The University of the State of New York

The State Education Department
State Review Officer
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No. 24-164

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 Office of Michelle Siegel, attorneys for petitioners, by Joseph DaProcida, 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 a decision of an impartial hearing officer (IHO) which denied their request for home-based applied behavior analysis (ABA) services for their son. Respondent (the district) cross-appeals from the portion of the IHO's decision which granted funding for an assistive technology device. The appeal must be sustained. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student has received a diagnosis of autism spectrum disorder (ASD) accompanied with an intellectual impairment and a language impairment (Dist. Ex. 4 at p. 1).[1] The student received early intervention services and preschool special education services (id. at pp. 3-4). In June and July of 2020, the student underwent a private neuropsychological evaluation (see Dist. Ex. 4). The student began attending The Titus School (Titus) in fall 2020 and received a "dual school and

[1] The hearing record includes duplicative copies of a 2020 neuropsychological evaluation (Tr. pp. 46-47; see Parent Ex. B; Dist. Ex. 4). For purposes of this decision, the district's exhibit will be cited.

home based 1:1 ABA program" (Parent Ex. Q ¶ 9).[2] In May 2022, Titus stopped providing the student's home-based ABA services and the parents obtained 15 hours per week of home-based ABA services for the student through Stride Behavior Services (Stride), which, according to the parent, the district funded by virtue of its obligation to maintain the student's placement during the pendency of an impartial hearing (id. ¶ 18; see Parent Ex. P ¶ 2).

A CSE convened on December 19, 2022, determined the student was eligible for special education as a student with autism, and developed an IEP to be implemented beginning on January 16, 2023 (Dist. Ex. 1 at pp. 1, 46, 52).[3] The CSE recommended a 12-month 6:1+1 special class placement in a district specialized school (id. at pp. 46-47). For related services, the CSE recommended that the student receive five 45-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of individual physical therapy (PT) per week, and five 45-minute sessions of individual speech-language therapy per week (id. at p. 46). The CSE also recommended full-time individual behavior support paraprofessional services and a "[d]ynamic display speech generating device (SGD) with applications," in addition to one 60-minute session of group parent counseling and training per week (id. at pp. 46, 47).

The parents signed an enrollment contract with Titus on May 24, 2023 for the student's attendance during the 2023-24 12-month school year (see Parent Ex. J).[4] The contract indicated that the tuition costs for the 2023-24 school year included related services of speech-language therapy, OT, PT, ABA services, and the services of a board certified behavior analyst (BCBA) (id. at pp. 1-2).

On June 16, 2023, the parents sent the district a letter stating their intent to continue the student's enrollment at Titus for the 2023-24 school year (see Parent Ex. D). The parents noted that the student was enrolled at Titus for the 2022-23 school year, which an IHO in a prior impartial hearing ordered the district to fund (id. at pp. 1, 3). The parents asserted that they did not agree with the recommendations of the December 2022 CSE, including but not limited to, the CSE's failure to recommend a nonpublic school placement and ABA services on the IEP (id.). The parents stated that the letter was to notify the district of their intent to re-enroll the student at Titus for the 2023-24 school year and seek pendency and funding for the cost of the program, inclusive of the extended day program of 15-hours per week of home-based ABA services provided by Stride (id. at p. 5; see Parent Ex. Q ¶ 21).

A. Due Process Complaint Notice

In a due process complaint notice dated July 3, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent

[2] The parents commenced due process proceedings involving the student's programming for subsequent school years (see Parent Ex. D).

[3] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

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

Ex. A at pp. 1-2). The parents raised several issues in the due process complaint notice regarding the December 2022 CSE and resultant IEP, including but not limited to, the CSE's failure to recommend ABA methodology, a functional behavior assessment or behavioral intervention plan, the inclusion in the IEP of inaccurate present levels of performance and inappropriate special transportation services, and the district's failure to ensure the parents had a meaningful opportunity to participate in the CSE process (id. at pp. 5-9). For relief, the parents requested reimbursement for the student's attendance at Titus for the extended 2023-24 school year plus 15 hours per week of 1:1 home-based ABA services with BCBA supervision, special transportation services, and funding for an appropriate augmentative and alternative communication (AAC) device with the Proloquo2go application (id. at pp. 11-12).[5]

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 10, 2023 and concluded on March 15, 2024 after 12 days of proceedings (see Tr. pp. 1-81).[6] In a decision dated March 24, 2024, the IHO found that the documentary evidence submitted by the district, without testimonial support, was not sufficient to establish that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 5, 9). The IHO found that the there was "no explanation, let alone a cogent responsive explanation, for the CSE's program and placement recommendation" (id. at p. 5). Therefore, the IHO determined that the district did not meet its burden of proof (id.).

Next, the IHO held that the testimonial and documentary evidence presented by the parents established that Titus was an appropriate unilateral placement for the student (IHO Decision at p. 7). The IHO noted that the district did not raise any issues that would limit or preclude tuition reimbursement and that the hearing record demonstrated that the parents cooperated with the CSE and provided "timely written notice" (id.). Thus, the IHO found that equitable considerations favored the parents' request for tuition reimbursement (id.). The IHO awarded the parents the cost of the student's placement at Titus during the 2023-24 school year (id.).

However, the IHO denied the parents' request for 15 hours per week of home-based 1:1 ABA services with BCBA supervision from Stride during the 2023-24 school year, holding that it was not supported by the hearing record (IHO Decision at pp. 7-8). The IHO found that the student was making progress at Titus and that "[t]he [p]arent cannot have it both ways; tuition reimbursement because the Titus school [wa]s meeting the Student's needs and then claim a need for services because the school alone c[ould not] meet the Student's needs" (id. at p. 8). The IHO determined that there was support for the assistive technology device in the hearing record and

[5] The parent also requested pendency services in the due process complaint notice based a prior finding of fact (Parent Ex. A at p. 10).

[6] Neither party appeared on August 10, 2023, and the district failed to appear at the next two hearing dates on September 8, 2023 and September 13, 2023 (Tr. pp. 1-14). The IHO addressed the parents' claim for pendency in an interim decision dated September 30, 2023, which found that the student's pendency placement lay in a February 24, 2023 unappealed IHO decision and consisted of the costs of the student's full tuition at Titus, special transportation, and 15 hours per week of home-based ABA for the 12-month school year (Interim IHO Decision at pp. 4-5; see also Pendency Ex. B).

ordered the district to directly fund/reimburse the cost of the device and application (id. at pp. 8-9).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in denying their request for home-based ABA services with BCBA supervision.[7] The parents contend that the IHO erred in finding that the student's progress was solely due to program at Titus and failed to consider that the student had been receiving 15 hours of 1:1 home-based ABA services per week while attending Titus. The parents argue that the student's progress was at least in part due to the home-based ABA and the evidence in the hearing record supports that finding. Moreover, the parents assert that the IHO erred in holding that there was insufficient evidence in the hearing record to support the request; arguing there was ample support from "uncontroverted evidence" for the need for this service. The parents contend that the IHO erred in finding the parents could not request funding for Titus and the home-based ABA services. The parents request the SRO reverse the IHO's denial and order the district to fund 15 hours per week of 1:1 home-based ABA services with BCBA supervision.

In an answer with cross-appeal, the district responds to the parents' allegations and argues that the IHO correctly denied the parents' request for home-based ABA services. First, the district contends that, for outside services that represent a portion of the unilateral placement, a parent must undergo financial risk normally associated with unilateral placements. Further, the district argues that the requested services were for generalizing skills to other environments and were not necessary for the student to make meaningful educational progress. Thus, the district asserts that the services were excessive.[8] As for a cross-appeal, the district argues that the IHO erred in ordering it to fund the assistive technology device. The district contends that the parent rejected the student's IEP to unilaterally place the student at Titus and that, therefore, the district was not obligated to implement any aspect of the December 2022 IEP. The district asserts that it was not required to provide the assistive technology and the SRO should annul the order by the IHO.

In an answer to the cross appeal, the parents argue that they were not obligated to undergo financial risk related to the home-based ABA services provided by Stride in order to obtain funding from the district. Further, the parents contend that there was no evidence the services provided by Stride were a gift or that they could not be held responsible for the costs. Regarding the assistive technology device, the parents assert that the hearing record establishes that the student required

[7] The request for review was signed by the student's mother (Req. for Rev. at p. 6). However, the parents' attorney submitted the pleading through the Office of State Review's electronic filing system, representing in the e-filing form that the parents were represented by counsel for purposes of the appeal, and the parents' counsel signed a memorandum of law as well as an answer to the cross appeal on the parents' behalf. The parents' counsel is reminded that State regulation provides that, if a party is represented by counsel, the pleadings must be endorsed with the name, mailing address, and telephone number of the party's attorney (8 NYCRR 279.7[a]).

[8] The district further argues that, should the SRO grant the parents' request for ABA services, the award should be calculated based on a 42-week school year.

the device as a necessary component of FAPE and the IHO acted properly by ordering the district to fund the device.[9]

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

[9] The parents submit additional evidence with their answer to the cross-appeal. In a reply to the answer to the cross-appeal, the district objects to the consideration of the additional evidence. Generally, documentary evidence not presented at an impartial hearing may be 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 additional evidence offered by the parents is not necessary to render a decision and, therefore, will not be considered.

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]).[10]

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-

[10] 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).

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 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 final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

Initially, the district does not cross-appeal from the IHO's decision that it denied the student a FAPE for the 2023-24 school year or that Titus was an appropriate unilateral school placement for that school year (IHO Decision at pp. 5, 7; see Ans. to Cross Appeal ¶ 5). Accordingly, these determinations have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[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]). On appeal, the crux of the dispute between the parties relates to the unilaterally obtained home-based ABA services delivered to the student by Stride during the 2023-24 school year and funding for the student's assistive technology device.

A. Home-Based ABA Services

Initially, the IHO erred by considering the home-based ABA services, which had been delivered to the student during the 2023-24 school year, separately from the unilateral placement of the student at Titus. A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist.,

744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365; T.Y. v. New York City Dep't of Educ., 2016 WL 11263665, at *18 [E.D.N.Y. Aug. 26, 2016] [rejecting the district's argument that services provided outside of the school program should be segregated and disregarded when assessing the unilateral placement], adopted 213 F. Supp. 3d 446 [E.D.N.Y. 2016]). Thus, as the private home-based ABA services were delivered concurrently with the student's attendance at Titus, the IHO should have considered all of the programming provided when determining the appropriateness of the unilateral placement.[11] As noted, the district has not appealed the IHO's determination that the student's unilateral placement at Titus was appropriate and there is no basis in the hearing record for a finding that the entire unilateral placement including the home-based program did not offer specially designed instruction to meet the student's unique needs.

To the extent the IHO found that the services constituted maximization, such an analysis would have been appropriately viewed as an equitable consideration in that an IHO may consider evidence regarding any components of the unilateral placement that are segregable costs that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).[12] More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those

[11] The IHO's concern that Titus met the student's needs and that, therefore, the parent should not be permitted to request more services to supplement the school placement (see IHO Decision at p. 8) is the sort of analysis that may arise when a parent seeks compensatory education (i.e. prospective relief to remedy a past harm) to make up for gaps in a unilateral placement (see, e.g., Application of the Dep't of Educ., Appeal No. 22-139). But, here, the student both attended Titus and received the home program contemporaneously so these components may not be separated for purposes of examining the unilateral placement.

[12] The Second Circuit Court of Appeals has recently held it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations based on the IHO's analysis of the appropriateness of the unilateral placement (i.e., in this case, omitting the home-based ABA component of the unilateral placement) (A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2, quoting Forest Grove Sch. Dist., 557 U.S. at 246-47).

required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, as noted above, the student had been receiving home-based ABA services in addition to a school program for several years (see Parent Ex. N at p. 10; Q ¶¶ 9, 18; P ¶ 2). In a private neuropsychological evaluation conducted in June and July 2023, the neuropsychologist recommended that the student continue with "[a] full-time ABA program with home-based ABA services," indicating that the home services addressed the student's "maladaptive behaviors" that posed risk of injury and prevented the student from being available for learning, reinforced skills addressed in the school program, and allowed for the "substantial time" necessary to allow the student to "acquire skills and make progress" (Parent Ex. N at p. 10).

The Titus administrator testified that, based on the student's complex developmental profile and learning needs, he did not have independent vocal expressive language, engaged in self-injurious behaviors, engaged in mouthing of inedible objects, and engaged in emotional and physical dysregulation, and, therefore, required "wraparound services" in order to be able to make meaningful and appropriate educational progress and to maintain goals that he had previously acquired and use them functionally (Tr. pp. 64-65, 69-70). The clinical director of Stride also indicated that the student needed the home-based ABA services "to reduce his severe maladaptive behaviors in all settings, so he is available for learning, can better acquire and retain learned skills, avoid substantial regression, and increase his independence" (Parent Ex. P ¶ 41).

The evidence in hearing record shows that the home-based ABA services provided to the student during the 2023-24 school year focused on the student's reducing the student's aggressive and self-injurious behaviors, and improving the student's self-care skills, functional communication skills, and ability to transition between activities, and allowed the student to practice skills so we could acquire and retain them (Parent Ex. O ¶¶ 67-67; P ¶ 34; Q ¶ 21).

Stride conferred with Titus concerning the student's "needs, goals, strategies for achieving goals, and progress" so that the home-based services would "reinforce the learning and skill development initiated at Titus to help [the student] acquire and retain skills and increase his independence" (Parent Ex. O ¶ 66; P ¶ 33).

In denying the parents' request for funding of the home-based ABA services, the IHO cited only the student's progress at Titus during the 2023-24 school year, indicating that such progress demonstrated that the student did not require the home-based services (see IHO Decision at pp. 7-8, citing Parent Ex. I). However, the hearing record does not support the IHO's attribution of the student's progress to the school program alone. The Titus administrator testified that the providers collected data on the work that they were doing with the student at school, but that a lot of the

work that they were doing with the student at school was supported by the work that was being done at home and "vice versa" and so it was hard to parse out if the student made progress by the Titus program's services alone (Tr. p. 65). However, the Titus administrator added that they collected data on targets that they were working on in school and the home-based team did the same for the targets that they were working on in the home setting (Tr. pp. 56-66).

Based on the foregoing, the evidence in the hearing record does not support a determination that the home-based ABA services provided to the student by Stride during the 2023-24 school year exceeded the level exceed the level of services the student required to receive a FAPE.

Finally, the district argues that denial of the home-based ABA services is warranted on another ground; namely, that in order to obtain funding from the district for private services, the parent must have undergone financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test"] [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14).

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]). When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker, 873 F.2d at 567 [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist., 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

Here, there is no evidence of the parents' financial risk or their legal obligation to pay for these services. For example, the parents did not offer into the hearing record a contract with Stride. In addition, the parent's testimony does not demonstrate a contractual or financial risk borne by the parents (see Tr. pp. 73-75; Parent Ex. Q). The parent testified that, in May 2022, Titus stopped providing the student's home-based ABA services because the family moved and at that time she found Stride, which provided the 15 hours of home-based ABA services to the student (Parent Ex. Q ¶ 18). The parent testified that Stride had been providing the student with 15 hours per week of home-based ABA services since July 2023 (id. ¶ 21). However, the parent's testimony only stated that she signed a contract with Titus (id. ¶ 24). The only evidence in the hearing regarding the cost of the home-based ABA services came from the clinical director of Stride, who testified regarding the hourly rate charged for 1:1 ABA and BCBA services (Parent Ex. P ¶¶ 2, 41); however, she did not testify to the parents' contractual obligation to pay for the services (see Tr. pp. 66-71; Parent Ex. P). Moreover, the Titus head of school testified that the Stride provider was not an employee of Titus (Tr. pp. 62, 66).

With that said, the parent was not necessarily required to show a financial obligation for the period of time when the district was required to fund the services pursuant to pendency (see Application of a Student with a Disability, Appeal No. 22-177 Application of a Student with a Disability, Appeal No. 21-245; Application of a Student with a Disability, Appeal No. 20-042). Indeed, from the date of the parent's due process complaint notice, July 3, 2023 (see Parent Ex. A), through the date of this decision, June 28, 2024—which encompasses the 2023-24 school year[13]—the district has been obligated to fund the student's ABA services from Stride pursuant to pendency (see Interim IHO Decision). Thus, the issue of whether the parents incurred a legal obligation to pay for the services is moot and it is unnecessary to address the question further r(Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]).

B. Assistive Technology

I turn next to the district cross-appeal challenging the IHO's order for it to provide the student with assistive technology. In ordering the district to provide the student an AAC device with Proloquo2go application, the IHO only indicated only that "there [wa]s support in the record for the device" (IHO Decision at p. 8, citing Parent Ex. I).

Initially, the fact that the December 2022 IEP recommended an SGD with applications (Dist. Ex. 1 at pp. 47) would not require the district to provide the device, as the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]; Letter to Hobson, 33 IDELR 64

[13] The parents' contract with Titus provided that the 12-month 2023-24 school year ran from July 5, 2023 through June 21, 2024 (see Parent Ex. J at p. 1; see also Parent Ex. Q ¶ 2). There is no evidence in the hearing record regarding the dates on which Stride delivered services to the student but to the extent the

[OSERS 2000]; Memorandum to Chief State Sch. Officers, 34 IDELR 263 [OSEP 2000]). Rather, once the parents rejected the recommended public school placement, they rejected the entire December 2022 IEP (Parent Ex. D). If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]). Consequently, the district was not required to provide the student, who was unilaterally placed at Titus, with an assistive technology device even if the district recommended the same device in the December 2022 IEP (see Dist. Ex. 1 at p. 47).

Moreover, the hearing record indicates that the student already had an assistive technology device. The parent testified that the student "still need[ed] an appropriate AAC device with the Proloquo2go application" (Parent Ex. Q ¶¶ 10, 28). However, the Titus head of school testified that the student's "current AAC device [wa]s a high-tech dynamic display system utilizing the Proloquo2go application installed on an iPad" (Parent Ex. O ¶ 46). Further, the Stride clinical director testified that the home-based provider was helping the student improve his "functional communication with the use of his AAC device" and that the student was "making progress in communicating his needs and wants utilizing his AAC device" (Parent Ex. P ¶¶ 34, 37).

The parents could have obtained the assistive technology device and sought reimbursement from the district as part of their overall unilateral placement of the student under the authority discussed above which permits parents to secure components of a unilateral placement from different sources (see C.L., 744 F.3d at 838-39). However, there is nothing in the hearing record to establish who paid for or was financially obligated to pay for the device the student used during the 2023-24 school year. Thus, even though it is uncontested that the student did benefit from assistive technology, there is insufficient evidence to support an order requiring the district to provide the student an assistive technology device.

VII. Conclusion

The IHO erred in viewing the home-based ABA services provided by Stride during the 2023-24 school separately from the student's unilateral placement at Titus and in denying the parents' request for district funding of those services on the ground that the student made progress at Titus. The evidence in the hearing record does not support a finding that the home-based ABA services were in excess of the services the student required to receive a FAPE. In addition, the evidence in the hearing record does support the IHO's order for the district to fund the costs of the student's AAC device with the Proloquo2go application.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 24, 2024, is modified by reversing those portions which denied the parents' request for district funding of home-based ABA services provided by Stride during the 2023-24 school year and which ordered the district to fund the cost of the student's AAC device with the Proloquo2go application; and

IT IS FURTHER ORDERED that, to the extent it has not already done so, the district shall fund the costs of the home-based ABA services delivered to the student by Stride during the pendency of this proceeding.

Dated: **Albany, New York**
June 28, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER