and independent leisure skills"—no longer "engage[d] in any functional play" and her attention for "cartoons" and "books" had "decreased drastically" (id.). The student also "regressed in self-feeding for several months, placing her hands into her cup and not feeding herself"; however, the evaluator noted that these skills had "improved" (id. at pp. 2-3).

With regard to the student's medical history, the May 2022 autism evaluation reflected that she had "generally been healthy without any major illnesses, surgeries, or hospitalizations" (Parent Ex. C at p. 3). In addition, the report reflected that the student had been seen by "multiple neurologists and psychiatry" over the past 18 months and had been prescribed psychotropic medication (id.).

During testing, the student "spoke in phrases and short sentences," and responded to "closed ended and yes/no questions consistently" (Parent Ex. C at p. 3). The evaluator noted, however, that the student did not "initiate nor maintain conversations" (id.). In addition, the student's nonverbal communication—or more specifically, her eye contact—was described as "fleeting and not well integrated with spoken language" (id.). According to the evaluator, the student "appropriately sustained" attention for tasks "within her developmental level," but "showed periods of agitation and heightened sensitivity" when presented with tasks of increased complexity, and would "periodically hit her chest and [engage in] scripted lines from a television show" (id.). During those behavioral episodes, the evaluator "lowered her voice and offered [the student] her hands," which "helped [the student] to calm and refocus on the testing activities" (id.). The evaluator opined that the student was "sufficiently engaged throughout the evaluation, and thus the results of this assessment [we]re a valid reflection of [her] current skills and functioning" (id.).

Based on the testing results, the evaluator found that the student met the criteria for the following diagnoses: autism spectrum disorder with language and cognitive impairments, social communications impairments—level 3 and restrictive, repetitive behaviors—level 3; an intellectual disability (unspecified); an unspecified anxiety disorder; and an unspecified depressive disorder (see Parent Ex. C at pp. 6-7). According to the evaluator, the student—with the "comprehensive support of [the student's] family, therapists, and special education teachers"—could "regain skills that ha[d] been lost" (id. at p. 7). The evaluator opined that the student had "likely lost developmental skills and failed to progress in new skill acquisition due to the disruption of in-person school and therapy over the last two years" (id.). The evaluator further opined that the student required "compensatory services," but "should not receive any services via telehealth" and specified that "[a]ll" of the student's "special education and therapy services should be provided in person" (id.).

To address the student's needs, the evaluator identified over four pages of recommendations, which included, in part, the following: an educational plan described as "[f]ull year, full day programming in an autism-specific classroom," with staff trained and experienced in educating students with comorbid diagnoses of autism and intellectual disability; a classroom operating on principles of ABA with "visual supports and environmental arrangements (e.g., [Treatment and Education of Autistic and Related Communication Handicapped Children] (TEACCH) that promote[d] independence"; a small student-to-teacher ratio "with mostly 1:1 instruction throughout the day"; minimal breaks from school, with "no more than 2-3 days off school at a time"; a 12-month school year program, with "home or center-based services"—as part of the student's IEP—when school was not in session for "more than 2-3 days" and provided by a district contracted agency; if district contracted agency services were not available to cover school breaks, then the evaluator recommended using an "out of district placement in an autism-specific day school that operate[d] 12 months out of the year"; the direct services of a BCBA on a weekly basis; related services of speech-language therapy, OT, and PT; "teaching daily living skills, independence in activities, and safety awareness"; and the evaluator recommended that if a "full day (8-10 hours), full week (5 days), full year (12 months) ABA educational program" was not available, then the parents would need to work with the district to "explore residential schools that provide[d] intensive programming for [students] with autism and comorbid intellectual disability" (Parent Ex. C at pp. 8-9).

Additionally, the evaluator made recommendations for "[o]utpatient treatment services in order to address core deficits and build functional capacity" such as a "minimum of 15 hours per week of ABA, with "home- and community-based sessions in order to build functional skills within the context of daily life routines"; weekly related services of speech-language therapy, OT, and PT; and an evaluation by a child psychiatrist (Parent Ex. C at p. 9). Next, the evaluator described recommendations for ABA programming for the student, such as using discrete trial training for "skill acquisition, together with a "substantial degree of incidental teaching" across environments when completing her daily activities; and generalizing skills into a "more naturalistic environment" through the use of "behavioral shaping, differential reinforcement strategies, cueing and prompting/prompt fading, environmental modification, visual supports, and visual schedules" (id. at pp. 9-10). The evaluator also recommended "integrating structured teaching approaches into [the student's] ABA program" by using TEACCH, which was described as a "visually driven system for organizing the child's environment" in order to increase the student's "independent functioning" (id. at pp. 10-11). As a final recommendation, the evaluator described family support services (id. at pp. 11-12).

In a letter dated June 24, 2022, the parents, through their attorney, notified the district of their intentions to unilaterally place the student at MCC, at district expense, for the 2022-23 school year (12-month school year program) (see Parent Ex. B at p. 1). The parents also indicated their intention to pursue an "after-school ABA-based therapeutic program through the [MBC]" for the student (id.). The parents requested that the district continue to provide the student with round-trip transportation to MCC pursuant to State law (id. at p. 2).

On or about July 11, 2022, the student began attending MCC for the 2022-23 school year (see Parent Ex. M; see also Parent Exs. J-L).

A. Due Process Complaint Notice

By due process complaint notice dated July 11, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at pp. 1, 8).¹ Initially, the parents asserted the student's right to pendency services based on the 2019 IHO decision, which ordered the district to provide the following: direct funding of the costs of the student's tuition at MCC, direct funding of the costs of two hours per day of individual ABA services to be delivered by MBC on "weekends and on days when [MCC wa]s not in session and at a rate of \$195.00 per hour, and the provision of round-trip special education transportation to MCC (id. at pp. 1-2).

Next, and as relevant to this appeal, the parents sought the following relief: findings that the district failed to offer the student a FAPE for the 2022-23 school year, that the student's unilateral placement at MCC was appropriate, and equitable considerations weighed in favor of the parents' requested relief; an order directing the district to reimburse the parents or to directly fund the costs of the student's tuition at MCC for the 2022-23 school year; an order directing the district to fund after-school or home-based, individual ABA services for not less than 20 hours per week; an order directing the district to continue to fund BCBA supervision services for not less

¹ The parents' due process complaint notice was not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one (see generally Parent Ex. A).

than two hours per week; an order directing the district to provide home-based or after-school services consisting of speech-language therapy and OT for not less than two 30-minute sessions per week; and an order directing the district to provide compensatory educational services to make up for "any amount of instruction and/or services" the district "reasonably should have provided but failed to deliver" to the student during the 2022-23 school year (Parent Ex. A at pp. 8-9). The parents also requested that the IHO order the district to provide the requested services for seven days per week (including weekends), and during school holidays, vacations, and summer months to prevent regression (id. at pp. 9-10).

B. Facts Post-Dating the Due Process Complaint Notice and the Impartial Hearing

On August 11, 2022, the IHO conducted a prehearing conference (see Tr. pp. 1-8). On August 12, 2022, a CSE reconvened to review and consider the May 2022 autism evaluation of the student obtained by the parents (see Parent Exs. D at p. 51; E at pp. 1-2). The August 2022 CSE continued to recommend the same special education program and related services as recommended by the March 2022 CSE, with the exception of modifying the services of the full-time paraprofessional from an individual service to a group service (compare Parent Ex. D at pp. 46-47, with Dist. Ex. 2 at pp. 47-48). In a prior written notice dated August 26, 2022, the district summarized the special education program recommended for the student (see Parent Ex. E at pp. 1-2). In a school location letter of the same date, the district identified the public school site (assigned school) within which the student's IEP would be implemented (id. at p. 5).

When the impartial hearing next resumed on September 13, 2022, the IHO conducted a status conference (see Tr. pp. 9-14). On September 19, 2022, the district executed a "Pendency Implementation Form" for the student, which indicated that the student's pendency services consisted of the following, pursuant to the 2019 IHO decision: direct funding and parent reimbursement for the costs of the student's tuition at MCC on a 12-month school year basis; direct payment or reimbursement for the costs of the student's individual ABA services for two hours per day and delivered by MBC to the student on weekends and when MCC was not in session, on a 12-month school year basis; and round-trip special transportation services on a 12-month school year basis (no provider or form of payment indicated) (Parent Ex. H at pp. 1-2).

In a letter dated October 3, 2022, the parents informed the district about their concerns with the student's August 2022 IEP and the new assigned school recommendation (see Parent Ex. F at p. 1). Among other things, the parents indicated that during the CSE meeting, the members discussed the May 2022 autism evaluation results, as well as the recommendations contained therein; the student's "PANDAS diagnosis"; the "changes in her functionality since 2020"; the student's "increased need for 1:1 support"; and the "effectiveness of ABA methodologies" in the student's "current educational setting" (id.). In addition, the parents noted that the CSE discussed the student's "inability to maintain in-class skills and behaviors beyond the moment and to apply those behaviors in all her daily activities across environments" (id.). According to the parents, the student's then-current providers all expressed the "resulting need for additional after-school services (including ABA and all related services) in order for [the student] to make meaningful progress toward her academic and therapeutic goals" (id.). Additionally, the parents noted the CSE's response, which was that the district "could not provide the level of support being recommended by every professional who work[ed] with or who evaluated [the student]" (id. at pp. 1-2). The parents also noted that, having investigated the newly recommended assigned school, they were concerned that ABA was not used, and that the student required ABA to "overcome her

maladaptive behaviors," which had become "more disruptive and dangerous" over the past year (id. at p. 2).

After the first two days of proceedings, the parents submitted an amended due process complaint notice, dated October 5, 2022, which neither the parties nor the IHO entered into the hearing record as evidence (see generally Tr. pp. 1-99; Parent Exs. A-Q; Dist. Exs. 1-4).² The amended due process complaint notice added information concerning the May 2022 autism evaluation of the student, which the August 2012 CSE had reconvened to review and consider in the development of the student's August 2022 IEP (see Admin. Hr'g Ex. 1 at pp. 6-8). Otherwise, the parents repeated and reiterated the allegations and relief set forth in the July 2022 due process complaint notice within the amended due process complaint notice (compare Parent Ex. A at pp. 5-10, with Admin. Hr'g Ex. 1 at pp. 4-10).

On November 7, 2022, the IHO conducted a second prehearing conference "based upon an amended [due process] complaint [notice] accepted on October 5th, 2022" (Tr. p. 16). The IHO confirmed with the parties that, subsequent to the initial impartial hearing dates, a CSE had reconvened, which resulted in the parents filing the amended due process complaint notice (see Tr. pp. 16-17). The parents' attorney indicated that the issues in the amended due process complaint notice remained "essentially the same, aside from the event that occurred"; the IHO then confirmed with the parents' attorney that the parents were, therefore, "just raising an objection to the August 12th IEP" (Tr. p. 17). The impartial hearing resumed on December 8, 2022, wherein the IHO conducted another status conference (see Tr. pp. 22-29).

On the final day of the impartial hearing, January 10, 2023, the district conceded that it failed to offer the student a FAPE for the 2022-23 school year, and the parents withdrew issues related to transportation and their related requests for any relief consisting of transportation (see Tr. pp. 30, 40, 43-44).³ The parents' attorney clarified the home-based services the parent requested as relief, including 15 hours per week of ABA, speech-language therapy, and OT, as per the recommendations in the May 2022 private evaluation (see Tr. p. 44). In addition, the parents' attorney indicated that the parents sought compensatory educational services "based on the lack of home-based services or the lack of services outside of school hours during the first half of the school year," noting that the student was not currently receiving any outside services at that time (id.). The parents' attorney also clarified for the IHO that the parents sought PT services as part of the home-based program as well, notwithstanding the fact that the PT services were not specifically

² For ease of reference, the amended due process complaint notice will be cited as "Admin. Hr'g Ex. 1." As a reminder to the parties and to the IHO, State regulation do not automatically permit amendments to a due process complaint notice as matter of course; instead, State regulation mandates that a "party may amend its due process complaint notice only if: (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subdivision (j)(2) of this section; or (b) the [IHO] grants permission, except that the [IHO] may only grant such permission at any time not later than five days before an impartial due process hearing commences" (8 NYCRR 200.5[i][7][a]-[b]).

³ Although the district conceded that it failed to offer the student a FAPE for the 2022-23 school year, the district entered four documents into the hearing record as evidence but did not present any testimonial evidence (see Tr. p. 34, 40; see generally Dist. Exs. 1-4).

noted in the due process complaint notice (see Tr. pp. 44-45). The impartial hearing then proceeded, and concluded, with the presentation of the parents' witnesses (see Tr. pp. 47-96).

C. Impartial Hearing Officer Decision

In a decision dated February 17, 2023, the IHO found that the district conceded that it failed to offer the student a FAPE for the 2022-23 school year and that the parents failed to sustain their burden to establish that MCC was an appropriate unilateral placement for the student for the 2022-23 school year (see IHO Decision at pp. 4, 10-15). The IHO did not address equitable considerations, having determined that the parents had not met their burden with respect to the appropriateness of MCC (id. at p. 15).

In support of the conclusion that MCC was not an appropriate unilateral placement, the IHO initially characterized the facts and evidence in this case as "troubling" (IHO Decision at p. 13). More specifically, the IHO noted the district's decision to not defend its recommendation for the student, and the "inconsistent" evidence about the student's program at MCC from the director and the parents with respect to "what [wa]s actually happening during the school day" (id.). Here, the IHO focused on the disparate testimony concerning the student's sparse attendance at MCC, noting that although the director testified that the student "'attend[ed] school both in person and through synchronous remote instruction,' . . . [i]n reality, [the student] ha[d] only attended school this year a handful of times, and not since September" (id.). According to the IHO, this was due, in part, to the fact that, based on the parent's testimony, the student could not be "safely transported to school despite attempts made with both parents"—and by further noting that the hearing record was devoid of any evidence that MCC had made "any efforts . . . to actually get [the student] to school" (id.). The IHO found that, instead, MCC's response was to create a "remote schedule for which [the student] start[ed] school late [two] days per week and [wa]s on her own for one hour and fifteen minutes during the school day every day" (id.).

