



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-224

Application of a STUDENT WITH A DISABILITY, by his parent, 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:

Brain Injury Rights Group, attorneys for petitioner, by Peter Albert, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied in part her request to be reimbursed for her son's unilaterally-obtained services for the 2023-24 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which awarded the parent reimbursement for unilaterally obtained home-based related services. The appeal must be dismissed. 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 attended the Henry Viscardi School at the Viscardi Center (Viscardi) for the 2022-23 and 2023-24 school years (Parent Ex. A at p. 3). A CSE convened on May 19, 2023, found the student eligible for special education as a student with an orthopedic impairment, and developed an IEP to be implemented on July 10, 2023 (Parent Ex. D at pp. 1, 26).¹ The May 2023

¹ The student's eligibility for special education as a student with an orthopedic impairment is not in dispute (see

CSE recommended 12-month services and that the student attend a State "Supported Non Public School . . . -Day" (id. at pp. 21, 26). For summer 2023, the CSE recommended that the student receive six hours per day, five days per week of instruction in an 8:1+2 special class with the related services of two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 22, 27). The May 2023 CSE also recommended a speech generating device (SGD) with eye-gaze and with mounting and specified a Tobii Dynavox I-13+ SGD Snap + Core First Language Board (id. at p. 22). The student was also recommended to receive special transportation (id. at pp. 25-26, 27).

For the 10-month 2023-24 school year, the May 2023 CSE recommended that the student attend a State supported nonpublic day school in an 8:1+2 special class for six hours per day and receive the related services of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy (Parent Ex. D at pp. 19-20). The May 2023 CSE also recommended numerous supplementary aids and services including individual daily use of a Tobii Dynavox I-13+ SGD Snap + Core First Language Board (id. at pp. 20-21). The student was also recommended to receive special transportation services which included transportation from the closest safe curb location to school, 1:1 paraprofessional services, a lift bus, air conditioning, and a route with fewer students (id. at pp. 25-26).

A May 22, 2023 medical accommodation form, completed by the student's pediatrician, stated that the student required limited travel time of no more than 90 minutes and that he should be last pick-up and first drop off (Parent Ex. E). The form also indicated that the student required a paraprofessional in the class to support his ability to attend and participate (id.).

In a September 2023 letter to the district, the parent stated that the student had an existing IEP which included special transportation accommodations and that the parent had requested an "IEP meeting" to further discuss the student's related services, but noted that to date, no IEP meeting had been scheduled and that she was requesting one "as soon as possible" (IHO Ex. I).

A. Due Process Complaint Notice

In a due process complaint notice dated November 13, 2023, the parent alleged that the district procedurally and substantively denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at pp. 1, 7). Specifically, the parent asserted that the May 19, 2023 IEP failed "to offer or provide a 'dual recommendation' for related services which would provide [the student] with appropriate related services enabling him to receive educational benefits and make meaningful educational progress" (id. at pp. 1-2). The parent also requested that the district be required to provide the student with special transportation accommodations of limited travel time and "specific early Friday-after-school travel time from school to home" (id. at p. 2). The parent also invoked pendency based on a May 26, 2023 unappealed IHO decision (id.).

34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

The parent further alleged that for the 2023-24 extended school year, the district failed to recommend sufficient related services to be received in-school, failed to indicate whether the recommended related services to be received in-school were to be provided on a push-in or pull-out basis, failed to recommend home-based related services, failed to recommend indirect/consultation services for assistive technology and speech-language therapy, failed to timely or properly evaluate the student in "all areas of his needs," failed to recommend appropriate special transportation accommodations including limited travel time and "early Friday-after-school travel time (for religious accommodations) from school to home," and failed to reconvene the CSE upon the parent's request (Parent Ex. A at pp. 6-7).

As relief, the parent requested an interim order on pendency establishing the student's home-based related services as pendency, a finding that the district failed to offer the student a FAPE for the 12-month 2023-24 school year, an order "directing the CSE to add related services in OT, PT, and [speech-language therapy] to the regimen proposed in the May 17, 2023 IEP, to be provided in-school," an order "directing the CSE to add a dual-recommendation for related services in OT, PT, and [speech-language therapy] to the regimen proposed in the May 17, 2023 IEP, to be provided at-home," an order directing the district "to add/clarify the limited travel time accommodation included in the April 28, 2022 IEP, as well as early-Friday travel time accommodations (from school to home) for religious accommodations," an order directing the district "to provide and fund indirect/consultation services for [assistive technology] and [speech-language therapy]," an order directing the district "to reimburse the [p]arent for the cost of private related services paid for since July 5, 2023," and an order directing the district "to reimburse or directly pay for missed related services at the individual providers' rates since July 5, 2023" (Parent Ex. A at p. 7).

B. Impartial Hearing Officer Decision

A prehearing conference was held before an IHO from the Office of Administrative Trials and Hearings (OATH) on January 3, 2024 (Tr. pp. 15-39).² A pendency hearing was held on January 16, 2024 (Tr. pp. 40-58).³ In an interim order on pendency dated February 14, 2024, the IHO found that the parties agreed to the services set forth in an April 28, 2022 IEP as pendency (Interim IHO Decision at p. 8).⁴ The IHO ordered that the student's pendency services consisted of a 6:1+2 special class in a State-approved nonpublic school, with the related services of three periods per week of adapted physical education (APE), three 30-minute sessions per week of OT, three 30-minute sessions per week of PT, three 30-minute sessions per week of speech-language therapy, assistive technology devices and/or services, a speech generating device (SGD) with eye-gaze with mounting Tobii Dynavox I-13+ SGD snap + core first language board, and

² The parent, the parent's attorney, and the IHO appeared on December 18, 2023 for a prehearing conference, at which the district did not appear (Tr. pp. 1-14). Due to the possibility of settlement, the IHO wanted to "get [the district] involved in this discussion" and subsequently scheduled a status conference, wherein she would hold an additional prehearing conference with the district present (Tr. pp. 6, 10-11).

³ An additional status conference was held on February 6, 2024 (Tr. pp. 59-75).

⁴ On March 18, 2024, the IHO issued a corrected interim order on pendency to correct a typographical error on the cover sheet (Tr. p. 239). The IHO did not make any changes to the "substance of the document" (id.).

"transportation from the closest safe curb location to school, adult supervision-1:1 paraprofessional, lift bus, air conditioning, wheelchair compatible (regular size wheelchair), and limited travel time" (id. at p. 9).

The parties reconvened on March 11, 2024 for an impartial hearing on the merits of the parent's claims in the due process complaint notice, which concluded on March 18, 2024 after two additional days of proceedings (Tr. pp. 76-240). In a decision dated April 26, 2024, the IHO found that the district conceded that it did not offer the student a FAPE for the 12-month 2023-24 school year, that the parent's home-based related services were appropriate, and that the student was entitled to transportation (IHO Decision at pp. 4, 6). Turning to the parent's request for funding for privately-obtained services to supplement the district's recommendations, the IHO found that the parent met her burden of proving that "two additional hours of PT, OT, and [speech-language therapy] per week offered an educational program" which met the student's needs (id. at p. 10). The IHO further found that the student's physical therapist and speech-language pathologist credibly testified that the related services recommendations in the May 2023 IEP were insufficient to meet the student's needs and that the student was making progress with the additional services (id. at pp. 10-11). The IHO stated that the testimony was supported by documentary evidence (id. at p. 11). The IHO determined that the progress report "submitted into the record indicate[d] that [the s]tudent [wa]s making progress this school year with the assistance of the [augmentative and alternative communication (AAC)] device, and that [the s]tudent [wa]s participating in the curriculum" (id.).

With regard to the parent's request for funding for an "intensive therapy program," the IHO determined that the parent did not meet her burden of proof (IHO Decision at pp. 11-12). The IHO found that the "intensive therapy program" was not related to the student's educational needs and was utilized for the purpose of "reduc[ing] the need for future surgeries" (id. at p. 11). The IHO noted that the parent "did not provide any documentary or testimonial evidence to establish that the program was recommended for educational purposes" (id.). The IHO also found that the parent did not request reimbursement for the "intensive therapy program" in her due process complaint notice (id.). The IHO denied the parent's request for reimbursement for the "intensive therapy program" and for "computer software" (id. at pp. 11-12). The IHO determined that the parent purchased the software for her own use, it was not related to the student's needs and further she did not request reimbursement for the software in the due process complaint notice (id. at p. 12). Next, the IHO determined that equitable considerations favored reimbursement for the student's home-based related services (id. at pp. 13-14). Lastly, the IHO addressed the parent's claims related to special transportation (id. at pp. 14-15). The IHO found that the student was entitled to special transportation and that recommendations related to special transportation in the May 2023 IEP were appropriate and "provide[d] [the s]tudent with a FAPE" (id. at p. 15). The IHO determined that the hearing record did not support the parent's claims related to allegations of lateness, travel time, and arrival times on Fridays (id.). The IHO also found that the district was not required to "provide for religious accommodations for travel for students" (id.). As relief, the IHO ordered the district to reimburse the parent for two 60-minute sessions per week of OT, two 60-minute sessions per week of PT, and two 60-minute sessions per week of speech-language therapy for the 12-month, 2023-24 school year (42 weeks) at rates not to exceed \$200 per hour (id. at p. 16).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying the parent's request for reimbursement of the student's intensive therapy sessions, assistive technology services software, and in failing to award limited travel time as part of the student's special transportation services. As relief, the parent requests full reimbursement for the cost of the student's intensive therapy sessions and for the cost of software related to assistive technology and AAC. In addition, the parent requests a finding that the student requires and is entitled to limited travel time.

In an answer and cross-appeal, the district argues that the IHO erred in awarding the parent reimbursement for privately obtained home-based related services of OT, PT and speech-language therapy. The district asserts that there was no evidence offered to establish that the student required home-based services and further that no evidence was offered in support of the parent's privately obtained OT services. The district also contends that the parent failed to establish the need for home-based services in excess of what the IEP already provided. The district further asserts that the progress report included in the hearing record was related to the student's day program at Henry Viscardi and not related to the student's home-based related services. The district also alleges that the student is already receiving home-based services as compensatory education and an additional award would be burdensome to the student. The district argues that the IHO's decision should be affirmed in all other respects.

In a reply and answer to the district's cross-appeal, the parent reasserts her claims set forth in her request for review and argues that the district's cross-appeal should be denied.⁵

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

⁵ The parent has annexed a May 14, 2024 IEP to her reply as a proposed exhibit. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer'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 the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). Here, the parent's proposed additional evidence is not necessary to render a decision in this matter as it pertains to a CSE meeting that took place after the conclusion of this proceeding and which may be the subject of a subsequent due process complaint notice if the parent disagrees with the May 2024 CSE's determination. Therefore, I decline to accept the parent's proposed additional evidence.

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]).⁶

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

At the outset I note that the parent has not appealed from the IHO's interim order on pendency, or from the IHO's denial in her final decision of the parent's request for "early Friday-after-school travel time (for religious accommodations) from school to home" and the district has not cross-appealed from the IHO's determination that it failed to offer the student a FAPE for the 2023-24 school year, therefore, those determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 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]). In addition, the parent has not appealed from the IHO's decision to the extent it did not address all of the claims in the due process complaint notice. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue

⁶ 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).

not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The IHO did not address the parent's claims that the district failed to timely or properly evaluate the student in "all areas of his needs," or that the CSE failed to reconvene upon the parent's request (Parent Ex. A at pp. 6-7). As a result, the parent's appeal is limited to the issues of whether the IHO erred in denying the parent's request for reimbursement of the student's intensive therapy sessions, assistive technology software, and in failing to award limited travel time as part of the student's special transportation services. Consequently, the parent's other claims have been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]). Further, the district's cross-appeal is limited to whether the IHO erred in awarding the parent reimbursement for home-based OT, PT and speech-language therapy services.

A. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive. 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). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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 (id. 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., 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). 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).

For summer 2023, the May 2023 CSE recommended that the student attend Viscardi in an 8:1+2 special class for six hours per day and receive the related services of two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and two 30-minute sessions per week of individual speech-language therapy (Parent Ex. D at p. 22). The May 2023 CSE also recommended individual daily use of a Tobii Dynavox I-13+ SGD Snap + Core First Language Board (id.). For the 10-month school year, the May 2023 CSE recommended that the student attend Viscardi in an 8:1+2 special class for six hours per day and receive the related services of three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and three 30-minute sessions per week of individual speech-language therapy (id. at pp. 19-20). The May 2023 CSE also recommended numerous supplementary aids and services including individual daily use of a Tobii Dynavox I-13+ SGD Snap + Core First Language Board (id. at pp. 20-21). The student was also recommended to receive special transportation services which included transportation from the closest safe curb location to school, 1:1 paraprofessional services, a lift bus, air conditioning, and a route with fewer students (id. at pp. 25-26). The parent disagreed with the May 2023 CSE's recommendations, asserting that the May 2023 IEP did not offer sufficient services to address the student's needs (Parent Ex. A at pp. 1-2, 6-7).

During the impartial hearing, the parent requested reimbursement for "intensive" therapy sessions (Tr. pp. 112, 113, 116-17, 122-23, 127, 189, 191-95, 197-98, 225-26; Parent Exs. G at p. 7; I at pp. 1-2; L at p. 6).⁷ The parent also requested reimbursement for the computer software that she purchased so that the parents could practice with the student while he was learning to use the eye-gaze function on his SGD (Tr. p. 227). The parent appeals from the IHO denial of her requests

⁷ The district argued during the impartial hearing that the parent's due process complaint notice did not include all of her requested relief and that the district was not on notice that the parent was seeking reimbursement for the intensive therapy sessions or for an assistive technology "device program or any other type of services related to that" (Tr. pp. 229-30). However, review of the parent's November 13, 2023 due process complaint notice indicates that the parent sought reimbursement for home-based services and that the parent disagreed with the May 2023 CSE's recommendation for assistive technology and speech-language therapy (Parent Ex. A at pp. 6, 7).

for reimbursement for the intensive therapy sessions and computer software. The district cross-appeals from the IHO's award of reimbursement of home-based OT, PT and speech-language therapy asserting that the parent failed to demonstrate the appropriateness of the services.

1. The Student's Needs

The student's pediatrician indicated that the student has a complex medical history and that manifestations of his diagnoses were spastic quadriplegia, cerebral palsy, dystonia, occasional seizures, urinary incontinence, and disorders of psychological development (Parent Exs. E; F). Additionally, the student's pediatrician stated that the student had severe limitations in ambulation, was nonverbal, had an inability to communicate his needs, and became anxious and stressed at times due to environmental conditions (id.). According to the pediatrician, the student required a paraprofessional in the class to support his ability to attend and participate (Parent Ex. E). Further, the pediatrician stated that due to his special needs and his inability to communicate it was necessary for the student to have limited travel time which would help with his physical and emotional well-being (Parent Ex. F; see Parent Ex. E).

The student's May 2023 IEP present levels of performance stated that he required full teacher support to function and participate throughout the school day and a highly structured environment, and that he benefitted from repetition when learning new material, vocabulary, and concepts (Parent Ex. D at pp. 1, 26). With respect to his speech-language skills, the IEP reported that the student was nonverbal and communicated his wants, needs and academic knowledge with eye-gaze utilizing his AAC device and/or eye-gaze/touch when offered concrete symbols or verbal choices, and noted that he needed to be reminded to relax and focus while using his device to enhance accuracy and success (id. at pp. 1-2). The student was reported to often experience "miss-hits," but that he remained motivated to achieve accuracy and demonstrate his understanding (id. at p. 2). The student had a 25-button grid size and demonstrated emergent skills understanding basic features of the software (id.). The IEP stated that the student used the device not only as a method of communication but also to develop his receptive language skills as the visual of each symbol was aiding his overall language development (id. at pp. 2-3). According to the IEP, the student used his language for a variety of functions including to comment, to request actions or objects, and to respond to "Wh" and yes/no questions (id. at p. 3). It was further reported that the student used a technique called Partner Augmented Input (PAI) in which the communication partner used the device as often as the student did providing "exposure" to the symbols and symbol combinations and visual motor memory links to differing language concepts, and that through employing this method the student's Mean Length of Utterance (MLU) was typically between three and five words (id.).

In the area of reading, the IEP stated that sometimes the student had difficulty answering comprehension questions, benefitted from hearing a limited amount of text more than once—especially informational text—and sometimes was easily distracted and required verbal cues to stay focused during lessons and activities (Parent Ex. D at p. 2). Regarding mathematics, the IEP stated that the student's 1:1 correspondence counting skill was sometimes inconsistent when counting objects in a group, which was increasingly evident when the group exceeded five objects and may have been due to his difficulty in tracking the items he counted (id.).

With respect to the student's social development, the May 2023 IEP stated that the student was a "good citizen" and good friend who followed class rules and enjoyed playing with all of his classmates (Parent Ex. D at p. 3). According to the IEP, the student "love[d]" to be in the company of his peers but needed moderate support to interact and communicate, and needed to enhance his communication skills when interacting with his peers (id. at pp. 3-4).

Regarding his physical development, the IEP stated that the student was non-ambulatory and was then-currently dependent for mobility throughout the school day, traveled to and from school in an adapted stroller, and was transferred to a loaner manual wheelchair for a more functional position and greater access to the curriculum throughout the school day (Parent Ex. D at p. 4). The student required supportive seating to maintain upright and midline posture, required maximum assistance for transfers and transitional movements, and demonstrated fair head control (id.). According to the IEP, the student presented with delays in fine motor control and bilateral integration skills secondary to increased tone, as well as delays in visual motor integration and visual perception skills (id.). The student presented with low tone centrally, high tone in all four extremities, decreased range of motion, and deficits in strength and endurance (id.). The student required assistance for all school related activities of daily living and was not toilet trained (id. at pp. 4, 5). In addition, the student followed a specific diet and only ate foods from home, used a scoop bowl and an adapted cup, and needed food to be placed on the sides of his mouth to prevent choking (id. at p. 5).

The 2022-23 school year fourth quarter progress report from Viscardi stated that the student was progressing satisfactorily toward annual goals involving responding to "Wh" questions (with a notation that the student often needed to hear a small amount of text more than once to be successful), demonstrating comprehension of object labels/actions/descriptives in picture identification tasks, and production of novel nouns/actions/descriptive concepts in play activities and structured therapy activities (Parent Ex. G at pp. 1, 4-5). The progress report stated that the student was progressing gradually toward annual goals involving addition and subtraction story problems, addition and subtraction problems in picture form, counting aloud by ones and tens, increased auditory processing skills by listening to short stories and responding to wh-questions, increased expressive language skills, and sustained sitting on a bench with minimal assistance (id. at pp. 2-8). The 2022-23 school year fourth quarter progress report also indicated the student was working on annual goals involving rhyming, improving control and range of motion of oral-motor musculature during feeding, picking up finger food items from a tray, releasing shapes in a sorter, and moving his head to stop the power wheelchair; however, regarding this last annual goal, it was noted that the student was still waiting for a trial chair (id. at pp. 1-2, 6-9).

The occupational therapist who had provided the student's intensive OT services in the years prior to the 2023-24 school year (private occupational therapist) identified the student's needs as exhibiting stereotypical postural control and movement strategies that impeded his ability to develop selective isolated control within and between his upper extremities, forearms, wrists and hands, and needing selective isolated control to develop active upper extremity approach, reach, power and prehension grasps (Parent Ex. J at p. 1). She also noted needs in the areas of isolated control of his eyes and neck to become proficient in the use of his communication device (id.). The private occupational therapist stated that the student's effort to communicate "overflow[ed]" into increased upper extremity tone and stereotypical movement, and that this habituated non-varietal movement was causing range of motion limitations throughout his upper extremities,

forearms, wrists and hands, and put the student at an "extremely high risk" of contractures which would hinder his function in an educational setting (id.). The private occupational therapist stated that OT services outside of school would be essential to address the posture and movement behaviors that interfered with the student's ability to gain functional approach, reach, power grasps, prehension grasps, and fractioned finger movement for dexterity and recommended one hour treatments two to three times per week (id.).

The student's physical therapist who provided home-based weekly PT as well as PT during the intensive sessions (private physical therapist) during the 2023-24 school year described the student as significantly impaired, such that he remained dependent for all function and required almost total lower body, trunk, and head support to sit erect, plan, and participate in age-appropriate activities/environments and to move from chair sitting to standing and walking (Parent Ex. I at p. 1).⁸ The private physical therapist reported that the student had limited power and prehension grasping skills for self-care skills, self-feeding abilities, and age-appropriate play skills (id.). She further reported that the student required moderate head support to keep his eyes on the horizon and nose to the vertical for longer periods of time (id.). According to the private physical therapist, due to the complexity of these impairments, they could not be addressed solely within the limitations of the educational setting and that the student required extensive therapy intervention to address significant range of motion limitations, and sensory and neuromuscular system impairments (id. at pp. 1-2).

The private physical therapist testified that she communicated with the student's private occupational therapist and discussed the student's current needs (Tr. pp. 113-14). Consistent with her report, the private physical therapist testified that the student was significantly impaired such that he remained dependent for almost all his function and transfers and required total body trunk and head support to sit erect in play and participate in age-appropriate activities and environments (Tr. pp. 112-14; see Parent Ex. I). She explained that the student could isolate some movement in his shoulders and hips for function, but overall lacked the mobility and control to sit independently on the floor or on a bench and had limited power and prehension grasping skills for self-care, feeding and age-appropriate play skills (Tr. p. 113). The private physical therapist testified that the student required moderate support through his trunk and his head to keep his eyes on the horizon and his nose vertical to the floor for long periods of time, which was necessary for use of his augmentative communication device, which in turn was necessary for learning and accessing low-tech communication devices such as a head pointer or using switches (Tr. p. 115). She also testified that the student had "range of motion and difficulties with body awareness" for his lower body and often overrecruited stiffness when he was placed in sitting, support standing, or facilitated walking, which interfered with appropriate weight shifting and that in sitting or supported standing he tended to collapse into "almost end-range trunk flexion" when he was not given adequate trunk support (Tr. pp. 114-15). The private physical therapist testified that all of the impairments were preventing the student from gaining balance and postural control against gravity and due to those complexities of the impairments, the student really required extensive therapeutic intervention to address all of those areas (Tr. p. 115).

⁸ In the opening of the letter, the private physical therapist stated the student was three years and six months old (Parent Ex. I at p. 1). The student's date of birth indicates that at the time the letter was written, he was six years and ten months old (id.).

The private physical therapist added that the student was inconsistently using the low-tech communication options such as the head pointer and switches, and that over the last summer the student demonstrated regression and started to develop elbow flexion contractures because of an unexpected leave of absence on the therapist's part, and the decrease in the amount of services further limited his ability to access the low-tech options, which she stated were "really a necessity" in case "he los[t] power" (Tr. pp. 119-21). The private physical therapist testified that the student required daily intervention so that he could transition independently and navigate the classroom environment, noting that he did not have appropriate head, neck, and trunk control to sit on a bench or floor to access education like his peers and was unable to ambulate independently (Tr. p. 122). In order for the student to be able to access his curriculum and make progress (and in addition to the services recommended by the district), the physical therapist recommended that the student receive two hours per week of OT and PT and continuation of the intensive programs for 20 hours per week for four times per year, as well as limited travel time (Tr. pp. 122-24).

2. Specially Designed Instruction

Although the parent disagreed with the recommendations in the May 2023 IEP, the student attended Viscardi for the 2023-24 school year.⁹ The parent combined the student's attendance at Viscardi with two hours per week each of home-based OT, PT, and speech-language therapy. In addition, the parent provided the student with intensive therapy sessions four times per year, which consisted of 20 hours per week of PT and 20 hours per week of OT or speech-language therapy (Tr. p. 127; see Tr. pp. 189-91, 194-95). The parent also purchased computer software for use with the student's SGD, which allowed the parents to help the student practice using the eye gaze function of the SGD (Tr. p. 227).

Generally, a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). It appears that the IHO considered the appropriateness of the weekly home-based services separately from the student's day program at Viscardi. Review of the hearing record reflects that the IHO's analysis in this regard failed to take into account the totality of the circumstances (see Gagliardo, 489 F.3d at 112). While the IHO correctly determined that the intensive therapy sessions and computer software were not related to the student's educational needs at Viscardi, there also was no evidence in the hearing record to demonstrate that the student required the weekly home-based related services to access his daily programming at Viscardi. Beyond a second quarter progress report, there was no evidence of the student's programming at Viscardi during the 2023-24 school year (Parent Ex. H; see Parent Exs. A-G, I-L).

⁹ The parent's attorney argued that the parent agreed that Viscardi was an appropriate placement for the student, however it was not sufficient (Tr. p. 232). Notwithstanding the parent's argument, she alleged that the May 2023 IEP denied the student a FAPE and disagreed with the recommendations of the May 2023 CSE, which constitutes a rejection of the district's offered programming which included placement at Viscardi (Parent Ex. A at pp. 6-7).

Review of the evidence in the hearing record does not support a finding that the student's programming at Viscardi was insufficient such that he required home-based related services, intensive therapy sessions, and the computer software purchased by the parent.

a. Intensive Therapy Sessions

The parent testified that during the time the student was in early intervention, one of his physical therapists recommended that the parent seek consultation from the therapists that provide the "intensives" and that they recommended the student receive the intensive program so he could maintain and gain function and so that he could function in his environment (Tr. pp. 199-200).

The private physical therapist testified that she was a member of the team that provided the student's intensive therapy which consisted of "20 hours per week occupational therapy and physical therapy," and that at times the speech-language pathologist also joined for the intensive treatment (Tr. pp. 116-17; see Parent Ex. I at pp. 1-2).¹⁰

The private physical therapist explained that the team, which included an occupational therapist and herself, provided care for the student during that "intensive" to work on specific functional outcomes related to his mobility (Tr. p. 112). She stated that the intensive therapy sessions were provided through a combination of clinic and in the home sessions four times per year and that the therapy had focused on specific mobility and facilitation strategies that enabled the student to play while sitting with less support, take more steps with help from his parents or in his walker at school, vocalize/move his head to express yes or no, and use an eye gaze augmentative communication device (Tr. pp. 112, 117, 126, 128-29; Parent Ex. I at pp. 1-2).

The parent explained that the purpose of the "intensives" was to provide the student with a "very intense" body workout where the providers stretched out every single muscle in the student's body and she added that it was a "real intense program" where the student gained "a lot more" function and stamina (Tr. p. 193). The parent testified that after the intensives she could see a tremendous difference in how the student held his body, how he was able to move, and how he was able to access his environment and that this kept the student from needing surgeries which potentially would mean he would have to miss a lot of school (id.).

The parent testified that the student received the intensive therapy program in August, October or November, and February of the 2023-24 school year (Tr. pp. 191-92).¹¹ The parent testified that typically she tried to schedule the intensive therapy when the student was not in school and noted that of the past three intensives that happened during the past year, only one had to be scheduled during school (Tr. p. 194). The private physical therapist also testified that the intensive therapy "typically" was done during school vacation (Tr. p. 128).

¹⁰ Later in her testimony the physical therapist clarified that the intensive therapy consisted of 20 hours of PT and 20 hours of either OT or speech-language therapy during the same week, or "40 hours," which was consistent with the parent's testimony (Tr. p. 127; see Tr. pp. 189-91, 194-95).

¹¹ The parent's testimony was not clear as to whether the fall 2023 "intensive" session occurred in November or October, at one point testifying that "I believe it was in October" and at another point "I believe it was in November" (see Tr. pp. 186, 192).

b. Home-Based Related Services and Computer Software

The private physical therapist explained that she was contracted to see the student weekly to help bridge the gap between the intensive therapy he received four times a year so that he would not lose function (Tr. p. 112). During the 2023-24 school year, the student's weekly therapy consisted of one two-hour session of PT conducted on Sunday in the home, which, the private physical therapist noted, carried over activities identified during the intensive programs (Tr. pp. 115-16, 124-25, 128, 130, 189; Parent Ex. I at p. 2). The private physical therapist testified that the student was also receiving OT during the 2023-24 school year, but was not able to testify as to whether the student was receiving any OT services beyond the intensive program (Tr. pp. 115-16, 122-24; see Tr. p. 117). The parent testified that the occupational therapist provided services to the student for 40 minutes weekly on Sundays in the provider's home (Tr. pp. 187-88).

The parent testified that additionally, the student received, through a bank of compensatory services, speech-language therapy services for one hour per week in the home and PT services on Sundays for 45 minutes per session, which she noted was an outdoor PT activity and could only happen when the weather permitted and so it did not occur in the winter (Tr. pp. 188, 190, 197).

The private physical therapist stated that the student had complex single and multi-system impairments that could not be addressed solely within the limitations of the educational setting (Parent Ex. I at p. 2). The private physical therapist explained that she believed the student was receiving the additional services because the district had failed to recommend or provide sufficient services for the student to address his significant range of motion limitations, sensory, and neuromuscular system impairments (Tr. p. 116).

As for the parent's appeal of the IHO's denial of reimbursement for the student's AAC computer software, on the last day of the impartial hearing, the parent amended her exhibits to include a series of invoices (Tr. pp. 213, 218; Parent Ex. L). The IHO commented that the exhibit also included an invoice for a "program that works with" the student's AAC device "that we ha[d] not discussed at all during the course of this hearing," and which the IHO determined was "not part of the remedies that [the parent was] seeking" (Tr. pp. 218-20). The parent asserts that the speech-language pathologist and the parent used the computer software at home and school and therefore it was part of the parent's request for reimbursement for indirect assistive technology services.

The parent's invoice refers to an item entitled "Look Lab" (Parent Ex. L at p. 1). The private speech-language pathologist who worked with the student using his AAC device testified that she delivered services to the student once per week for a 60-minute session, together with "some assistive technology service in the school setting" (Tr. pp. 138, 143). She described the student's district-provided AAC device as a "high-tech, speech-generating device called a Tobii Dynavox . . . I-13 . . . eye gaze device" on which he had "a software called TD Snap, which [wa]s communication software that was programmed to interact with the eye tracker on the device itself" (Tr. pp. 143-44; Parent Ex. D at p. 22). Additionally, the speech-language pathologist testified that the student used a "page set within the software called Motor Plan 60" and concluded that he had "what we would consider a robust communication system" that could be used "to express a range of functions" (Tr. pp. 144-45). Her testimony did not include discussion of the Look Lab software and how it interacted, if at all, with the student's AAC device then-currently in use, or

that it was required for the student to benefit from his communication system (see Tr. pp. 138-159). The parent testified that the student needed practice using his eye gaze device, and that the parents purchased the Look Lab software "privately so [the student] c[ould] practice with it and gain more control of his eyes on the device" (Tr. p. 227; Parent Ex. L at p. 1). According to the parent, no one from Viscardi indicated that the software was required, nor did the CSE when it developed the student's IEP (id.).

c. Viscardi Day Program

The sole information in the hearing record regarding the instruction the student received during the school day at Viscardi came from a 2023-24 school year second quarter annual goal progress report (see Parent Ex. H).

The 2023-24 school year second quarter progress report from Viscardi shows the student was working toward annual goals targeting answering simple comprehension questions with the use of his communication device, identifying initial/medial/final consonant sounds from a list of CVC (consonant, vowel, consonant) words, copying/creating simple sentences pertaining to a topic, identifying and sequencing numerals to 50, solving addition/subtraction problems to 10, locating new symbols on his ACC device, initiating communication, responding to simple "Wh" questions using single symbol and symbol combinations, interacting with his peers in group games and activities, using appropriate adaptive equipment to complete fine motor activities, demonstrating an improvement in visual motor integration skills by identifying/selecting all upper-case letters and moving eyes and/or head to localize and focus on a requested object or image, ambulating using an adaptive mobility device, navigating the school building with decreasing assistance, and sitting with minimal trunk support demonstrating head and trunk alignment (Parent Ex. H at pp. 1-10).

The private physical therapist testified that the district's recommendations for the student for the 2023-24 school year included three 30-minute sessions per week of OT and PT during the 10-month school year and two 30-minute sessions per week of OT and PT during summer 2023 (Tr. pp. 117-18; see Parent Ex. D at p. 20). The private speech pathologist, who provided the student with speech-language services in the home once per week for 60 minutes and some assistive technology services in the school, testified that the district recommended for the student three 30-minute sessions per week of speech-language therapy (Tr. pp. 143, 152; see Parent Ex. D at p. 20). Additionally, the parent testified regarding the services the district recommended for the 2023-24 school year that included the related services of OT, PT and speech-language therapy (Tr. p. 176). However, none of the witnesses testified about the related services the student received at Viscardi during the 2023-24 school year, such as how the services were specially designed to meet his unique needs, or how, if at all, the Viscardi related services were delivered in conjunction with the home-based and intensive services (see Tr. pp. 107-201).

Based on the foregoing, the IHO erred in finding the parent's unilaterally obtained weekly home-based services were appropriate. However, the IHO correctly determined that the parent's unilaterally-obtained intensive therapy sessions and computer software program were not appropriate. The hearing record does not indicate that the parent's private providers collaborated with the student's providers at Viscardi or that the unilaterally-obtained services otherwise supported the student's access to his school-day programming at Viscardi; accordingly, to the

extent the evidence in the hearing record is limited to the home-based services in isolation and does not provide evidence of the totality of the student's program, which would include both the student's programming and services at Viscardi and the home-based services, the parent has failed to meet her burden that the home-based services she obtained privately were appropriate for the student under the Burlington-Carter standard. Thus, the IHO erred by awarding reimbursement for the parent's weekly home-based services.

B. Special Transportation

Turning to the parent's request related to limited travel time, the IHO found that the student was entitled to special transportation and that recommendations related to special transportation in the May 2023 IEP were appropriate and "provide[d] [the s]tudent with a FAPE" (IHO Decision at p. 15). The IHO determined that the hearing record did not support the parent's claims related to allegations of lateness, travel time, and arrival times on Fridays (id.). The IHO also found that the district was not required to "provide for religious accommodations for travel for students" (id.).

In this instance, while the parent's claims related to transportation were not moot at the time of the IHO's April 26, 2024 decision since there were approximately two months remaining in the 2023-24 school year, the issue has since become moot as of the date of this decision (see IHO Decision at p. 16). Accordingly, I do not find it necessary to review that portion of the IHO's decision.

A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (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]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

Here the parent requests a specific change to the IEP for the 2023-24 school year. To the extent the parent continues to disagree with the recommendations of the CSE for the next school year, she may file a due process complaint notice to challenge those recommendations.

VII. Conclusion

Having determined that the IHO erred in finding that the parent's unilaterally obtained weekly home-based related services were appropriate and that the hearing record supports the IHO's determination that the parent failed to demonstrate the appropriateness of the intensive therapy sessions and computer software acquired during the 2023-24 school year, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's request for relief.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated April 26, 2024 is modified by reversing those portions which found that the parent met her burden to prove the appropriateness of the unilaterally obtained weekly home-based OT, PT, and speech-language therapy and awarded reimbursement for those services.

Dated: **Albany, New York**
 September 9, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER