



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 24-361

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:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared B. Arader, 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 II) which denied her request to be reimbursed for her son's private services delivered by Applied ABC for the 2021-22 and 2022-23 school years and denied her request for reimbursement of a private evaluation. The appeal must be sustained in part.

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

For the 2020-21 school year, a Committee on Preschool Special Education (CPSE) convened on July 28, 2020 to develop an IEP with an implementation date of September 8, 2020 (Dist. Ex. 3 at pp. 1, 15-16). The July 2020 CPSE found the student eligible for special education and related services as a preschool student with a disability and recommended that the student attend an approved special education preschool program (id. at pp. 15-16, 19).¹ The July 2020 CPSE recommended that the student receive five hours per day of instruction in an 8:1+2 special

¹ The student's eligibility for special education as a preschool student with a disability for the 2020-21 and 2021-22 school years is not in dispute (see 34 CFR 200.1[mm]; 8 NYCRR 200.1[mm]).

class along with the related services of three 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual occupational therapy (OT) (id. at pp. 1, 15-16). The CPSE also recommended that the parents receive four 60-minute sessions per year of parent counseling and training (id. at pp. 1, 16). The student attended an 8:1+2 special class at the ADAPT program at Forest Hills West School (ADAPT) for the 2020-21 school year (Dist. Ex. 25 at p. 2). According to the parent, the CPSE reconvened on February 9, 2021 to amend the student's IEP to include two 30-minute sessions per week of individual physical therapy (PT) along with "a 12 [-month] extended school year" (Parent Ex. A at p. 10).²

A CPSE convened on July 13, 2021 to develop an IEP with an implementation date of July 19, 2021 (Dist. Ex. 2 at pp. 1, 9). The July 2021 CPSE continued to find the student eligible for special education and related services as a preschool student with a disability (id. at p. 1).³ The July 2021 CPSE recommended an 8:1+2 special class in an early childhood program selected by the parent along with three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of individual PT, and four 30-minute sessions per year of parent counseling and training (id. at pp. 1, 9). For the 2021-22 school year, the student continued to attend ADAPT (Dist. Ex. 9 at p. 1).

A final notice of recommendation dated July 13, 2021, summarized the recommendations of the July 2021 CPSE, indicated there was "no change" to the student's recommendation for services in July and August 2021, and noted that the student would attend ADAPT (Dist. Ex. 24).

An initial assessment of the student was conducted by Applied ABC from August 11, 2021 through August 20, 2021 (Parent Ex. II at p. 1). Applied ABC recommended that the student receive 20 hours per week of ABA instruction direct care, three hours per week of supervision of ABA therapists, two hours per week of parent training, one hour per month for coordination of care, one hour per week of treatment planning, and three hours every six months of reassessment (id. at p. 10).

The student was evaluated by a private psychologist on January 20, 2022, January 27, 2022 and February 3, 2022 (Parent Ex. AAA; Dist. Ex. 9 at p. 1). The private psychologist noted that the student was referred by his parents for a neuropsychological evaluation and following a review of records, observation of the student, and academic, cognitive, and social/emotional testing, the evaluator recommended, in a March 2, 2022 psychoeducational evaluation report, that the student receive ABA instruction in school and at home, among other recommendations (Dist. Ex. 9 at p. 1).

On February 11, 2022, the district conducted a social history assessment as part of the student's turning five reevaluation (Dist. Ex. 17 at p. 1). By prior written notice dated March 2, 2022, the district proposed a reevaluation of the student in preparation for the student's transition to kindergarten, which included a request for consent for additional assessments (Dist. Ex. 8 at pp.

² The hearing record does not include a February 2021 IEP.

³ Although the box "July/August 2021 Only" was checked off on the cover page of the July 2021 IEP, the parent asserts that the student received services for the entire 2021-22 school year pursuant to this IEP (Parent Ex. A at pp. 13-17).

1, 3). On March 3, 2022, the district conducted a classroom observation of the student in his 8:1+2 special class at ADAPT (Parent Ex. D at pp. 1-2).⁴

A prior written notice, dated June 16, 2022, reflected that a CSE convened on June 9, 2022, and found the student eligible for special education and related services as a student with autism (Dist. Ex. 7 at p. 1).⁵ According to the prior written notice, the June 2022 CSE recommended 12-month services consisting of an 8:1+1 special class in a specialized school, along with related services consisting of individual OT, individual PT, and individual speech-language therapy (*id.*).

In a prior written notice, dated June 30, 2022, the district notified the parent of the public school site to which the student had been assigned (Parent Ex. H at p. 1). In a prior written notice dated August 19, 2022, the district notified the parent of a different public school site to which the student had been assigned (Dist. Ex. 5 at p. 2).⁶

By letter dated August 22, 2022, the parent notified the district of her intention to enroll the student at the Gersh Academy (Gersh) for the 2022-23 school year (Parent Ex. G at p. 1). In the 30-page notice, the parent also stated that the student had regressed while attending ADAPT and that the parent had incurred out-of-pocket expenses for obtaining 1:1 ABA services provided weekly in the student's home (*id.* at p. 19). The parent further stated that Gersh was an appropriate unilateral placement for the student and that the district should fund the student's attendance at Gersh for the 2022-23 school year (*id.* at p. 26). The parent also requested reimbursement for compensatory education, as well as any out-of-pocket expenses incurred for 1:1 ABA services (*id.* at p. 28).

On August 22, 2022, the parent signed an enrollment agreement with Gersh for the 2022-23 school year from September 1, 2022 through June 23, 2023 (Parent Ex. I at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated September 8, 2022, consisting of 121 enumerated paragraphs as well as numerous subparagraphs, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years (Parent Ex. A at pp. 1, 2, 4-6, 7-9, 10-12, 14-16, 21-23, 28). The parent asserted that every IEP for the school years in question was procedurally and substantively deficient, that the district had failed to properly assess and address the student's needs, and that the district further violated the student's constitutional rights, his rights pursuant to section 504 of the Rehabilitation Act of 1973 (section 504), and had engaged in systemic violations of the IDEA (*id.* at pp. 4-27). As relief,

⁴ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is her responsibility to exclude evidence that she determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

⁵ The hearing record does not include a copy of the June 9, 2022 IEP. Nevertheless, 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]).

⁶ Both the June 30, 2022 and August 19, 2022 prior written notices indicated that the school locations were for the services recommended "in September 2022" (Parent Ex. H at p. 2; Dist. Ex. 5 at p. 3).

the parent sought findings that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, district funding of independent educational evaluations (IEEs), reimbursement and/or funding for the cost of the student's attendance at Gersh for the 2022-23 school year, compensatory educational services, reimbursement for out-of-pocket expenses incurred for evaluations and reimbursement for out-of-pocket expenses incurred in obtaining 1:1 ABA services (id. at p. 28).

B. Impartial Hearing and Impartial Hearing Officers' Decisions

This matter was initially assigned to an IHO (IHO I) who presided over 11 days of proceedings (IHO I Tr. pp. 1-111).⁷ On February 2, 2023, IHO I issued an interim decision directing the district to fund comprehensive independent evaluations in speech-language therapy, OT, and assistive technology (Feb. 2, 2023 Interim IHO I Decision at p. 3). On November 13, 2023, IHO I issued an interim decision directing the district to fund an independent evaluation in PT (Nov. 13, 2023 Interim IHO I Decision at p. 3). On February 16, 2024, the parties convened before IHO I and offered documentary evidence into the hearing record and presented opening statements (IHO I Tr. pp. 68-103). On March 21, 2024, the parent's attorney and IHO I appeared for a hearing date, to which the district did not appear (IHO I Tr. pp. 104-07). The parties appeared on April 4, 2024 and, following a discussion about the availability of witnesses and IHO I's upcoming retirement, IHO I recused himself from the matter and the hearing was adjourned (IHO I Tr. pp. 108-11).

After the recusal of IHO I, the matter was reassigned to the Office of Administrative Trials and Hearings (OATH), and another IHO (IHO II) reconvened with the parties on April 11, 2024 (Tr. pp. 1-20). The parties then reconvened on May 2, 2024 for witness testimony and the impartial hearing concluded on May 22, 2024, after four additional days of proceedings (Tr. pp. 21-293).

In a decision dated July 16, 2024, IHO II found that the district failed to meet its burden of demonstrating that it offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (IHO II Decision at p. 15). IHO II noted that the district did not submit prior written notices for each of the school years at issue and without supporting witness testimony, the hearing record was insufficient to support the recommendations in the IEPs (id.). IHO II further noted that neither party offered the student's IEP for the 2022-23 school year as evidence (id.).

Next, IHO II addressed the parent's home-based ABA program for the 2021-22 and 2022-23 school years (IHO II Decision at pp. 15-18). IHO II found that the ABA services provided during the 2021-22 and 2022-23 school years were not "specifically designed to meet the needs of [the s]tudent" (id. at p. 17). IHO II further found that there was no documentary or testimonial evidence in the hearing record that "sufficiently demonstrated what the services provided at the student's home entailed and how they were tailored to meet the needs of [the s]tudent" (id.). IHO

⁷ The hearing transcript is not consecutively paginated with the hearings before IHO I consisting of 111 consecutive pages for hearings taking place between December 20, 2022 and April 4, 2024 and the hearing before IHO II consisting of an additional 293 pages for hearings taking place between April 11, 2024 and May 22, 2024; accordingly, for ease of reference, transcript cites to the hearing before IHO I will be identified as being before IHO I and the remainder of the transcript cites for the hearing before IHO II will be identified without any other indication (IHO I Tr. pp. 1-111; Tr. pp. 1-293).

II also determined that the progress reports offered by the student's home-based ABA providers did not "demonstrate a program that was specifically tailored to [the s]tudent" (id. at p. 18). For those reasons, IHO II determined that the parent "failed to show the appropriateness of the at-home ABA services provided" to the student (id.).

IHO II then turned to equitable considerations related to the home-based ABA program finding that the parent did not notify the district that she would be seeking reimbursement until her 10-day notice dated August 22, 2022 (IHO II Decision at p. 18). IHO II stated that if she had found the parent's home-based ABA program appropriate, she would have only awarded reimbursement for the time period of "September 1, 2022 [through] May 2023" (id.).

IHO II next considered the parent's request for tuition reimbursement at Gersh for the 2022-23 school year (IHO II Decision at pp. 19-20). IHO II determined that the district failed to meet its burden that it offered the student a FAPE for the 2022-23 school year (id. at p. 19). IHO II found that the parent's unilateral placement of the student at Gersh was appropriate and provided a program to address the student's specialized needs (id. at pp. 19-20). With regard to equitable considerations related to Gersh, IHO II found that the parent had submitted a 10-day notice clearly identifying her objections to the 2022-23 IEP and advising the district of her intention to unilaterally enroll the student at Gersh and seek public funding (id. at p. 20). IHO II found that there was "no bar to the relief sought with respect to tuition" (id.).

Turning to compensatory education and the recommendations set forth in the IEEs ordered by IHO I, IHO II found that "[t]he evidence and testimony in the record demonstrates that [the s]tudent was not provided a FAPE for the three school years in question" and the parent "presented credible evidence in the form of IEEs from qualified providers who opined that [the s]tudent presented with significant deficits that had not previously been adequately addressed" (IHO II Decision at p. 21). IHO II further found that the qualitative approach recommended in the IEEs was supported by witness testimony and that the district failed to rebut the recommendations (id.). IHO II then addressed the parent's section 504 claims and found that the parent did not meet her burden (id. at pp. 21-22).

IHO II also addressed the parent's request for reimbursement of a privately obtained neuropsychological evaluation (IHO II Decision at pp. 23-24). IHO II found that the parent had not established that she was entitled to reimbursement for the neuropsychological evaluation as an IEE (id. at p. 23). IHO II determined that the parent had not disagreed with any particular evaluation performed by the district (id. at p. 24). IHO II further found that the parent was not entitled to reimbursement as an equitable remedy either as the parent had been advised to wait to have the student evaluated until the district concluded the student's turning five reevaluation process, which began in January 2022 (id.). IHO II noted that the hearing record included a February 2022 social history and a May 20, 2022 psychological evaluation (id.). IHO II found the parent's request for reimbursement of the private evaluation conducted in January and February 2022 was not an appropriate equitable remedy (id.).

In conclusion, IHO II found that the district denied the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years and, as relief, awarded the parent tuition funding for the ten-month 2022-23 school year at Gersh; district funding for 23 hours of compensatory PT, 69 hours of compensatory OT, and 552 hours of compensatory speech-language therapy, all to be provided

at a reasonable market rate to be determined by the district's implementation unit and without an expiration date (IHO II Decision at p. 25). IHO II also ordered the district to provide the student with a "Via Pro from PRC Saltillo device with the LAMP Words for Life Speech application, an active wrap case for the device, an attachable strap and keyguard," 40 hours each of training in Partner Augmented Input, how to program and troubleshoot the device, and how to implement, carryover, and generalize the device for use across settings for both the student and the parent (*id.*). IHO II denied the parent's request for reimbursement for the costs of the "independent neuropsychological evaluation" and denied the parent's request for reimbursement of "co-payments made for at-home ABA therapy and secondary insurance premiums" (*id.*).

IV. Appeal for State-Level Review

The parent appeals. Initially, the parent makes a number of allegations concerning the privately obtained evaluation. More specifically, the parent asserted that the IHO erred in finding she should have waited longer before having the student evaluated, that the district failed to comply with the IDEA's reevaluation procedures, that IHO II erroneously concluded the district did not fail to evaluate the student in an area that would be addressed by a neuropsychological evaluation, that a failure to conduct evaluations can be a prerequisite for an IEE request, that the district failed to comply with the IEE procedures, and that the parent is entitled to reimbursement for the evaluation as an equitable remedy. Turning to the home-based ABA services, the parent asserts that she is entitled to reimbursement for the ABA co-payments because they were specially designed to meet the student's needs, the student made progress with the home-based services, and the home based ABA services were an essential component of the student's educational program. The parent further argues that funding for the home-based ABA services could be awarded as an appropriate compensatory remedy for the district's denial of FAPE. The parent contends faults IHO II for failing to develop the hearing record regarding any questions IHO II had concerning the appropriateness of the home-based ABA services. As relief, the parent requests reimbursement in the amount of \$7,000 for the privately obtained neuropsychological evaluation, and reimbursement for the cost to the parent of the home-based ABA services.⁸