Next, the IHO turned to the evidence in the hearing record concerning the student's behaviors (see IHO Decision at p. 13). The IHO again noted the inconsistencies between the director's "description of the [s]tudent's behaviors and how they [we]re affecting her learning" when compared to the parent's "candid testimony" (id.). For example, the IHO found that, based on the director's testimony, the student's "inappropriate classroom behaviors occur[ed] at a mean of 20 [percent] of the intervals across the time samples, self-injury remain[ed] low with a daily mean of 1.3 occurrences and tantrums paired with 2 inappropriate classroom behaviors [] recorded with a mean of less than one minute per day" (id.). In addition, the director testified that the student's aggression, "such as hitting, kicking, punching and biting rang[ed] from 0 to 2 occurrences per day" (id.). As characterized by the IHO, the director's testimony was "in stark contrast" to the parent's testimony, who explained that "'a lot of times [the student] g[ot] up throughout the session and [wa]s jumping or hitting herself or trying to hit her head on the wall'" (id.). In addition, the IHO pointed to the parent's testimony, which "described the hitting, banging her head, hitting her head with things and head butting as 'much more intense now'" (id.). The IHO also noted that, based on the parent's testimony, "[a]pproximately half of the instructional time [wa]s spent trying to calm [the student] down" (id.). In light of the discrepant testimony, the IHO—who indicated that it was the parent who was "on the front line daily regarding the [s]tudent's behavior"—found that the director's testimony about the student's "actual progress" had been "call[ed] into question" (id.).

The IHO concluded, therefore, that the student's behaviors interfered with her access to instruction and MCC was not addressing the student's "specific special education needs" (IHO Decision at p. 14). The IHO noted that the student's "disability prevent[ed] her from independently accessing any instruction without continuous in-person adult support" and here, MCC "maintained a misplaced reliance on the [p]arent[s] to support its program" (id.). As determined by the IHO, the student's "behavioral needs [we]re not being adequately addressed in the home setting without the presence of trained school personnel physically present," and moreover, the student required "in-person special education and related services" (id.). The IHO also noted that MCC was aware of the student's behaviors "at the start of the school year," as they were "not new" (id.).

Having noted the significance of the difficulties presented by the student's interfering behaviors and the student's need for in-person special education and related services, the IHO turned to consider the setting that may provide the student with an appropriate educational placement (see IHO Decision at pp. 14-15). First, the IHO pointed to the private evaluator's opinion, which indicated that the parties "may need to explore residential schools that provide[d] intensive programming for [students] with autism and comorbid intellectual disability," if a "full day (8-10) hour twelve-month ABA program [wa]s not available in the local school district" (id. at p. 14). The IHO appeared to weigh the private evaluator's opinion in the context of the highly restrictive nature of residential placements, as well as the Second Circuit's requirement that there must be "objective evidence that a student c[ould not] obtain an educational benefit in a less restrictive setting before finding that a residential placement [wa]s required by the IDEA" (id. [internal citations omitted]). With this as backdrop, the IHO concluded that the "student's needs [we]re acute," and that notwithstanding the parents' "Herculean efforts to maintain the [s]tudent in some type of day program," the student was then-currently "physically isolated from her teachers, related service provider and peers" (id.). In addition, the IHO indicated that "[a]dding additional hours to an insufficient program [wa]s not going to make the current private program appropriate" (id.). Moreover, and regardless of the cause, the IHO found that the student "regressed over the last few years in a day program" (id.).

Therefore, given the evidence in the hearing record, the IHO concluded that the "severity of the student's current behaviors, her significant deficits in functional academics, communication, social skills and motor issues," as well as her "inability to be transported safely to a day placement and her need for seven day a week round the clock support," warranted placement in a residential setting to "receive meaningful education" (IHO Decision at pp. 14-15). The IHO also concluded that the parents failed to sustain their burden to establish that MCC was an appropriate unilateral placement "or that adding an additional home component or bank of compensatory services would make it appropriate to meet [the student's] intensive needs" (id. at p. 15). As a result of these findings, the IHO indicated there was no reason to consider equitable considerations (id.).

As relief, the IHO ordered the district to convene a CSE meeting within 15 school days to "recommend a search for a residential placement," and in the meantime, the IHO ordered the district to fund the following home-based program for the student: 15 hours per week of ABA services, two 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of OT (IHO Decision at p. 15). In addition, the IHO ordered the district to establish a bank of individual ABA services to make up for any ABA services not provided to the student pursuant to pendency (id.).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by finding that MCC was not an appropriate unilateral placement for the student and by denying their request for direct funding of the student's tuition costs. In addition, the parents contend that the IHO erred by sua sponte ordering the district to place the student in a residential setting. The parents assert that although the IHO ordered compensatory education services for any missed pendency services, the IHO denied their request for a home-based program consisting of increased ABA services, speech-language therapy, and OT. And finally, the parents argue that the IHO did not reach the issue of equitable considerations. As relief, the parents seek findings that MCC was an appropriate unilateral placement and equitable considerations weigh in the parents' favor, and seek an award of direct funding of the student's tuition costs at MCC for the 2022-23 school year.⁴

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's finding that MCC was not an appropriate unilateral placement. As a cross-appeal, the district asserts that the IHO exceeded her jurisdiction by ordering the district to place the student in a residential setting and by ordering the district to provide make-up ABA services for services allegedly not provided pursuant to pendency. In addition, the district asserts that the IHO erred by ordering prospective relief of a residential setting and a home-based program of ABA services, speech-language therapy, and OT. The district argues that the parents failed to sustain their burden to establish that the student required a home-based program, and moreover, the home-based program recommended in the May 2022 autism evaluation related to the student's need to generalize skills across environments. As relief, the district seeks to dismiss the parents' appeal and to reverse the IHO's decision ordering the district to place the student in a residential setting and to provide make-up pendency services.⁵

In a reply to the district's answer and cross-appeal, the parents respond to the district's assertions, and generally argue to overturn the IHO's finding that MCC was not an appropriate unilateral placement for the student for the 2022-23 school year. The parents affirmatively assert that they do not contest the allegations raised in the district's cross-appeal arguing to reverse or overturn all of the relief ordered by the IHO (see Reply & Answer to Cr. App. ¶ 11). Specifically, the parents affirmatively assert that they are not appealing the "IHO's denial of a bank of compensatory hours of ABA or related services"; moreover, the parents affirmatively assert that they agree with the district's contentions that the "relief awarded by [the] IHO [] was inappropriate" and they now agree to "forego the request for funding for services outside of MCC" (*id.* ¶¶ 6, 11). As relief, the parents seek to reverse the IHO's finding that MCC was not an appropriate unilateral placement, and the IHO's order directing the district to recommend a residential placement for the student.

⁴ The parents submitted additional documentary evidence for consideration on appeal (see generally Req. for Rev. Exs. R-S).

⁵ The district also requests that the parents' additional evidence be rejected because the district did not have the opportunity for cross-examination and because it is not necessary to render a determination on appeal (see Answer with Cross-Appeal ¶5).

In a reply to the parents' answer to the cross-appeal, the district argues to reject the parents' pleading because it failed to comply with practice regulations as it was not properly verified.⁶

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 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).

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

⁶ Contrary to the district's contention, the parents' Reply and Answer to the Cross-Appeal filed with the Office of State Review was properly verified (see generally Reply & Answer to Cr. App.).

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).

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

VI. Discussion

A. Preliminary Matters—Additional Documentary Evidence

As noted, the parents submitted two documents as additional evidence for consideration on appeal (see generally Req. for Rev. Exs. R-S). The district argues that the additional evidence should be rejected, asserting that the district cannot cross-examine the affiant—the director of MCC—or the individuals who purportedly prepared the accompanying progress report (dated July 2022 through December 2022) (see Answer & Cr. App. ¶ 5).

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Here, the parents do not assert any arguments to support the consideration of either proposed exhibit (see generally Req. for Rev.; Parent Mem. of Law). Notwithstanding the fact that the parents claim that the newly submitted MCC progress report—which appears to cover the same time frame within which the impartial hearing took place—was not available during the impartial hearing, I will exercise my discretion and decline to admit and consider the parents' additional documentary evidence, as it is not necessary to render a decision in this matter.

B. Scope of Review

Initially, the district affirmatively asserts that it is not appealing the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year (see Answer & Cr. App. ¶ 6). As a result, this determination has 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]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

Next, a review of the allegations in the district's cross-appeal, together with the parents' answer thereto, reveal that the parties now agree that the IHO improperly ordered the district to place the student in a residential setting, that the IHO erred by awarding a prospective home-based program, and that the IHO properly denied the parents' request for a bank of compensatory educational services consisting of ABA and related services (compare Answer & Cr. App. ¶¶ 5-6, 14-17, with Reply & Answer to Cr. App. ¶¶ 6, 11).⁷ Given the parties' respective positions, the remainder of this decision focuses on whether MCC was an appropriate unilateral placement and whether the parents are entitled to funding for the costs of the student's tuition during the 2022-23 school year.

VII. Unilateral Placement

A. Student's Needs

While the parties do not generally dispute the nature and extent of the student's needs, a description thereof provides context for the discussion regarding whether MCC was an appropriate unilateral placement for the student.

Turning first to the student's cognitive abilities, the May 2022 autism evaluation report noted that, on the SB-5, the student's "abbreviated Intellectual Quotient (IQ) score of 63 . . . [fell]

⁷ Notwithstanding the fact that both parties agree that the IHO erred by ordering the district to recommend a residential setting for the student, it may be appropriate—given the student's behaviors and her inability to attend MCC in person—for a CSE to consider a more restrictive setting for the student, for even a short duration, in order to address the student's behaviors.

within the mild range of intellectual disability," and the student "displayed strengths on nonverbal IQ tasks, relative to verbal IQ tasks" (Parent Ex. C at p. 3). On the DAS-2, the student's developmental skills ranged from the three-year-old to the seven-year-old age levels, with strengths in visual-spatial-motor tasks and concurrent weaknesses in verbal reasoning (id. at p. 4). The student's adaptive skills were significantly below her measured cognitive abilities, falling in the low range on the Vineland-3, and as reported by the evaluator, the student exhibited severe symptoms of autism on the CARS-2 (id. at pp. 4-6). Furthermore, the student exhibited clinically significant internalizing and externalizing symptoms per parent report on the CBCL, with significant difficulty in the area of mood regulation and anxiety (id. at p. 6).

In describing the student's academic skills, the MCC director of education (MCC director) testified that the student required a "dense schedule of reinforcement to reinforce correct responding, response prompts to acquire novel academic skills, and modifications to curricula . . . with respect to specific skill domains" (Parent Ex. P ¶ 20).⁸ The director further testified that the student's goals for the 2022-23 school year "focus[ed] on increasing her functional academic skills" (id.). According to the MCC director, the student's reading and comprehension skills were at a first to second grade instructional level, and "extra stimulus prompts such as highlighting the relevant text with the target response" had helped to increase the student's independence with responding correctly (id.). The MCC director also noted that, as the length of text increased, the student "perceive[d] the reading task to be challenging and w[ould] often engage in problem behaviors to escape the task" (id. ¶ 21).

As reported in the May 2022 autism evaluation report, the student "previously enjoyed reading and would read independently"; it was further reported that the student "previously read books up to a second or third grade level" (Parent Ex. C at p. 5). However, the evaluator noted that, at the time of the evaluation, the student's "reading skills consist[ed] of sight words and some sentences" and she "no longer read[] for pleasure or as a leisure activity" (id.). At the impartial hearing, the student's mother testified that, at the start of the 2022-23 school year in July 2022, the student was "between a [first to second] grade level in reading, math, in all of her subjects," but currently, due to the intensity of the student's behaviors, the focus of the student's sessions was "trying to manage those behavior[s] so she c[ould] do [her] academic work" (Tr. p. 68).

Speaking to the student's social/emotional development, the MCC director testified that the student continued to experience challenges related to self-management (see Parent Ex. P ¶ 25). She described the student as continuing to demonstrate a "low frustration tolerance when presented with challenging tasks," and in these moments of frustration, the student "demonstrate[d] difficulty with self-regulation which present[ed] as becoming frustrated or engaging in problem behaviors" (id.).

The May 2022 autism evaluation report noted that, on the Vineland-3, the student received an adaptive behavior composite score that was below the first percentile and in the "Low range for her age" (Parent Ex. C at p. 5). According to the evaluator, the student's scores in the areas of communication skills, daily living skills, socialization skills, and motor skills "also fell in this range"; as a result, the evaluator noted that "[o]verall, the results indicate[d] significant delays and

⁸ To be clear, the May 2022 autism evaluation did not assess the student's academic skills (see generally Parent Ex. C).

impairment in adaptive skills" (id.). The May 2022 autism evaluation report revealed that the student's daily living skills fell "below the 3-year [old] level, with some skills scattering up to the 3-year, 5-month level" (id.). Additionally, the evaluator indicated that the student did "not show safety awareness for items that [we]re hot or sharp" and she was "not safe outside the home, and thus her family rarely le[ft] home" (id.).

Within the May 2022 autism evaluation report, the evaluator described the student's social skills as falling "below the 2-year [old] level" (Parent Ex. C at p. 5). While noting that the student "c[ould] be affectionate with family members and kn[ew] those who [we]re closer to her," the student no longer engaged in "back and forth interactions" (id.). The evaluator indicated that, "[p]reviously, [the student] enjoyed social games and playing next to other children her age" and she "used to laugh and giggle when watching other children play"; however, the student "no longer show[ed] any of her previously acquired social skills" (id. at pp. 5-6). Further, as noted above, the May 2022 evaluation report described the student as experiencing "episodes of acute upset characterized by screaming and crying uncontrollably, thrashing her body, throwing, jumping to the point of injuring her feet and rocking the house to the point of items falling from the walls and shelves, head banging, hitting her own head with her hands, and knocking her knuckles together to the point of bruising" (id. at p. 2).

As for the student's behavioral needs, the student's mother characterized the student's behaviors—such as hitting herself, jumping, and trying to bang her head on the wall or on anything nearby—as "safety concerns" and as the student's "biggest weakness" (Tr. pp. 66-67). At the impartial hearing, the student's mother testified that the student's behavior was "unpredictable," and explained, for example, that the student could be "in a good mood and happy," "sitting at her desk and . . . then out of nowhere she'll [] start hitting her head with whatever [wa]s near her"; as a result, the parent tried to keep the student's work area clear, with "nothing on the table and nothing near her" (Tr. p. 67). The student's mother also testified, however, that if the student had a "good bottle of water, she would just . . . suddenly grab the bottle and hit herself or if there [wa]s the phone or the iPad, which [wa]s what [the student used for] her remote sessions," the student would "try to quickly grab it and hit her head with it" (id.). In addition, the student's mother testified that the student "[cried] and scream[d] a lot," she was "very anxious," and the student awoke during the night with the "same behaviors that [they] s[aw] during the day" (Tr. p. 69). Further, the student's mother explained how, when she and the student's father attempted to transport the student to school in September, they had "padding on the car windows because [the student] was banging her head on the windows"; the student's mother testified that she sat "in the back [of the car] with [the student] while [her] husband [drove]" (Tr. at p. 89). According to the student's mother, the student would attempt to get out of the car, "she would bang her head on any area that wasn't padded," the student would "flail around the back seat," "try to grab the driver," "throw her body around," and "sh[ook] and hit[] herself really hard" (Tr. pp. 89-90). Basically, the student exhibited all of the same behaviors at home and in the car (see Tr. p. 90). In addition, the student's mother testified that, if the student was upset, she would generally hurt herself; but if she was close by, the student would "just hit [her] or headbutt [her] or bite [her] because she [wa]s feeling, . . . , very upset and frustrated" (Tr. p. 94). The student's mother added that, if she tried to block the student from hitting her head on the wall, the student would headbutt her instead of the wall, or bite her because she was blocking the wall (Tr. pp. 94-95).

Describing the student's communication needs with respect to her progress in speech-language therapy, the MCC director testified that the student used "words, phrases and sentences that range[d] in length from 1 to 6 words," but noted that her "language [wa]s largely comprised of rote, repetitive and learned phrases and sentences," and that "[o]utside of these communicative functions, she require[d] prompts to ask questions, comment or engage in conversations with peers and adults" (Parent Ex. P at ¶ 27). According to the MCC director, the student's receptive language goals focused on "improving her ability to understand expected versus unexpected behaviors, to teach her how to functionally replace the 'unexpected' behaviors (such as screaming) with more appropriate ones" (*id.* ¶ 28). The student's expressive language goals focused on "expanding her ability to [identify] what c[ame] next in a sequence for familiar self-care routines" (*id.*).

As noted above, the May 2022 autism evaluation report indicated that, on the CARS-2, the student received a score in the "[s]evere [s]ymptoms range for [a]utism [s]pectrum [d]isorder" and had "significant difficulty with social communication, including reduced expressive language, lack in social use of language, [and the] presence of echolalia and scripted phrases" (Parent Ex. C at p. 5). In addition, the May 2022 autism evaluation report reflected that the student's eye contact was "reported and observed to [be] fleeting and often not integrated with other forms of communication," and the student did "not make consistent attempts to engage socially with others and her responsiveness to the social initiations of others [wa]s often variable" (*id.*). Based on the student's mother's responses to the Vineland-3, and as noted in the May 2022 autism evaluation report, , the student's language skills were at the "1-year, 11-month age level for receptive language, 2-year, 5-month level for expressive language, and 6-year level for written language" (*id.*). The May 2022 autism evaluation report noted that the student spoke in "single words and short phrases" and "answer[ed] some personal questions, such as her name," but according to the evaluator, the student "could [previously] answer other personal questions such as her home address but ha[d] since lost those skills" (*id.*). In addition, the student reportedly "recognize[d] the names of family members and objects" and was able to "follow[] single and two-step directions when they involve[d] familiar items and [we]re within the context of daily routines" (*id.*).

Regarding the student's physical development, the MCC director testified that the student's poor frustration tolerance and sensory dysregulation presented challenges to her ability to complete routines around her home (*see* Parent Ex. P ¶ 30). According to the MCC director, the student's occupational therapy goals focused on "sensory processing, self-care skills, gross motor coordination, and self-management skills" (*id.*). With respect to self-regulation, the student's goals focused on "increasing [her] ability to select a multi-step sensory strategy and engage in corresponding activities to help her self-regulate based upon her needs" (*id.* ¶ 34). The May 2022 autism evaluation report indicated that the student engaged in repetitive behaviors and vocalizations and "show[ed] atypical sensory interests" (Parent Ex. C at p. 5).

B. MCC—Specially Designed Instruction

Having generally described the student's overall needs, the inquiry now turns to whether the student's unilateral placement at MCC provided her with specially designed instruction to meet her needs. As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (*Gagliardo*, 489 F.3d at 112; *see Frank G.*, 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible

student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Here, the parents contend that the IHO misapplied the legal standards used to determine the appropriateness of the student's unilateral placement at MCC for the 2022-23 school year. More specifically, the parents assert that MCC's program was reasonably calculated to confer educational benefit through its functional behavior assessment, behavior plan, 1:1 ABA-based academic instruction, related services of speech-language therapy and OT, as well as instruction targeting the student's leisure and community participation. In addition, the parents note their satisfaction with MCC's program, as MCC responded to their concerns and adapted the student's curriculum to her ongoing needs. According to the parents, the evidence in the hearing record demonstrates that the student was making slow progress during the first half of the school year and improved in some of her maladaptive behaviors.

The district contends that the IHO properly concluded that MCC was not an appropriate unilateral placement for the student, and the evidence in the hearing record demonstrates that MCC was not individualized to the student's academic or social/emotional needs. In addition, the district contends that the evidence in the hearing record reflects that MCC was not meeting the student's behavioral needs. The district also contends that the hearing record lacks evidence to establish what services the student actually received during the 2022-23 school year. As a result, the district argues to uphold the IHO's finding that MCC was not an appropriate unilateral placement.

Based upon an independent review of the hearing record, the evidence supports the IHO's determination that the parents failed to sustain their burden to establish that MCC was an appropriate unilateral placement for the student for the 2022-23 school year. Consistent with the IHO's determination, the evidence demonstrates that the MCC program—as described in the hearing record via a program description, the MCC director's testimony, and the student's daily schedule—bore little, if any, resemblance to the actual program the student received during the 2022-23 school year.

According to the MCC program description in the hearing record, MCC offered a "balanced special education program for [its] students that incorporate[d] all aspects of a student's development: cognitive, social, emotional, physical, and behavioral within a teaching model that [wa]s based upon the principles of [ABA]" (Parent Ex. N at p. 1). In addition, MCC provided students with "individualized instruction [that wa]s complemented by supported group instruction through participation in a variety of special subject areas, community-based experiences, and vocational opportunities" (*id.*). According to the program description, the individualized instruction was "assigned to students based on their inventories, designated goals created by MCC, the wishes of the parents, and the needs of the community," and the curricula "always include[d] measurable outcomes for students as well as detailed teacher operations" (*id.* at p. 2). In addition, the MCC program description indicated that "[s]tudent responses to instruction [we]re continually measured throughout the instructional day" (*id.*). MCC's class structure included one-to-one, two-to-one, and two-to-one crossbridge classrooms, as well as flexible ratios to allow for the "individualization of skills that allow[ed] for programming that promote[d] increased independence during works tasks, decreased rates of reinforcement and support during groups" (*id.* at pp. 3-4). The MCC program also included "Social Programming" to provide students with "opportunities" to make "progress academically, socially, and in their communication skills," and to interact with nondisabled peers; "Self-Management" to promote independence in "self-help

skills, activities of daily living, leisure skills, and instruction to facilitate learning"; and "Behavioral Support, Plans and Crisis Management" to help students "navigate physiological changes commensurate with puberty and adolescence," as well as offering students a "supportive environment that respect[ed] the dignity, shifting behavioral needs and learning of all [MCC] students" (*id.* at p. 4). MCC also provided a "highly trained team of behavior analysts, behavioral support staff, classroom faculty, and related service therapists [who] work[ed] collaboratively to ensure that [MCC] students' needs [we]re met through teaching socially appropriate replacement behaviors" (*id.*). According to the program description, MCC also offered speech-language therapy and OT services (*id.* at pp. 6-7). And finally, the MCC program description indicated that MCC could provide remote instruction "if a student [wa]s required to quarantine due to exposure, contracting COVID-19 or building closure," and such remote instruction would be provided via both "synchronous and asynchronous learning" as further described therein (*id.* at p. 8).⁹ However, it was also noted that "MCC students otherwise attend[ed] school in person daily" (*id.* [emphasis in original]).

In addition to the MCC program description, the MCC director further described MCC's program in her testimony, and spoke directly about the student's program at MCC. For example, the MCC director testified that MCC was an "independent special education school focused on the needs of students with autism and related disabilities in need of a highly individualized program of [ABA]" (Parent Ex. P ¶ 6). She also indicated that, for the 2022-23 school year, the student was placed in a classroom with a "2:1 adult to student ratio, with seven students total, one lead teacher and four [ABA] instructors" (*id.* ¶ 9). According to the MCC director, the student's lead classroom teacher was a "certified special and general education teacher" and a BCBA; the three ABA instructors in the classroom received training in the "principles of behavior analysis, behavior management, [and] data collection and analysis" upon hiring (*id.*). The MCC director testified that the "program designed for [the student] ha[d] been individualized to address her needs as determined from her prior reports and through criterion-based assessment," including annual goals and short-term objectives based on the student's needs as determined by the Assessment of Functional Living Skills (AFLS), the parent's wishes, and the student's future educational needs (*id.* ¶ 11). She further testified that the AFLS provided MCC "with specifics about [the student's] strengths and deficits that allowed for individualized goals to be developed" for the student for the 2022-23 school year (*id.* ¶ 12). According to the MCC director, the AFLS identified the student's deficits, including: "difficulty with her social skills, her self-management and regulation skills, her core and applied academic skills (math, reading, writing) and her knowledge of health and safety," and "goals were identified and designed to address these deficits and corresponding programs were put into place within [the student's] daily programming" (*id.*). The MCC director noted that to meet the student's receptive, expressive, and pragmatic language needs, MCC provided two 45-minute sessions of individual speech-language therapy per week, and one 60-minute "transdisciplinary group," with 2:1 support from an ABA instructor in her classroom during groups (*id.* ¶ 14). In addition, the MCC director testified that the student received two 45-minute sessions of individual OT, and one 60-minute transdisciplinary group with 2:1 support from an ABA

⁹ Synchronous instruction referred to the provision of "live video sessions where the teacher/therapist wa[s] in a different location than the student" and "with the parent acting as a proxy in which they function[ed] as our 'hands' during the sessions" (Parent Ex. N at p. 8). Asynchronous instruction referred to the provision of "prerecorded" exercises or activities by video, including "written assignments/ worksheets individually tailored to the student's learning goals, or activities to execute with the parent or caregiver" (*id.*).

instructor in her classroom during groups, which focused on fine motor skills, motor planning, and sensory processing (id. ¶ 15).

According to the MCC director's testimony, the student was provided "five hours each day of 1:1 instruction and one hour of instruction for lunch and leisure skills with a 2:1 instructional ratio" (Parent Ex. P ¶ 9). She testified that, during the 2022-23 school year, the student "attend[ed] school both in person and through synchronous remote instruction," as the student had been diagnosed as having pediatric autoimmune neuropsychiatric autoimmune disorder (PANDAS) (Parent Ex. P ¶ 10). The MCC director noted that when the student's PANDAS symptoms "present[ed] in high frequency, [the student] w[ould] engage in self-injury, aggression, [and] repetitive screaming paired with motor movements," and during these times, "transporting [the student] to school c[ould] pose a risk to her safety as she w[ould] hit her head on the car windows, attempt to open the vehicle door, and engage in aggression towards the driver" (id.). The MCC director testified that the student's remote instruction was provided through synchronous video sessions for classroom instruction, speech-language therapy, and OT (Tr. p. 56; see Parent Ex. P ¶ 10). When provided with synchronous remote instruction, the student's parents or caregivers "act[ed] as a proxy during the session where needed and received guidance and direction from the teacher/therapist when prompting [wa]s needed" (Parent Ex. P ¶ 10). The MCC director further testified that the student had only been in school "just a handful of times" and her instruction had "been really largely remote" during the 2022-23 school year (Tr. p. 55). She indicated that the student's day was a "full day of remote instruction," and her remote schedule "would be pretty identical to what she ha[d] at school" (Tr. pp. 55-57).

However, the evidence in the hearing record shows that, contrary to the MCC director's testimony, the length of the student's school day was shorter for remote instruction than for in-person instruction, with fewer hours of direct instruction. For example, according to the student's in-person schedule for instruction, her day began at 8:45 a.m. with arrival, unpacking, and self-management routines, and ended with dismissal at 2:45 p.m. (six total hours of school) (see Parent Ex. K). As reflected in her MCC in-person schedule, the student received approximately five hours of instruction in either a one-to-one or a two-to-one setting (id.).¹⁰ For in-person instruction, the student received one-to-one instruction throughout the day apart from lunch and "leisure" (id.). During her 30-minute lunch period, the student received "2:1 instruction" in meal skills and social skills (id.). According to the in-person schedule, on Wednesday and Thursday the student received a speech-language therapy or OT "consultation" during lunch with one-to-one instruction (id.). The student's in-person schedule also reflected that she received two-to-one instruction during "leisure," which the MCC director described as a time when students learned to set up their "own individual schedule for leisure-type activities they would like to engage in" so they could learn to "self-manage their free time" (Tr. at p. 60; see Parent Ex. K).

In contrast, according to the student's remote instruction schedule, the student's school day started at 9:15 a.m. and ended at 2:15 p.m., for a total of five hours per day on Monday, Wednesday, and Friday, and approximately one less hour of total time each day when compared

¹⁰ The student's schedule indicated that in addition to her arrival routine her day included individualized instruction, group instruction, adapted physical education, community-based instruction, transdisciplinary community-based instruction, music therapy, speech therapy, lunch, leisure skill instruction, and occupational therapy (Parent Ex. K).

to the student's in-person schedule (8:45 a.m. to 2:45 p.m., six hours total per day) (compare Parent Ex. L at p. 1, with Parent Ex. K). In addition, the student only received approximately three hours and 45 minutes of direct instructional time during remote instruction on Monday, Wednesday, and Friday—as compared to the five hours she was intended to receive during in-person instruction—with approximately one hour and 15 minutes being devoted to lunch and "leisure" during remote instruction (compare Parent Ex. L at p. 1, with Parent Ex. K). The MCC director testified that during remote instruction, the student's leisure period "would be . . . activities that she would self-select with the parent" (Tr. pp. 60-61). The student's mother testified that during her leisure period, the student would "build Legos or take a walk" (Tr. p. 89). The student's remote schedule additionally showed two 45-minute periods of adapted physical education each week (one on Wednesday and one on Friday), which were described by the MCC director as "asynchronous available activities" that were prepared by the adapted physical education teacher, but that the student did with the parent, which also reduced the amount of direct instruction the student received from MCC on her remote instruction schedule (Tr. pp. 59-60; see Parent Ex. L at p. 1).

Moreover, the student's remote schedule revealed that, on Tuesday and Thursday, the student did not begin her school day until 10:00 a.m., but still ended her school day at 2:15 p.m.—for an approximately four hour and 15-minute school day—and thus, on these days she was only scheduled to receive a total of approximately three hours of instruction (see Parent Ex. L at p. 1). Speaking to the student's later start time on Tuesday and Thursday, the MCC director explained that in-person students typically received instruction from 9:15 a.m. to 10:00 a.m. on Tuesday and Thursday, but the student was "struggling to participate in some of those sessions" and MCC had "slowly added these additional—you know, we [we]re hoping to add those additional sessions back in as she was able to tolerate longer and longer sessions" (Tr. at p. 58; see Parent Ex. L at p. 1). The MCC director also testified that, generally they tried to have the student "persevere through the whole, . . . , 45-minute session," and the student made it through "a lot of the sessions"; however, there were still sessions when the student indicated she was not "feeling well" and would "sign off a bit early" when she was not "physically able to persevere through an activity" (Tr. pp. 58-59).

In light of the above, the evidence reflects that if the student had attended MCC in person during the 2022-23 school year, she would have received a total of approximately 25 hours per week of direct instruction (see Parent Ex. K). However, since the student attended MCC via remote instruction, the evidence reflects that she received a total of approximately 18 hours per week of direct instruction (see Parent Ex. L at p. 1).

Moreover, testimonial evidence elicited from the student's mother demonstrates that the student's behaviors impeded her ability to participate in the already limited remote instruction, thereby reducing the amount of direct instruction the student received even more. At the impartial hearing, the IHO asked the student's mother to describe a "typical day" of remote instruction at her home with the student (Tr. p. 85). According to the student's mother, the student's classes began at 9:15 a.m., with the student sitting at the table for "Zoom sessions on the iPad" (Tr. pp. 85-86). She noted that the student would earn a "few-minute break[s] after she'[d] earned all her checks" for the class, and as a result, she could watch a video or play with toys before the next class started (Tr. p. 86). Generally, the student attended back-to-back classes, however, the student's mother testified that, "sometimes, . . . the majority of the session [wa]s trying to keep [the student] calm and keep her from hurting herself" (id.). To calm the student, MCC staff used Calm Connect

videos and activities "to try to help [the student], . . . , self-regulate and calm herself" (*id.*). The student's mother testified that, a "lot of times . . . [the student] g[ot] up throughout the session and [wa]s jumping or hitting herself or trying to hit her head on the wall" (Tr. pp. 86-87). She further testified that "[s]ome days [we]re . . . better than others" and "it really depend[ed] on, . . . , how [the student] [wa]s that day for how well she c[ould] sit through and do the activities that she [was] doing in class" (Tr. p. 87). The student's mother added that "for the most part," the student was able to do the activities with the parent and teachers "working through with her and taking frequent breaks" (*id.*).

When asked about the student's ability to sit through a back-to-back ABA session that, on a Thursday, would extend for approximately two hours and 15 minutes, the student's mother explained that "on a typical day," the student could sit for "maybe an hour and a half or an hour and 20 minutes or so," "but not all of that hour and a half [was] doing work" (Tr. p. 88). The student's mother testified that approximately "half" of the student's instructional time was spent trying to calm the student by performing a "Calm Connect activity" or "yoga" (Tr. pp. 88-89). In addition to having a shorter school day with fewer hours of direct instruction while on remote instruction, the student's MCC attendance record showed that from July 2022 through December 2022, the student was absent on approximately 32 out of the total of 96 school days (*see* Parent Ex. M).

Turning to the student's progress during the 2022-23 school year, the MCC director generally described the student's program and goals with few references to measured progress (*see* Parent Ex. P ¶¶ 20-35). For example, she testified that performance data showed that extra stimulus prompts, such as highlighting the text with the desired response, had been effective in increasing the student's independence in responding to questions about what she had read in her leveled reader, and the student had made progress in math and was solving double digit subtraction problems with regrouping independently using visual prompts (*see* Parent Ex. P at ¶¶ 21, 23). The hearing record did not include any progress reports from MCC or the student's related services providers, and failed to include any data obtained by the student's ABA providers (*see generally* Tr. pp. 1-99; Parent Exs. A-Q; Dist. Exs. 1-4).

At the impartial hearing, when asked why she had enrolled, and then reenrolled, the student at MCC, the student's mother testified about progress she had made. For example, the student's mother testified that "when [the student] first started [at MCC], she could only say a couple words, and they taught her to speak in phrases and sentences" (Tr. pp. 77-78). She also testified that over the years at MCC, the student "learned reading, and math, and . . . writing," adding that "[b]efore she was able to write [] the home notes to tell me about [] how her day was and what she was doing in school" (Tr. p. 78; *see* Tr. pp. 57-58). The student's mother also noted that, during remote sessions, she was able to speak with MCC staff "daily at the end of each session to go over what worked and what didn't work and to make changes for the next sessions" (*id.*). She further testified that MCC "adapt[ed] really well based on [her] feedback and also [based on] seeing how [the student was] doing in the sessions" (Tr. p. 79). The student's mother added that MCC took "data of every session so they c[ould] adapt and use that going forward" and MCC staff were "very willing to [] tailor each session to her needs and work around her—her difficulties" (*id.*). In addition, the student's mother testified that the student made a "lot of progress in the—her academics and related services, despite the behavioral issues that she's experienced," and she had

also made progress with "reading and answering comprehension questions as well as some writing and math" (id.).

Notwithstanding this testimony, however, the student's mother also testified that she sought additional services as a home-based program, in part, to "overcome the regression that [the student had] experienced the last few years from the PANDAS" and to help the student generalize skills (Tr. pp. 81-82). The student's mother testified that the student's "safety and the dangerous behaviors impair[ed] her ability to do work in the classroom," noting also that the student's "behavioral needs [we]re so severe right now that she need[ed] more ABA and more services tha[n] c[ould] be provided during a normal school day" (Tr. pp. 82-83).

In addition to the regression observed by the student's mother, evidence in the hearing record demonstrates that since September 2020, when the student's difficult and self-injurious behaviors erupted, the student has exhibited regression. As noted above, at the time of the May 2022 autism evaluation, the student's mother reported "significant regression in [the student's] language and developmental skills," she had stopped communicating at the level she did prior to September 2020 and regressed from speaking in the "phrase to sentence level" to now speaking only in "single words with periodic shorter phrases" (Parent Ex. C at p. 2). At that time, the student's mother also reported that the student no longer engaged in "any functional play" and had previously "made gains in play and independent leisure skills" (id.). In addition, the student's interest in television and books had "decreased drastically" (id.). At the impartial hearing, the student's mother testified that the student had "difficulty with language" and "difficulty communicating [] what she [was] feeling" (Tr. p. 66). The student's mother also testified that while the student had "always had a language delay," she had been "able to express herself better prior to" September 2020 when they "noticed a big change" (Tr. p. 67). The student's mother testified that, at this point, the student could still speak in "very simple sentences, like a few words and [she] c[ould] answer some questions" (id.).

The MCC director testified that the student continued to struggle with self-regulation and engaged in "several different forms of problem behavior that imped[ed] her ability to participate in instruction," as well as her "participation with peers and within activities within the classroom and therapy sessions" (Parent Ex. P ¶¶ 17, 25). Specifically, the student demonstrated "inappropriate classroom behaviors, tantrums, self-injury and aggression" (id. ¶ 17). According to the MCC director, to address the student's behaviors MCC conducted a functional behavioral assessment (FBA) that included the "direct observation data of these target behaviors," as well as the use of "indirect measures including the Functional Assessment Screening Tool (FAST)" (id. ¶ 18).¹¹ The MCC director explained that "[t]hese direct and indirect measures together helped [MCC] identify the specific social, environmental, communication and academic factors that [we]re associated with target behaviors that interfere[d] with [the student's] ability to participate in education, social opportunities, activities of daily living, and learning" (id.). She added that the purpose of the FBA was to "understand the function of these problem behaviors and pair them with the least intrusive, most effective procedures to both decrease the problem behaviors [they] observed, while also increasing more appropriate replacement behaviors" (id.). The MCC director

¹¹ The MCC director's testimony did not identify when MCC conducted the FBA of the student (see generally Tr. pp. 47-63; Parent Ex. P). However, the student's August 2022 IEP reflected that the CSE had relied on an FBA report, which appeared to have been dated January 2021 (see Parent Ex. D at pp. 1, 18).

testified that "[s]ince implementing strategies and tactics within this plan, problem behaviors at school and within remote sessions ha[d] remained low for three of the four targeted behaviors" (*id.* ¶ 19).¹² She also testified that data was "collected as partial interval recording across [two] time samples per day," and that "[c]urrently, inappropriate classroom behaviors occur[ed] at a mean of 20 [percent] of the intervals across the time samples with a range from 0-100 [percent] of occurrence during these intervals," and self-injury "remained very low in frequency with a daily mean of 1.3 occurrences per day with a range of 0-10 occurrences per day" (*id.*). In addition, the MCC director testified that the student's tantrums were "recorded as a duration measure and range[d] from 0 to 10 minutes during school/sessions with a mean of less than one minute per day," and "aggression [had] remained very low with a mean of less than one occurrence per day and a range of 0 to 2 occurrences per day" (*id.*).

However, while the MCC director testified that three out of four of the student's targeted behaviors "remained very low," this information was not consistent with the testimony about the student's behavior elicited from the student's mother (compare Parent Ex. P ¶ 19, with Tr. pp. 70). At the impartial hearing, the student's mother testified that she had expressed concerns about the student's behavior at the March 2022 CSE meeting, and specifically informed the CSE about the changes in the "intensity and frequency" of the student's behaviors, as well as noting that the behaviors had increased (Tr. at pp. 70-71).¹³ Further, at the time of the impartial hearing, the student's mother testified that the student could not be transported to school because of her aggressive and self-injurious behaviors in the car, and her behaviors during remote instruction were "so intense" that trying to manage the student's behaviors was "pretty much the focus of her—her sessions" (Tr. pp. 68, 89-90). While the student's mother acknowledged that MCC had developed a behavioral intervention plan (BIP) for the student that had "reduce[d] some of the behaviors like the jumping down"—which the student had done so forcefully that she "developed a stress fracture in her leg"—and touching her eyeball and putting her hands in her mouth to "try to almost, like, gag herself," the student's mother testified that the student's "other behaviors like hitting herself, banging her head on things, taking objects and hitting her head with [them], biting herself, biting [the parent], or headbutting [the parent] as [she] [was] trying to block her," were all still present and "[we]re much more intense now" (Tr. pp. 90-91). In addition, and as noted above, the May 2022 autism evaluation revealed that the student's behaviors had "increased in frequency since initial onset" in September 2020, "with periods of mild reduction and no return to previous baselines" (Parent Ex. C at p. 2). The evaluator also reported that while the student had previously made gains in play and independent leisure skills, at the time of evaluation, the student no longer engaged in any functional play (*id.*). And the evaluator indicated that, for a period of time, the student exhibited a heightened sensitivity to smells, and regressed in self-feeding for several

¹² The four targeted behaviors included inappropriate classroom behaviors (defined as "jumping out of her seat, touching her eyeball/eye socket with her finger, putting her hand/finger in her mouth [or attempting to gag herself], putting her hands down her pants, any type of repetitive wiping motion on her body, loud scripting, and any stereotypy that interfere[d] with her ability to work/attend to work"), self-injury (defined as "hitting her body parts against surfaces"), tantrums (defined as the student's "failure to emit a response/follow a direction within 10 seconds, paired with at least [two] inappropriate classroom behaviors (e.g., jumping out of seat, loud scripting, screaming, kicking, [self-injurious behavior (SIB)], aggression, etc.)," and aggression (defined as "hitting, kicking, punching, and biting") (Parent Ex. P ¶19).

¹³ The student's mother reiterated her concerns about the student's behaviors at the August 2022 CSE meeting (see Tr. pp. 73-74).

months, placing her hands into her water cup and not feeding herself, but these had since improved; however, "no other developmental skill ha[d] improved" (*id.* at pp. 2-3).

In her testimony, the MCC director opined that, in addition to ABA and a one-to-one learning environment, the student's behaviors required a "setting that conduct[ed] an FBA and implement[ed] a BIP using research-based tactics," and that completed a "daily analysis of her behavior data so that empirically based adjustments c[ould] be made to the plan in order for her to progress" (Parent Ex. P ¶ 36). However, there is little, if any, evidence in the hearing record to support a finding that MCC provided the student with such a setting, especially during remote instruction (*see generally* Tr. pp. 1-99; Parent Exs. A-Q; Dist. Exs. 1-4). Although MCC provided support to the parents—who were responsible for ensuring the student's participation in remote instruction—and the parents felt that MCC was responsive to the student's needs and difficulties, the only behavior plan discussed in the hearing record focused on the student's behaviors that "impeded her ability to participate in instruction, participation with peers, and within activities within the classroom and therapy sessions" (Parent Ex. P ¶¶ 17, 20).

In light of the foregoing, while the evidence in the hearing record shows that the student's dangerous behaviors during transportation were preventing her from attending in-person instruction, and her self-injurious and aggressive behaviors at home prevented her from accessing a full day of remote instruction, the hearing record is devoid of evidence demonstrating that MCC had made any efforts to address either the transportation or the remote instruction issue or had developed any formal plan to facilitate the student's return to the classroom. Thus, overall, the evidence in the hearing record supports the IHO's finding that MCC was not an appropriate unilateral placement for the student for the 2022-23 school year, and the IHO properly denied the parents' request to be reimbursed for the costs of the student's tuition at MCC.

VIII. Conclusion

Having found that the parents failed to establish the appropriateness of the student's unilateral placement at MCC for the 2022-23 school year, the necessary inquiry is at an end, and there is no basis to disturb the IHO's finding.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.¹⁴

**Dated: Albany, New York
June 2, 2023**

**CAROL H. HAUGE
STATE REVIEW OFFICER**

¹⁴ As previously discussed, in the context of this appeal, the parties have expressed their agreement, consistent with the district's arguments on cross-appeal, that the IHO improperly ordered the district to place the student in a residential setting, that the IHO erred by awarding a prospective home-based program, and that the IHO properly denied the parents' request for a bank of compensatory educational services consisting of ABA and related services.