The University of the State of New York

The State Education Department
State Review Officer
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No. 23-221

Application of a STUDENT WITH A DISABILITY, by his 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 Regina Skyer and Assoc., LLP, attorneys for petitioners, by Jesse Cutler, Esq. and Linda A. Goldman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 their son's tuition costs at the Manhattan Children's Center (MCC) for the 2021-22 school year. The appeal must be sustained in part, and as explained below, the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. By the time the particular dispute arose in this proceeding, the student had attended MCC for several years (see Parent Ex. CC at ¶ 8). The CSE convened on October 15, 2020, to conduct an annual review and revise the student's IEP (see generally Dist. Ex. 2). Finding the student eligible for special education as a student with autism, the CSE recommended that the student be placed in a 6:1+1 special class and receive adapted physical education, occupational therapy (OT), physical therapy

(PT), speech-language therapy, and the support of an individual paraprofessional for behavioral support and that the parent be provided with parent counseling and training (Dist. Ex. 2 at pp. 47-48). On June 2, 2021, the district sent the parent prior written notice outlining the student's recommended educational program and a school location letter identifying the school the student was assigned to attend for the 2021-22 school year (Dist. Exs. 9; 10).

By letter dated June 17, 2021, the parents disagreed with the recommendations contained in the October 2020 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2021-22 school year and, as a result, notified the district of their intent to unilaterally place the student at MCC and seek funding for the placement from the district (Parent Ex. B).

In a due process complaint notice, dated July 1, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A). The parent's raised allegations related to the October 2021 IEP, including concerns regarding the evaluative information relied on in developing the IEP; the student's present levels of performance, management needs, and annual goals; and the student's need for more 1:1 instruction, as well as concerns related to the assigned public school site, such as the grouping of the student and the parents' inability to visit the school (id.).

Following status conferences on September 14, 2022, October 6, 2022, and November 9, 2022, an impartial hearing convened on December 15, 2022 and concluded on August 1, 2023, after 13 total days of proceedings (Tr. pp. 1-133). In a decision dated September 5, 2023, the IHO determined that the district offered the student a free appropriate public education (FAPE) for the 2021-22 school year and dismissed the parents' due process complaint notice (IHO decision at pp. 3-6). The IHO generally found that the October 2021 CSE considered sufficient evaluative information, that the October 2021 IEP included information regarding the student's present levels of performance, management needs, and annual goals from the student's nonpublic school, and sufficiently explained the program offered by the CSE (id. at pp. 5-6).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parties' dispute on appeal is whether the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year and, if so, whether the parents' unilateral placement of the student at MCC was appropriate and whether equitable considerations favored an award of tuition reimbursement. However, for the reasons discussed below, the matter must be remanded back to the IHO for further administrative proceedings.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir.

2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. FAPE

As background for why this matter must be remanded to the IHO for further administrative proceedings, a brief discussion of the student's needs as revealed by the available evaluative

[1] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

information, a description of the district's recommended program as detailed in the October 2020 IEP, and the program and services provided at the unilateral placement at MCC is warranted.