In an answer, the district argues that the IHO's decision should be affirmed. Specifically, the district asserts that the IHO correctly denied the parent's request for an IEE because the parent did not disagree with a district evaluation before privately obtaining a private evaluation. The district further alleges that the parent raised the argument that the district's evaluations were insufficiently comprehensive for the first time in her appeal. The district also contends that the parent did not demonstrate that she made a request that would trigger the district's obligation to fund an IEE or defend its evaluations. The district further argues that the parent is not entitled to

⁸ The parent also raises allegations related to Section 504. State law does not make provision for review of claims related to the Americans with Disabilities Act (ADA) or section 504 through the State-level appeals process authorized by the IDEA and the Education Law (*see* Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding the ADA and section 504 and such claims by the parent's will not be further discussed herein (*see A.M. v. New York City Dep't of Educ.*, 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; *see also D.C. v. New York City Dep't of Educ.*, 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

reimbursement for the evaluation as an equitable remedy. Next, the district argues that the IHO properly denied the parent's request for reimbursement of out-of-pocket expenses incurred in obtaining home-based ABA services. The district contends that the IHO correctly determined that the parent did not demonstrate the appropriateness of the home-based ABA services. In the alternative, the district argues that if the parent's home-based ABA services are found to be appropriate, reimbursement should be denied on the ground that the parent lacks standing due to the ABA services being covered by the parent's insurance and the lack of further contractual liability. The district further argues that the parent failed to demonstrate that the home-based ABA services were needed for more than generalization of skills.

In a reply, the parent asserts that she raised her disagreement with the district's evaluations throughout the proceedings and has not waived any arguments. The parent further alleges that she has standing to seek reimbursement of insurance co-payments.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew 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]).⁹

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.

⁹ 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" (Andrew F., 580 U.S. at 402).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. Preliminary Matter - Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. In her closing memorandum of law to IHO II, the parent sought relief in the form of reimbursement "for out-of-pocket costs paid for secondary insurance premiums" for the 2020-21, 2021-22, and 2022-23 school years (IHO II Ex. I at p. 13). In her findings of fact, IHO II noted that the parent obtained secondary health insurance in order to obtain home-based ABA on or about February 2021 (IHO II Decision at p. 6). IHO II found that the parent provided documentary evidence of a monthly premium beginning in February 2021; however, IHO II noted that the hearing record also demonstrated that the student was not assessed for home-based ABA until August 2021, and that "[n]o explanation was proffered for why insurance coverage began in February of 2021 when the initial assessment did not occur until August of 2021" (id.). IHO II ultimately denied the parent's "request for reimbursement for co-payments made for at-home ABA therapy and secondary insurance premiums" (id. at p. 25).

After finding that the parent's home-based ABA program was not appropriate, IHO II then found that the parent failed to provide the district with 10-day written notice before August 22, 2022 (IHO II Decision at pp. 15-18). For that reason, IHO II stated that if she had found the parent's home-based ABA program appropriate, she would have only awarded reimbursement for the time period of "September 1, 2022 [through] May 2023" (id. at p. 18).

In the opening of her request for review, the parent stated that she was not appealing IHO II's findings that the district failed to establish that it provided the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, that Gersh was an appropriate unilateral placement for the 2022-23 school year, and that "equitable factors support[ed the p]arent's claim for tuition reimbursement" (Req. for Rev. at p. 1). The request for review further specified that the parent is appealing IHO II's "denial of reimbursement for a neuropsychological evaluation and her ABA co-payments" (id.). However, the request for review did not specifically address IHO II's finding as to the lack of a 10-day notice limiting relief for home-based ABA services to the period from September 2022 through May 2023 (see Req. for Rev.).

State regulation provides that a pleading must set forth "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 specifies that "any issue 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 Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Following a thorough review, I find that the parent has not appealed from IHO II's findings that she was not entitled to reimbursement of secondary insurance premiums or from IHO II's equitable determination that she would have only awarded reimbursement of home-based ABA services for the time period of "September 1, 2022 [through] May 2023" (IHO II Decision at p. 18). Accordingly, IHO II's denial of such relief has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, the district has not cross-appealed from IHO II's determinations that it failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, that Gersh was an appropriate unilateral placement for the student for the 2022-23 school year, that the parent provided adequate 10-day written notice of her intention to seek funding for home-based ABA for the 2022-23 school year, or from IHO II's award of compensatory education. As such, those findings are also final and binding (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

B. Unilaterally Obtained Services 2021-22 School Year

Turning to a review of the privately obtained home-based ABA services, 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).

1. The Student's Needs

For the 2021-22 school year, the student received services as recommended in his July 2021 IEP, in addition to the after school home-based ABA program, secured by the parent and scheduled for 20 hours per week (Dist. Ex. 9 at p. 3; Parent Ex. FF at p. 1; see Dist. Ex. 2 at p. 1; Parent Exs. FF at pp. 13-14; II at p. 11).

According to the July 2021 IEP the student had a disability classification of preschool student with a disability (Dist. Ex. 2 at p. 3). The student had received a diagnosis of autism spectrum disorder prior to the CPSE meeting (Dist. Exs. 9 at p. 1; 17 at p. 1).

In the area of academic achievement and functional performance, the July 2021 IEP indicated that the student could not eat independently with a utensil, did not ask to use the bathroom independently, and could not put clothes on with buttons, snaps, or zippers (Dist. Ex. 2 at p. 3). The IEP reported the student drank from a cup with some spilling and could take off his socks and shoes (id.). It further reported the student needed to be constantly monitored for safety and noted that he was not careful around hot and sharp objects (id.). The IEP stated the student did not clean up his toys (id.). It indicated the student was unable to correctly point to a picture of a foot or a

cup, and he could only replicate a few simple two-block designs of single color and could not replicate any three-block designs (*id.*). According to the IEP, the student "ha[d] difficulty integrating, developing non-verbal reasoning, and trial and error learning" (*id.*). The student repeated words; however, he did not demonstrate functional communication skills and had a significant functional communication delay (*id.*). With regard to strengths, the IEP reported the student was a sweet and happy child (*id.*). Based on parent report, the IEP noted the student did not identify familiar items or pictures and occasionally repeated words heard on television; however, not in a functional manner (*id.* at p. 4).

As related to social development, the July 2021 IEP stated that the student did not demonstrate the ability to cooperate and share with others, or to change from one activity to another without having a tantrum (Dist. Ex. 2 at p. 4). The IEP further noted that he did not always understand other's emotions and did not say thank you or please appropriately (*id.*). As related to social strengths, the IEP indicated the student "overall [] ha[d] no difficulty interacting with others," and he demonstrated affection by hugging and kissing (*id.*). The IEP stated per parent report that the student did not respond to his name consistently and did not follow directions (*id.*).

In the area of physical development, the July 2021 IEP reported the student was referred at three and a half years old for a PT evaluation due to concerns with low muscle tone and trunk strength and with poor body control and postural endurance (Dist. Ex. 2 at p. 4). The IEP reported the student tended to walk on his toes frequently, had difficulty navigating the stairs, and was very unsafe on stairs without assistance (*id.*). In the area of PT, the IEP noted that the student demonstrated poor postural control and endurance, his jumping skills were not age appropriate, and he demonstrated an overall decrease in body control and coordination (*id.*). In the area of OT, the IEP stated that the student had immature grasp patterns for manipulating small objects (*id.*). The IEP further stated that the student had delayed bilateral hand skills; difficulty following simple one step instructions, sitting still, and attending to activities, and also had a limited attention span (*id.*).¹⁰

2. Specially Designed Instruction

Although the parent disagreed with the recommendations in the July 13, 2021 IEP, the student attended ADAPT for the 2021-22 school year (Parent Ex. ZZ at ¶¶ 46-47). The parent combined the student's attendance at ADAPT with 20 hours per week of home-based ABA (Dist. Ex. 9 at p. 3).

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

¹⁰ The July 2021 IEP identified strategies for addressing the student's management needs that included modeling, positive reinforcement, redirection, verbal cues and physical prompts (Dist. Ex. 2 at p. 4). The IEP noted that the student could participate in all school activities with adult supervision (*id.* at p. 5). To address the student's identified needs, the July 2021 CPSE included approximately seven annual goals with short-term objectives (*id.* at pp. 6-8).

at 365). It appears that IHO II considered the appropriateness of the weekly home-based services separately from the student's day program at ADAPT (IHO Decision at pp. 16-18). In finding that the parent's home-based ABA instruction was not appropriate, IHO II held that the parent's unilaterally obtained services were not "specifically designed to meet the needs of [the s]tudent" (IHO II Decision at p. 17). I find that IHO II's analysis in this regard failed to take into account the totality of the circumstances (see Gagliardo, 489 F.3d at 112). Moreover, the hearing record reflects that the parent's home-based ABA services, in combination with the program at ADAPT, provided the student with specially designed instruction sufficient to show that the unilaterally obtained program, as a whole, was appropriate.

While the hearing record did not include progress reports for the student's 2021-22 school year, the March 2022 private psychoeducational evaluation report provided updated information from January 2022 educational and speech and language annual review reports related to the student's present levels and needs (Dist. Ex. 9 at pp. 4-5). The March 2022 private evaluation report noted, per the January 21, 2022 educational annual review report, that the student presented with continued difficulties in areas of attention, social skills, and speech and language; however, it noted the student demonstrated improved eye contact and responsiveness to his name (id. at p. 4). The March 2022 private evaluation report further indicated, per the January 23, 2022 speech and language annual report, that the student had persistent challenges related to receptive, expressive language and social pragmatic skills, continued to be nonverbal and used a picture exchange communication system (PECS) to communicate his wants and needs during therapy sessions, although it also reported "growth in [the student's] joint attention as well as his ability to open and close communication with the clinician when provided verbal and visual prompts" (id. at p. 5).

Further, the hearing record included a March 3, 2022 classroom observation of the 8:1+2 special class program at ADAPT and a teacher interview completed as part of the student's turning five reevaluation (Parent Ex. D; see Dist. Ex. 8). According to the teacher interview, the student's special education teacher noted it was her second year teaching the student and reported that he "ha[d] shown a lot of progress since the beginning of last school year" (Parent Ex. D at p. 1). The special education teacher reported that the previous year the student did not relate to the environment, did not complete puzzles, was unable to sort, and did not follow directions or respond to his name (id.). She indicated the student, at the time of the teacher interview, could follow one-to-two step directions, responded to his name, played appropriately with toys in the classroom, and sought out the attention of adults throughout the day (id.). The special education teacher reported that the student sorted three colors, completed puzzles, and built a tower with several blocks (id.). Further, the special education teacher reported that the student recognized his face in a picture, sat for five minutes independently but needed consistent prompts to remain seated, and did not demonstrate aggressive behaviors in her classroom (id.). As related to the student's readiness skills, the special education teacher stated that the student did not recognize the alphabet or numbers and did not have functional language, although he made vocalizations throughout the day (id.). She noted the student was not toilet trained (id.). The special education teacher stated that the student followed the morning routine, and could take his coat off, but had trouble putting it on (id.). She further stated the student did not interact with peers, had poor attention and concentration skills, and did not display the ability to work independently at that time (id.).

As recorded in the March 2022 classroom observation, the district social worker, observed that the student appropriately held his spoon as he ate cereal, made vocalizations during breakfast,

and responded to a verbal direction to throw out his cereal (Parent. Ex. D at pp. 1-2). According to the social worker, while the teacher sang the cleanup song, the student helped clean up by putting balls in a plastic container (id. at p. 2). During independent play, the student pushed beads around a maze as he made excited noises (id.). The social worker reported that during circle time the student did not engage in an interactive song where students needed to follow the gestures of the teacher and required hand over hand assistance from the assistant to imitate the teacher's gestures such as "clap hands, touch knees, and shake hands" (id.). Following the song, the teacher asked who came to school today, and the student "went to his teacher, took his picture, and put it on the school picture" and when asked to say hello to the class, he "gently waved his hand towards the students" (id.). Following reinforcement from his teacher, the student smiled, laughed, walked away from the teacher and then screamed and jumped up and down (id.). The social worker noted that the next activity included listening to a recording of a story read aloud (id.). According to the social worker the student was initially seated in his chair where he began yelling out sounds (id.). However, once the recording started the student sat quietly and looked at the book (id.). During a follow-up song, the student continued to sit quietly but did not follow any prompts to follow along (id.). The social worker reported the student needed five prompts to pick up a toy elephant (id. at p. 2). The social worker observed that the student ultimately picked up two toy elephants but when the teacher took one of the elephants from the student, he proceeded to "let out a loud scream" (id.).

For the 2021-22 school year, the hearing record did not contain a functional behavioral assessment (FBA) as used within the 8:1+2 special class program. However, the hearing record contained the home-based ABA assessment and treatment plans that identified the student's behaviors that acted as barriers to treatment during the 2021-22 school year (Parent Exs. FF; II).

More specifically, in August 2021, Applied ABC completed an initial assessment and treatment plan for the student for home-based ABA services (Parent Ex. II). In June 2022, Applied ABC completed an updated assessment summary and treatment plan that included baseline data from the previous August 2021 assessment (compare Parent Ex. FF, with Parent Ex. II). The August 2021 plan identified the student's foot stomping, out-of-seat behavior, crying, and screaming as behaviors to be reduced (Parent Ex. II at pp. 5-6). With regard to communication, the ABA program included goals that addressed the student's use of PECS to make different spontaneous mands, along with goals that targeted his ability to shake his head yes in response to a question; receptively identifying clothing, animals, and items in the environment; and vocally imitate sounds (id. at p. 6). The August 2021 home ABA program also identified social goals aimed at improving the student's eye contact, independent play, joint attention, turn-taking, and response to greetings (id. at p. 7). Additional goals included having the student respond to one step directions, respond to his name, respond to the command "come here," and correctly imitate motor responses, as well as goals for parent training (id. at pp. 7-9). Further, as related to coordination of care, the August 2021 ABA treatment plan stated that a board-certified behavior analyst (BCBA) would attend meetings and participate in discussions with the student's teachers and related service providers from preschool (id. at p. 9).

The home-based ABA assessment summary and treatment plan was revised in June 2022 (compare Parent Ex. FF, with Parent Ex. II). The June 2022 plan provided updated information on two behavior reduction goals that addressed the student's out-of-seat behavior and crying (compare Parent Ex. FF at pp. 6-7, with Parent Ex. II at pp. 5-6). According to the June 2022

home-based ABA treatment plan, he student made progress from August 2021 to June 2022 in that he decreased the amount of times he left his seat from 10 to 5, and he decreased his crying from four times a session to zero times a session (compare Parent Ex. FF at pp. 6-7, with Parent II at pp. 5-6).¹¹ The June 2022 home-based ABA treatment plan continued all of the communication goals from the August 2021 plan (compare Parent Ex. FF at p. 8, with Parent Ex. II at pp. 6-7). Whereas the August 2021 assessment of the student's baseline measured zero times on all of the following, by June 2022, the student demonstrated four mands with faded prompting, two spontaneous mands per one-hour period, responded to questions by nodding his head with 73 percent correct responses, identified 5 out of 10 animals correctly with 85 percent accuracy, identified 5 out of 10 items with 80 percent accuracy, and imitated three sounds (compare Parent Ex. FF at p. 8, with Parent Ex. II at pp. 6-7).¹² The June 2022 home-based ABA treatment plan carried over all of the student's social goals (compare Parent Ex. FF at pp. 8-9, with Parent Ex. II at p. 7). According to the June 2022 treatment plan, whereas baseline data in August 2021 was measured at zero, the student as of June 2022 made eye contact for one second when manding for preferred items 85 percent of the time, engaged in joint attention for three seconds without prompts with 87 percent accuracy, engaged in turn-taking while building with Legos or blocks with 75 percent accuracy, and greeted others by waving and making eye contact with 90 percent accuracy (compare Parent Ex. FF at pp. 8-9, with Parent Ex. II at p. 7).¹³ As related to additional goals, the updated June 2022 plan reported that the student had increased his performance from baseline data as related to following one step directions, responding to his name, responding to the instruction, "[c]ome here," and motor imitation (compare Parent Ex. FF at p. 9-10, with Parent Ex. II at pp. 7-8). Further, the June 2022 home-based ABA treatment plan carried over two of the four parent training goals from August 2021, and added three new goals (compare Parent Ex. FF at p. 11-12, with Parent Ex. II at p. 9). Additionally, the treatment plan, in the coordination of care section, indicated the BCBA working with the student communicated with the private psychologist to assist with the evaluation process, discussed the student's progress with the school psychologist, and intended to attend the student's upcoming June 2022 CSE meeting to review the student's goals and progress (Parent Ex. FF at p. 12; see Parent Ex. 9 at pp. 7-8).

While the hearing record is not particularly robust with evidence related to programming within the 8:1+2 special class at ADAPT as far as addressing the student's behavioral needs, under the totality of circumstances, I find the evidence presented by the parent sufficient to demonstrate that in addition to programming at school, the home ABA program was designed to provide more individualized support in areas that addressed behavior reduction and replacement,

¹¹ The updated June 2022 ABA assessment summary and treatment plan did not carryover data information on the student's progress as related to the behaviors of stomping feet or screaming; however, the plan added behavior reduction goals for whining, banging table, vocal stereotypy, and motor stereotypy (compare Parent Ex. FF at pp. 6-7, with Parent Ex. II at pp. 5-6).

¹² The updated June 2022 ABA assessment summary and treatment plan listed identification of clothing as a "[n]ew [t]arget" with zero correct responses as of June 2022, although listed as zero correct responses for August 2021 as well (compare Parent Ex. FF at p. 8, with Parent Ex. II at p. 6).

¹³ The updated June 2022 ABA assessment summary and treatment plan listed new objectives for independent play; however, it did not update or denote the student's progression on the previous objective in that same category (compare Parent Ex. FF at p. 9, with Parent Ex. II at p. 7).

communication, social communication, attention, and parent training (see Parent Exs. FF; II). While IHO II found the evidence did not demonstrate that the home ABA program provided the student specially designed instruction to meet his needs, review of the evidence points to the contrary, in that the home ABA program reported on areas that needed remediation and recorded progress in multiple goal areas targeted during the 2021-22 school year (Parent Exs. FF; II; XX ¶¶ 46-47). Based on the foregoing IHO II erred in concluding that the home ABA program did not provide specially designed instruction to meet the student's identified needs. Accordingly, under the totality of the circumstances, the parent's program consisting of the student's enrollment at ADAPT with 20 hours of home-based 1:1 ABA instruction was appropriate.

C. Unilateral Placement 2022-23 School Year

As noted above, an analysis of the parent's unilateral placement must take into account the totality of the circumstances. For the 2022-23 school year, the parent placed the student at Gersh and, in addition to that placement, obtained home-based ABA services from Applied ABC. IHO II determined that Gersh was an appropriate unilateral placement for the student and awarded the parent reimbursement. Additionally, as noted above, the district has not cross-appealed from IHO II's determination that Gersh was an appropriate placement for the student for the 2022-23 school year. Accordingly, there is no longer a dispute over the appropriateness of Gersh; however, a brief review of the program provided at Gersh is required in order to determine the appropriateness of the additional 20 hours of the home-based ABA provided by Applied ABC.

The parent unilaterally placed the student at Gersh for the 2022-23 (kindergarten) school year (Parent Exs. G at p. 1; I; see Parent Exs. J, K, and L at p. 1). According to the Gersh Academy program description entered into evidence, Gersh provides a "team approach" with the team consisting of the parent, the Gersh program director, a special education teacher, a school psychologist and/or a behavior specialist, a teacher assistant or 1:1 aide, and a speech-language pathologist, as well as an occupational therapist, physical therapist, and home program representative when indicated (Parent Ex. Z). The program description indicated that Gersh provides students with personalized attention, and small class sizes with a maximum of six students taught by a certified special education teacher and an assistant teacher (*id.*). Students at Gersh were grouped into classes according to ages, functional levels, and social skills levels (Parent Ex. EE at ¶ 59). As noted in the Gersh Academy program description, program features included the use of ABA methodology, individualized academic programs with multisensory and specialized instruction, use of discrete trial instruction when appropriate, and incidental teaching (Parent Ex. Z). The school's language skills development included pragmatic skills training, use of PECS and iPad, oral motor development, articulation training, with availability of augmentative and alternative communication (AAC) devices (*id.*). As noted in the program description, additional program features provided for social skills training with small group instruction, opportunities for integration, transition planning, and life skills preparation, in addition to related services of speech/language therapy, OT, counseling, PT, resource room, social skills training, equine therapy, and parent training (*id.*). The program description indicated that, at Gersh, all staff members were required to participate in weekly training sessions and received intensive training on autism spectrum disorder and ABA (Parent Exs. Z; EE at ¶¶ 55, 57-58). As part of the partnerships for parents, Gersh "strongly encouraged" parents to attend "twice-monthly [p]arent [s]upport/[t]raining groups" that provided on-site support and training groups to learn different approaches and "how to implement the ABA approach at home" (Parent Ex. Z).

For the 2022-23 school year (kindergarten) the student attended a 5:1+1 special class at Gersh and received weekly related services of four individual 30-minute sessions of speech language therapy, three individual 30-minute sessions of OT, and three individual 30-minute sessions of PT in addition to monthly parent training (Parent Ex. L at p. 1). In an April 2023 academic annual review report, the student's special education teacher indicated the student received intensive teacher and paraprofessional support using the principles of ABA in a highly structured classroom environment (id. at p. 2). The special education teacher reported the student needed consistent prompting to stay on task and listen to specified instruction; however, she noted the student "[wa]s making significant progress in learning the class routine and expectations" and "great strides in expanding his manding inventory" (id.). In the area of reading/writing, the special education teacher noted the student demonstrated difficulty identifying letters when provided an array of three; however, reported the student demonstrated "steady progress in the accomplishment of his writing goals, and stated "he [wa]s progressing nicely in tracing the lines" (id. at p. 3). In the area of math, the special education teacher reported the student was progressing steadily in achieving his math goals for the school year (id.). She noted that although the student had difficulty scanning an array of three, differentiation of instruction, repetition and use of visual cards allowed the student to demonstrate steady improvement in this area (id.). The special education teacher recommended the student continue in a 6:1+1 special class setting with a 1:1 paraprofessional in order to meet his academic, social, and behavioral needs, and "further recommended that [the student] attend an extended school year due to significant regression during breaks and holidays" (id. at p. 4).

The hearing record also included April 2023 annual review reports from the student's related service providers at Gersh in the areas of OT, speech-language therapy, and PT (Parent Exs. P, Q, R).¹⁴ In addition to reporting on the student's current needs, supports, progress made, and goals, the Gersh related service reports noted that the student benefited from an environment using ABA methodologies (Parent Exs. P at p. 1; Q at p. 1; R at p. 1). The April 2023 speech-language therapy annual review report stated that the student "benefit[ed] from the use of ABA methodologies . . . to complete therapeutic tasks" and provided examples such as use of a token board system, first/then statements, intermittent breaks, work to earn strategies, and verbal praise (Parent Ex. Q at p. 1). The April 2023 PT annual review report also noted that the student benefited from the use of a token board during therapy sessions and stated "[the student] responds well to a token system for each completed exercise" (Parent Ex. R at p. 1). Further, the April 2023 OT annual report, stated the student "benefit[ed] from working in a highly structured environment utilizing ABA methodologies such as the first/then approach, timers and positive reinforcers" (Parent Ex. P at p. 1). Moreover, for the 2022-23 school year, the hearing record included Gersh progress reports that specifically reflected the use of ABA methodology and discrete trail teaching in some speech-language therapy, OT, PT, and academic goals (Parent Exs. T; U).

In affidavit testimony, the educational program coordinator at Gersh reported that the student's teacher, teaching assistants, and related services providers used ABA instruction to work on: academic and study skills, teaching patience, waiting between activities, transitioning from

¹⁴ The hearing record included near duplicate reports in the area of PT dated April 30, 2023 with differences noted in the student's reported age (six years old, versus five years and 11 months) and the level of progress the student made toward annual goals ("emerging" versus "progressing") (compare Parent Ex. R, with Dist. Ex. 15).

one activity to another, extending the period of time engaged in academic work, following instructions and directions, responding to questions, and increasing sight word vocabulary (Parent Ex. EE at ¶ 79). The Gersh educational program coordinator reported additional areas addressed through ABA, which included: teaching the sequence of events, identifying and drawing numbers, recognizing and writing letters, recognizing and drawing shapes, teaching addition and subtraction, and teaching recognition of items that are similar and different (*id.*). Gersh staff also worked on improving the student's speech intelligibility, social cooperative play, ability to make choices, ability to understand spatial and temporal concepts; ability to complete activities of daily living, and development of functional independence and self-care skills (*id.*). Additionally, staff addressed the student's handwriting, ability to tolerate frustration; physical coordination, and ability to recognize and avoid dangerous situations (*id.*). Lastly Gersh staff used ABA to teach the student to appropriately ask for his needs to be met, answer questions regarding personal information, label items, and decrease his aggressive and task-avoidant behaviors (*id.*). The educational program coordinator reported that during the 2022-23 school year, supports provided to the student at Gersh "were effective and [] allowed him to make significant progress in all areas of his learning" (Parent Ex. EE at ¶ 81). Further, the educational program coordinator opined that Gersh was appropriate for the student because staff had observed "improvement in [the student's] academic skills, communicative skills, his behaviors, his self-advocacy skills, his ADL skills, his emotional regulation, and his ability to use the coping strategies that [Gersh staff] [we]re teaching [the student] to self-regulate and manage challenging situations, such as transitions from one activity or environment to another" (Parent Ex. EE at ¶ 89).

With regard to home-based ABA services for the 2022-23 school year, Applied ABC completed December 2022 and June 2023 treatment plans for the student (Parent Exs. GG; JJ). Like the previous assessment and treatment plans provided by Applied ABC, these plans provided baseline data and current performance information on goals in areas of behavior reduction, communication, social skills, and parent training (*see* Parent Exs. GG at pp. 9-14; JJ at pp. 7-13). The June 2023 treatment plan provided current data showing the student's performance from December 2022 through June 2023 (Parent Ex. GG at pp. 9-14). In relation to a behavior reduction goal, Applied ABC data showed the student got out of his seat five times per session in June 2022, and 1.5 times per session in December 2022, while in June 2023 the student did not get out of his seat (*compare* Parent Ex. JJ at p. 7, *with* Parent Ex. GG at p. 9). As related to the communication goal of making five spontaneous mands per session, the student increased his performance from zero mands in August 2021, to four mands in June of 2022, and maintained at four mands in December 2022 (Parent Ex. JJ at p. 8). Based on Applied ABC data the student increased his spontaneous mands to five by June 2023 (Parent Ex. GG at p. 11). The December 2022 Applied ABC treatment plan reported the student's social goals of eye contact, joint attention, and greeting as mastered (Parent Ex. JJ at pp. 10-11).

The BCBA who testified at the impartial hearing reported, based on her review of the home ABA treatment plans, that during the 2022-23 school year the student made progress with those plans as created and implemented by the previous provider (Parent Ex. XX at ¶ 56).¹⁵ The BCBA

¹⁵ The BCBA who testified at the impartial hearing worked as the student's BCBA for the home-based ABA program for the 2023-24 year, which is not a school year at issue in this proceeding (Parent Ex. XX ¶ 17). She reported that she met with the previous ABA provider and reviewed previous treatment plans and evaluative information prior to becoming the student's BCBA (Parent Ex. XX ¶¶ 17-21).

further reported that the student mastered some targets related to the identification of actions and body parts, he "manded" a break spontaneously and nicely waited for the break, matched identical pictures without a prompt, and played a matching game with skill; however, he needed a prompt for turn-taking (Parent Ex. XX at ¶ 57). The BCBA indicated the student needed a prompt to emit vocal responses to mand or label simple items within his environment (Parent Ex. XX at ¶ 57; see generally Parent Exs. GG; FF). She further indicated the student decreased his out of seat behavior, independently played with toys for one minute without prompting, and met 5 of the 16 goals within the home ABA treatment plans during the 2022-23 school year (Parent Ex. XX at ¶ 57). Mastered goals, as reported on the December 2022 home ABA treatment plan, included the goal of reducing the student's banging on the table, the behavior replacement goal of requesting a break using PECS, the communication goals of correctly responding to "[c]ome here," and imitating 10 motor responses, and social goals of making eye contact for one second when "manding" for a preferred item, in addition to the joint attention goal to "point and look" for three seconds when provided the instruction (Parent Ex. JJ at pp. 7, 8, 9, 10). On the June 2023 home ABA treatment plan, goals identified as mastered included: a behavior replacement goal that required the student to engage in independent play for two minutes without stereotypy behavior; and a skill acquisition goal that required the student to receptively identify 10 animals and another to correctly respond to 15 one-step directions (Parent GG at pp. 11, 12).

As with the 2021-22 school year, IHO II found that the home-based ABA program for the 2022-23 school year did not provide the student with specially designed instruction. However, in review of the evidence, for the 2022-23 year, the hearing record supports that contrary to IHO II's determination, the home-based ABA program addressed areas of need for the student and provided specially designed instruction. As described above, the student made progress on some of his goals, including having mastered some goals over the course of the 2022-23 school year (Parent Exs. GG, JJ, XX at ¶ 56-57). As the appropriateness of Gersh is not at issue, under the totality of the circumstances, the parent's unilateral placement consisting of enrollment at Gersh along with 20 hours of home-based 1:1 ABA instruction was appropriate to address the student's identified needs.

D. Equitable Considerations

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"]]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

As indicated above, the parent failed to appeal IHO II's denial of reimbursement for the home-based ABA services during the 2021-22 school year due to the parent's failure to provide the district with 10-day written notice for that school year (IHO II Decision at p. 18). Thus, at issue is reimbursement of the parent's insurance copayments for the home-based 1:1 ABA services for the 2022-23 school year. IHO II found that the parent had provided sufficient 10-day notice to the district of her intention to seek funding for the home-based ABA services for the 2022-23 school year and the district did not cross-appeal that finding. Overall, the IHO found that she would have awarded reimbursement for the time period of "September 1, 2022 [through] May 2023" (IHO Decision at p. 18).

With regard to additional equitable considerations, the district argues in its answer that the parent lacks standing for reimbursement of her insurance copayments because she "lacked an unambiguous agreement to pay for such services." (Answer ¶ 19). The district further asserts that the home-based 1:1 ABA instruction was only used for generalization of skills, which is not the responsibility of the school district (id. ¶ 20).

Turning first to the district's assertion that the student's home-based program was used only for generalization of skills, the March 2022 private psychoeducational evaluation report stated that the student required an ABA program at school, and, in addition, a home-based ABA program for carryover and to prevent regression (Tr. p. 240; Dist. Ex. 9 at pp. 13-14; Parent Ex. YY at ¶¶ 33a, 33e). During the impartial hearing the private psychologist testified that "[i]t would be difficult to assure progress with just a day program" (Tr. pp. 240-41).

As related to the home-based ABA program, the April 2023 academic annual review, completed by the Gersh special education teacher, did not mention the student's need for a home ABA program, the need for a home program to prevent regression, nor did it report the student

needed home ABA services to address goals addressed during the student's school day at Gersh in areas of executive functioning, reading/writing, math, social/emotional, or daily living skills (see Parent Ex. L at pp. 2-4). Additionally, the hearing record included a May 2023 BIP and a May 2023 FBA implemented in the student's kindergarten class at Gersh beginning in December 2022 (Parent Exs. J; K). The FBA included a description of behaviors that included: non-compliance, hitting, throwing objects, screaming, and tantrum behaviors all described as mild in intensity; however, the impact of the hitting and tantrum behaviors was described as moderate and the FBA noted that for educational impact, the student exhibited a pattern of behaviors that interfered with learning and interfered with the student's safety and the safety of others (Parent Ex. K). The Gersh special education teacher reported in an interview with the Gersh BCBA, that the student displayed challenging behaviors in September 2022 when he started at Gersh, and, by the time of the May 2023 FBA, the frequency of the student's behaviors had decreased, and the student's compliance had improved (*id.* at p. 6). The May 2023 FBA did not report on the need for a home ABA program (see Parent Ex. K).

The home BCBA in affidavit testimony, reported that research in the area of autism had found that students with autism required a full-time program to make cognitive gains and become more independent (Parent Ex. XX at ¶ 66). The home BCBA further testified that the student "required 1:1 ABA for 20 hours per week minimum afterschool during the school year" (Parent Ex. XX at ¶ 67). During the hearing, the BCBA testified that the student needed full-time 1:1 ABA instruction during the 2022-23 school year and testified that he received 1:1 ABA at home; however, did not know if the student received this instruction at school (Tr. pp. 145-46).

The parent in affidavit testimony reported "only because of the 1:1 ABA therapy he received and then his eventual enrollment at Gersh when [the student] began to inch back to making progress again" (Parent Ex. ZZ at ¶ 120).

As related to the home-based ABA program, the educational program coordinator testified that "ABA at home would only enhance [the student's] learning" and "wraparound services would only reinforce the skills that he's learning in school, and it would definitely prevent regression" (Tr. pp. 205-206).¹⁶ During cross-examination, the educational program coordinator testified that the student did not require at-home ABA for Gersh's program to be effective but noted if he had home ABA instruction the student would "pick up skills quicker and it would prevent regression" (Tr. pp. 214-15). Upon further questioning, the educational program coordinator testified that the, "[the student] definitely needed it," that "at-home ABA definitely help[ed] him to maintain skills [Gersh was] teaching him in the classroom," that the student could regress without the home program, and that "[h]e need[ed] a good wrap around program to address his deficits" (Tr. pp. 215-17). The educational program coordinator testified that Gersh and the home ABA provider collaborated as they used the same reinforcement schedule, the same kind of visuals and the same language, and they were working on toileting, transitioning, and regulation skills (Tr. p. 206).

¹⁶ The Gersh educational program coordinator testified that Gersh employed BCBA's and registered behavior technicians, and that the ABA provided throughout the day "in combination with the student's overall program during the [2022-23] school year" addressed all of the student's behavioral issues; however, it was not clear if the program coordinator was considering the at home ABA program in her response (Tr. p. 197).

The hearing record included a proposed schedule of services from December 2022 for at-home ABA that indicated the student's home-ABA program ran from 4:30 p.m. to 7:00 p.m. Monday through Friday and on Saturday and Sunday, the program ran from 9:00 a.m. to 11:30 a.m. (Parent Ex. JJ at p. 15). As reported above, the home-ABA program worked on overlapping areas and provided reinforcement of skills at home, and provided for parent training at home, on top of the parent training as provided by Gersh.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding any segregable costs charged by the private agency 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). 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 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"]).

Additionally, in discussing generalization of skills, courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]).

For the reasons discussed above, the hearing record shows that the home-based ABA delivered by Applied ABC addressed more than generalization of skills or carryover from the student's educational program provided at Gersh. To the extent that some of the home-based ABA services did provide generalization of skills, those portions of the home-based ABA services

directed at those skills could be considered in excess of what was required to provide the student with a FAPE; however, the district does not provide any argument, or cite to any evidence, that would indicate what portion of the home-based ABA services should be reduced. Here, where the hearing record does not include the IEP for the 2022-23 school year and the district did not cross-appeal from IHO II's determination that the student was denied a FAPE for the 2022-23 school year, the district has essentially declined to present its view of what would have constituted a FAPE for the student. Accordingly, the evidence presented by the parent as to the student's needs is unrebutted. Under these circumstances, as the parent presented evidence to show the appropriateness of the home-based services, and the district has not presented sufficient evidence, or argument, to show that the home-based services were in excess of a FAPE, equitable considerations weigh in favor of granting the requested relief in its entirety.

Next the district argues that the parent is not entitled to "compensation for at-home ABA costs" because she lacked standing to pursue that remedy in that she lacked an "unambiguous agreement to pay for such services" (Answer ¶ 19). The district references its closing brief in support of this contention (*id.*); however, the district misrepresented its own closing brief, which explicitly objected to funding for the parent's insurance premiums on the basis that the parent did not present any evidence that the insurance premiums would be different absent the provision of the home-based ABA services (IHO Ex. II at pp. 3-4). The argument, as presented in the closing brief, may have been persuasive as the parent should have a financial stake in the outcome of the proceeding (see *Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 [4th Cir. 2005] [finding a denial of a FAPE as an injury in fact was not redressable by tuition reimbursement, as the student's education had already been paid for by the parent's insurance carrier]). However, as noted above, the parent did not raise the request for insurance premiums on appeal. Additionally, with respect to the costs of the ABA services provided by Applied ABC, the hearing record includes invoices for the parent's copayments for August 2022, September 2022, January 2023, March 2023, and May 2023 (Parent Ex. S at pp. 1-6). Thus, the parent has demonstrated that she is legally obligated to pay those invoices to Applied ABC and that she is entitled to reimbursement for the invoices that were included in the hearing record.

E. Reimbursement for IEE

IHO II found that the parent had not established that she was entitled to reimbursement for the neuropsychological evaluation as an IEE (IHO II Decision at p. 23). IHO II determined that the parent had not disagreed with any particular evaluation performed by the district and that the parent was also not entitled to reimbursement as an equitable remedy (*id.* at p. 24).

The parent argues that IHO II improperly denied reimbursement for the March 2022 neuropsychological evaluation. The parent asserts that IHO II erred in finding that the parent should have waited for the district to complete the student's turning five reevaluation, and that the district did not fail to evaluate the student in an area that would be addressed by a neuropsychological evaluation. The parent also contends that the district failed to comply with the reevaluation procedures and that she is entitled to reimbursement based on the district's

noncompliance or as an equitable remedy. The district asserts that IHO II correctly denied reimbursement.¹⁷

At the outset I note that IHO II did not err in her finding that the parent's request for reimbursement for the cost of the March 2022 neuropsychological evaluation did not meet the statutory framework under which a parent has a right to obtain an IEE at public expense (see IHO II Decision at pp. 23-24). The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).

IHO II reviewed the parent's testimony which described asking the July 2021 CPSE and the CPSE liaison on December 8, 2021 about the student being evaluated (IHO II Decision at p. 23; see Parent Ex. ZZ at ¶¶ 45, 65, 66). The parent's affidavit reflected that the CPSE liaison advised the parent in December 2021 that the student's annual review would take place in January and the district would conduct a reevaluation (IHO II Decision at p. 23; see Parent Ex. ZZ at ¶¶ 65,66). IHO II found that "[d]espite being advised to wait until January, [the p]arent arranged for a private neuropsychological evaluation which occurred on January 20, 2022 and February 3, 2022" (IHO II Decision at p. 23). Review of the hearing record shows that it does not include a written request for reevaluation from the parent. Although the parent was told that the district was going to begin the turning five reevaluation process in January 2022, the hearing record indicates that the student was evaluated by the private psychologist on January 20, 2022, January 27, 2022, and February 3, 2022 (Parent Ex. AAA; Dist. Ex. 9 at p. 1). Accordingly, the hearing record supports IHO II's determination that the parent did not express disagreement with any evaluation conducted by the district prior to obtaining the private evaluation, and based on that, the parent was not entitled to an IEE at public expense.

However, this does not end the inquiry as the parent's due process complaint notice and arguments in her appeal demonstrate that the parent also requested the cost of the evaluation as additional equitable relief due to the district's denial of a FAPE to the student.

Under the IDEA, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher

¹⁷ The district also incorrectly argues in its answer that the parent did not challenge the comprehensiveness of the district's evaluations at the impartial hearing (Answer ¶¶ 10-12). Review of the parent's due process complaint notice shows that she challenged the sufficiency of the district's evaluative information for each of the school years at issue (Parent Ex. A at pp. 5, 8, 11, 15, 22).

requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

By prior written notice dated March 2, 2022, the district proposed a reevaluation of the student in preparation for the student's transition to kindergarten, which included a request for consent for additional assessments (Dist. Ex. 8 at pp. 1, 3). The hearing record reflects that the June 2022 CSE considered a March 2, 2022 social history assessment, March 14, 2022 classroom observations, and a May 19, 2022 district psychoeducational assessment (Dist. Ex. 7 at p. 2; Parent Ex. D at pp. 1-2; Dist. Exs. 10 at pp. 1-4; 17 at pp. 1-3).

Based on the foregoing, I decline to award the parent the additional equitable remedy of reimbursement for the March 2022 private evaluation. Permitting the parent to obtain an evaluation of the student, under these circumstances, would bypass the evaluation process, which is something that the Second Circuit has recently cautioned against (D.S., 2020 WL 5552035, at *11 [rather than seeking an IEE based on an objection to a particular assessment, a functional behavioral assessment, that was not part of the student's last reevaluation, the parents could have requested that the district conduct another reevaluation of the student]). Additionally, during the course of this proceeding, the parent obtained an interim order directing the district to: [f]und comprehensive independent evaluations, including: 1. Speech; 2. Occupational Therapy; and 3. Assistive Technology; [a]t market rate, as well as any further testing that may be recommended as a result of the aforementioned assessments (February 2, 2023 Interim IHO Decision). The IHO then supplemented that order by ordering a further PT evaluation at district expense (November 13, 2023 Interim IHO Decision). Accordingly, it is worth noting that the parent has already been awarded an IEE and only one IEE is permissible per district evaluation with which the parent disagrees (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

VII. Conclusion

In summary, IHO II erred in finding that the parent did not meet her burden of demonstrating the appropriateness of the unilaterally obtained home-based ABA services. IHO II

correctly found that equitable considerations favored the parent for the 2022-23 school year. The hearing record supports a finding that the parent is entitled to reimbursement for insurance copayments for September 2022, January 2023, March 2023, and May 2023. IHO II correctly denied the parent's request for reimbursement for the costs of the March 2022 private evaluation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 16, 2024, is modified by reversing those portions which denied the parent's request for district funding of home-based ABA services provided by Applied ABC for September 2022, January 2023, March 2023, and May 2023; and

IT IS FURTHER ORDERED that the district shall fund the costs of home-based ABA services delivered to the student by Applied ABC during the 2023-24 school year upon proof of payment.

Dated: Albany, New York
October 28, 2024

STEVEN KROLAK
STATE REVIEW OFFICER