Briefly, the student's October 2020 IEP indicated that the student had previously undergone a neuropsychological evaluation in November 2019 (Dist. Ex. 2 at pp. 1-4). As recorded in the October 2020 IEP, administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) yielded a full-scale IQ standard score of 42, which fell below the first percentile and indicated that the student performed in the "[e]xtremely [l]ow range overall" (id. at p. 1). The October 2020 IEP indicated that the Vineland Adaptive Behavior Scales- Third Edition (Vineland-III), completed by the student's parents, revealed that the student demonstrated "significantly underdeveloped skills" in communication, daily living skills, and socialization and his adaptive behavior composite score was below the first percentile (id. at pp. 3-4). The October 2020 IEP also included the results of the Childhood Autism Rating Scale – Second Edition (CARS-2), administered in May 2020 as part of an addendum to the November 2019 neuropsychological evaluation, which indicated that the student met the criteria for autism spectrum disorder (ASD) (id. at p. 4). The student's instructional/functional levels in reading and math were at the pre-kindergarten level (id. at p. 52; Dist. Ex. 11 ¶ 12; see Dist. Ex. 2 at pp. 5-6). With regard to expressive language, the October 2020 IEP indicated that the student communicated using multimodal forms that included vocal approximations, gestures, and an augmentative and alternative communication system and that his spontaneous length of utterance using vocal approximations ranged from one to three words (Dist. Ex. 2 at pp. 10-11). In terms of receptive language, the student was working on expanding his vocabulary and identifying an object given its function (id. at pp. 9-10). The October 2020 IEP noted that the student showed an interest in peers but required prompting to engage in appropriate interaction (id. at p. 13). In addition, the student had difficulty with transitions (id. at p. 15). The IEP further noted that the student had a behavioral intervention plan (BIP) that targeted his motor and oral stereotypy (id. at p. 14). In the area of physical development, the October 2020 IEP indicated that the student wore orthotics due to instability when walking (Dist. Ex. 2 at p. 15). The student previously had seizures; however, since March 2018 he had been seizure free and he was provided with medication for managing his symptoms (id.). The IEP indicated that the student experienced sensory dysregulation and difficulties with balance and coordination (id. at pp. 15-17).

Finding the student eligible for special education as a student with autism, the October 2020 CSE recommended a 12-month program with placement in a 6:1+1 special class with the provision of a full time paraprofessional to provide the student with behavioral supports (Dist. Ex. 2 at pp. 1, 21, 47, 48). In addition, the CSE recommended that the student receive related services of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of OT in a group, three 30-minute sessions per week of individual physical therapy (PT), three 30-minute sessions per week of individual speech language therapy, two 30-minute sessions per week of speech language therapy in a group, and two periods per week of adapted physical education (id. at pp. 47-48). The CSE also recommended that the student's parents be provided with one 60-minute session per month of parent counseling and training in a group (id. at pp. 47-48).

The October 2020 IEP identified strategies and resources to address the student's management needs, which included providing the student with immediate feedback for reinforcement and use of a consistent positive reinforcement schedule, as well as scaffolding,

repetition, redirection, and modeling (Dist. Ex. 2 at p. 20). The IEP further indicated that the student would benefit from: an augmentative and alternative communication (AAC) device; a functional behavioral assessment (FBA) and a BIP; visual aids such as charts, graphs, and pictures; pairing the student with a compatible peer buddy; being in close proximity to the teacher; teaching of social skills such as hand raising, taking turns, and sharing as part of the curriculum; break opportunities, a visual schedule, repeated exposure, sensory breaks, simplified instructions and directions; frequent check-ins, clear and consistent rules, routines, and expectations; short and varied tasks to maintain attention; multi-modality approach to support comprehension and retention; high interest related materials to increase motivation; and differentiated questions, in addition to focusing on the student's strengths such as pointing to a preferred choice, and awareness of the student's environmental triggers (id.). In addition to providing for related services and management needs, the October 2020 CSE developed goals in consultation with the parents, following a review of the evaluative data (id. at pp. 22-36; Dist. Ex. 11 ¶ 17).

At MCC, for the 2021-22 school year, the student received five hours per day of 1:1 individualized instruction using applied behavioral analysis (ABA), one hour per day in a 2:1 ratio during instructional lunch and leisure skills, three 30-minute sessions of individual speech-language therapy per week, two 30-minute sessions of individual OT per week, one 30-minute group session per week in each related service of speech-language therapy and OT supported 1:1 by a classroom staff member, and a 30-minute lunch consultation per week with each discipline (Parent Ex. D; Dist. Ex. 7 at p. 1).[2] Additionally, the student's schedule at MCC included groups for morning meeting and music with 1:1 instruction, as well as adapted physical education provided with 1:1 instruction (Parent Ex. D).[3]

Supports provided to the student at MCC, during 1:1 ABA teacher instruction, included: use of two-dimensional, and three-dimensional stimuli (e.g., pictures, number line, objects); use of an AAC device; use of iPad applications and games; and prompted levels of supports including full physical prompts, partial physical prompts, response prompts, vocal response prompts, visual response prompts, and gesture response prompts, as well as schedules of reinforcement and systematic fading of prompts (see Dist. Ex. 2 at pp. 5-9). The director at MCC noted additional supports provided to the student that included the completion of an FBA and development of a BIP, positive reinforcement, sensory support, use of pictures to increase identification of objects and functions, a multi-modal communication approach, use of "mands"/requests, and providing social skills training with peers (Parent Ex. CC ¶¶ 18-19, 20, 22, 23, 24). In relation to the related services of OT, as reported in the October 2021 IEP, supports for the student at MCC included providing a "sensory diet" including sensory activities such as "weight-bearing yoga poses, log rolls, and heavy work exercise" in addition to oral sensory input in use of chewy tubes, Toothette oral care swabs, and providing external facial massages, as well as participation in the "Wilbarger Protocol" which provided the student deep pressure on his back and extremities through brushing followed up with compressions that gave proprioceptive input to the student (Dist. Ex. 2 at p. 15).

[2] The educational progress reports all included a summary of the student's participation in five hours per day of 1:1 individualized instruction using ABA, with the October 2020 CSE relying on the June 2020 report (see Parent Exs. J at p. 1; M at p. 1; W at p. 1; X at p. 1; Dist. Ex 7 at p. 1).

[3] According to the October 2020 IEP, the student received PT services outside of his school as it was not offered at MCC, with the occupational therapist targeting gross motor skills and goals (see Dist. Ex. 2 at pp. 17-18, 19).

Additional supports included providing gestural and verbal cues, visual cues, physical assistance, sensory breaks, as well as use of iPad applications, a stylus and adapted loop scissors (id. at pp. 17, 18, 19). In the area of speech-language therapy, the October 2021 IEP reported that supports provided to the student at MCC included using a multimodal communication approach, use of pictures, a slant board, and "highly desirable objects," as well as an AAC device that provided "aided language input," with the therapist modeling the words and phrases on the device or a gesture prompt pointing to the button (id. at pp. 10-11). Additional supports included use of question prompts, physical prompts, and indirect verbal prompts (id. at pp. 10, 11, 12, 13). In addition, MCC formulated goals for the student's 2021-22 school year in the areas of academics, OT, and speech-language therapy (Parent Exs. E-G).[4]

Turning to the IHO decision, the IHO's determination that the district offered the student a FAPE for the 2021-22 school year rested on the IHO's finding that the district had offered "a cogent and responsive explanation for their decisions that show[ed] the IEP [wa]s reasonably calculated to enable the child to make progress appropriate in light of his circumstances" (IHO Decision at p. 5). The IHO found that there were no procedural errors, that the CSE had sufficient evaluative data and considered different classroom options for the student (id. at pp. 5-6). The IHO noted that the district offered the student a 6:1+1 special class placement and that the district's "witness explained that the recommended ABA method was the same approach and philosophy being offered in the [district] placement, but it was called a different name" (id. at p. 6). However, it is unclear from the IHO's wording in the decision if she found that the student required ABA in order to be offered a FAPE under the October 2020 IEP, or whether she found that ABA was provided in the student's programming.

Generally, an IEP is not required to specify the methodologies used with a student and the precise teaching methodologies to be used by a student's teacher are usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (Rowley, 458 U.S. at 204; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; A.S. v. New York City Dep't of Educ., 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; R.E., 694 F.3d at 192-94; M.H., 685 F.3d at 257). As long as any methodologies referenced in a student's IEP are "appropriate to the [student's] needs," the omission of a particular methodology is not necessarily a procedural violation (R.B., 589 Fed. App'x at 576 [upholding an IEP when there was no evidence that the student "could not make progress with another methodology"], citing 34 CFR 300.39[a][3] and R.E., 694 F.3d at 192-94). A CSE should take care to avoid restricting school district teachers and providers to using only the specific methodologies listed in a student's IEP unless the CSE believes such a restriction is necessary in order to provide the student a FAPE.

However, when the use of a specific methodology is required for a student to receive an educational benefit, the student's IEP should so indicate (see, e.g., R.E., 694 F.3d at 194 [finding an IEP substantively inadequate where there was "clear consensus" that a student required a

[4] Although the hearing record includes the MCC goals from the 2021-22 school year in the areas of OT, speech language therapy and academics, the October 2020 CSE relied on the 2020-21 MCC goals; the 2021-22 MCC goals are similar to the 2020-21 goals (compare Parent Exs. P-R, with Dist. Exs. 4, 5, 8). The hearing record includes duplicate exhibits as related to the student's 2020-21 speech language therapy, occupational therapy and academic goals (compare Parent Exs. P-R, with Dist. Exs. 4, 5, 8).

particular methodology, but where the "plan proposed in [the student's] IEP" offered "no guarantee" of the use of this methodology]). If the evaluative materials before the CSE recommend a particular methodology, there are no other evaluative materials before the CSE that suggest otherwise, and the school district does not conduct any evaluations "to call into question the opinions and recommendations contained in the evaluative materials," then, according to the Second Circuit, there is a "clear consensus" that requires that the methodology be placed on the IEP notwithstanding the testimonial opinion of a school district's CSE member (i.e. school psychologist) to rely on a broader approach by leaving the methodological question to the discretion of the teacher implementing the IEP (A.M. v. New York City Dep't of Educ., 845 F.3d 523, 544-45 [2d Cir. 2017]). The fact that some reports or evaluative materials do not mention a specific teaching methodology does not negate the "clear consensus" (R.E., 694 F.3d at 194).

One possible reading of the IHO's decision suggests that the IHO may have believed that to some extent the student required ABA to receive a FAPE, and the district's witness convinced the IHO that had the student received the recommended program at a district school, the student would have received ABA instruction that was along the same approach or philosophy as that offered at MCC, albeit under a "different name" (IHO Decision at p. 6).[5] Although there may be some references to ABA in the student's IEP, there is no provision in the IEP that requires the student to receive ABA methodology either exclusively or as part of his instruction (see Dist. Ex. 2 at p. 13, 34).

Thus the IHO's reasoning that the district would have provided the student with ABA cannot stand because the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child before the beginning of a school year (Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 [indicating that "[a]t the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]). Generally, R.E. stands for the proposition that a district cannot rely on after the fact testimony to rehabilitate a deficient IEP (see R.E., 694 F.3d at 186-88). In grappling with the permissibility of retrospective evidence in R.E., the Second Circuit squarely held that the question of whether an IEP was reasonably calculated to enable the student to receive education benefits "must be evaluated prospectively as of the time [the IEP] was created" (R.E., 694 F. 3d at 184-88 [explaining that with the exception of amendments made during the resolution period, the adequacy of an IEP must be examined prospectively as of the time of its drafting and that "retrospective testimony" regarding services not listed in the IEP may not be considered]).

Although the Second Circuit has held that a district cannot rely on after-the fact testimony in order to "rehabilitate a deficient IEP," testimony that "explains or justifies the services listed in

[5] In review of the particular testimony the IHO cited, when asked by counsel to "explain why did the team not consider an ABA model program of instruction for [the student]?", the district school psychologist responded that "in District 75, the teachers use a model like ABA. They use a reward system, either the child gets a reward or doesn't get a reward. So we don't call it ABA. But anyway, they use a similar philosophy to ABA. That's why we didn't recommend ABA, because in District 75, we use a similar – similar protocol to ABA" (Tr. pp. 79-80; Dist. Ex. 11 ¶1). Counsel then asked "would that be noted on the IEP?", the school psychologist responded that "Yes, it's noted in the 6:1:1. If the parent went to see the school, they would see that—that ABA is—is in fact, you know, used, but it's not called ABA. The Board of Education doesn't refer to it as ABA" (Tr. p. 80).

the IEP" is permissible and may be considered (R.E., 694 F.3d at 186-88; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 462 [2d Cir. 2014] [explaining that "[b]y way of example, we explained that 'testimony may be received that explains or justifies the services listed in the IEP,' but the district 'may not introduce testimony that a different teaching method, not mentioned in the IEP, would have been used'"] [internal citations omitted]; P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 416 [S.D.N.Y. 2017] [noting that the "few additional details" about the CSE's recommendations described in testimony did not materially alter the written plan or prevent the parents from making an informed decision]).

Here, the district witness' testimony that the student would have received ABA-type services is exactly the type of retrospective evidence that "a different teaching method, not mentioned in the IEP, would have been used" that may not be relied on to determine that a particular IEP offered the student a FAPE (E.M., 758 F.3d 442 at 462). However, it is not clear from the witness' testimony of the witness was trying to indicate that a need for ABA instruction would have been met in the district public school or if the student's needs could have been met using instruction that was not solely based on ABA. It may be that the student does not require a particular methodology in order to make progress as, for example, the educational program the student received from MCC was not solely an ABA program given that the student appears to have received related services without the use of ABA (see e.g. Parent Exs. T; U). According to the parents, the student "has received 1:1 instruction using [ABA] from Early Intervention and throughout his academic career" and thus it is not clear to what extent any other approaches have been tried or whether the selection of 1:1 ABA has been the preference of his parents and private providers (Parent Ex. A at p. 2).

Accordingly, the IHO erred in simply relying on the district school psychologist's testimony regarding the type of instructional methodology offered at district public schools and the portion of the IHO's decision that found that the student was offered a FAPE by the October 2020 IEP must be set aside and the matter remanded for further proceedings and a weighing of appropriate evidence in light of the standards described above (8 NYCRR 279.10[c]).

Upon remand, the IHO may further develop the hearing record on each issue that must be ruled upon, including obtaining a copy of the 2019 neuropsychological evaluation that is referenced in the October 2020 IEP, which, based on testimony by the district school psychologist, included a recommendation for the use of ABA instruction for the student (see Tr. p. 74; Dist. Ex. 2). To be clear, the IHO's determination that the October 2020 IEP offered the student a FAPE for the 2021-22 school year has been set aside only for its reliance on impermissible retrospective evidence. Upon remand the IHO remains free to render determinations with respect to the student's need for a particular methodology, such as ABA or 1:1 instruction, and remains free to determine that, based on the student's needs, the October 2020 IEP was appropriate or inappropriate at the time it was drafted. Additionally, in the event the IHO determines on remand that the October 2020 IEP did not offer the student a FAPE, the IHO may render findings with respect to the parents' unilateral placement of the student at MCC for the 2021-22 school year and equitable considerations and may take additional evidence with respect thereto.

VII. Conclusion

Having found that the IHO based the finding that the district offered the student a FAPE on an improper basis, and, as the IHO did not address the appropriateness of the parent's unilateral placement at MCC or equitable considerations and the hearing record may be insufficiently developed on these issues, this matter is remanded for the IHO to further develop the hearing record and then make determinations on these issues.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 5, 2023, which determined that the October 15, 2020 IEP offered the student a FAPE for the 2021-22 school year is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the district's offer of a FAPE to the student for the 2021-22 school year and potential further proceedings regarding the appropriateness of the parent's unilateral placement of the student at MCC for the 2021-22 school year and a weighing of equitable considerations.

Dated: **Albany, New York**
December 5, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER