The University of the State of New York

The State Education Department
State Review Officer
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No. 24-485

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:
Gutman Vasiliou, LLP, attorneys for petitioner, by Mark Gutman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Tony L. Mincieli, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO), which denied her request that respondent (the district) fund home-based applied behavioral analysis (ABA) services for her son for the 2024-25 school year. The district cross-appeals, arguing that equitable considerations support denial of the parent's requested relief. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed. Therefore, the facts underlying this matter will not be recited here in detail. Briefly, a CSE convened on October 25, 2022, found the student eligible for special education as a student with autism and developed an IEP recommending a 6:1+1 special class in a State-approved nonpublic day school, a 12-month extended school year, adapted physical education, assistive technology, a daily individual paraprofessional for behavior support, special transportation, and related services consisting of four 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical

therapy (PT), four 30-minute sessions per week of individual speech-language therapy, one 30-minute sessions per week of group speech-language therapy, and one 60-minute session per week of individual parent counseling and training (see Parent Ex. S).

According to the parent, the district's central based support team (CBST) was unable to secure an appropriate nonpublic day school placement, so the parent unilaterally placed the student at the Gersh Academy (Gersh) sometime beginning in August 2023 (Parent Exs. A at p. 2; E; R ¶¶ 8-15).[1] The district's failures to offer the student a FAPE for the 2020-21 through 2023-24 school years were the subject of prior impartial hearings (see Parent Exs. A at p. 2; E; R ¶¶ 5, 7, 16, 19).

On January 26, 2024, a CSE convened to develop an IEP for the student for the 2024-25 school year (see Dist. Ex. 1). Finding the student remained eligible for special education as a student with autism, the January 2024 CSE recommended 12-month programming consisting of placement in a 6:1+1 special class in a district specialized school, adapted physical education, assistive technology, a daily individual paraprofessional for behavior support, special transportation, and related services consisting of three 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, four 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group speech-language therapy, and one 60-minute session per month of "[i]ndividual/[g]roup" parent counseling and training, (id. at pp. 39-41).[2] At the January 2024 CSE meeting, the parent expressed that the student had made a lot of progress in his behavior and academics since his last CSE meeting and that applied behavior analysis (ABA) "ha[d] been very helpful" (id. at p. 50).

In a March 1, 2024 prior written notice, the district informed the parent of the recommendations made by the January 2024 CSE (Dist. Ex. 2). In a school location letter dated March 1, 2024, the district notified the parent of the specific school location the student was assigned to attend for the 2024-25 school year (Dist. Ex. 3).

In a letter dated June 14, 2024, the parent advised the district that she had re-enrolled the student at Gersh for the 2024-25 school year and intended to seek funding from the district for the student's tuition, related services, and transportation costs (Parent Ex. E). The parent further advised that she disagreed with the January 2024 CSE's recommended program for the student, contending that there was no justification for the CSE to change the student's placement from a nonpublic school to a district specialized school and that the January 2024 CSE ignored the student's need for ABA therapy (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A). Specifically, the parent alleged that the district failed to create an appropriate IEP for the

[1] Gersh has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] 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]).

student because it changed the student's placement recommendation from a State-approved nonpublic school to a district specialized school without any justification or explanation, failed to provide an appropriate program for the student that included ABA therapy, and failed to address the student's behavioral needs (id. at p. 3). The parent invoked pendency and asserted that the student's last agreed upon program was Gersh with 15 hours of home-based ABA services (id.). The parent also requested a finding that the district denied the student a FAPE for the 2024-25 school year, a finding that Gersh was an appropriate unilateral placement for the student, an order directing the district to directly fund the student's tuition costs at Gersh for the 2024-25 school year, and an order directing the district to fund the student's home-based ABA services (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 17, 2023 (see Tr. pp. 8-73). At the impartial hearing, the district offered 12 exhibits, all of which were admitted into evidence (Tr. pp. 14-16). The parent offered 19 exhibits, 17 of which were admitted into evidence (Tr. pp. 17-20). Parent exhibits C and D, two prior final determinations made by IHOs in prior administrative proceedings involving the student, were not admitted into evidence (Tr. p. 20).

In a decision dated October 9, 2024, the IHO determined that the district failed to meet its burden to prove that it had offered the student a FAPE for the 2024-25 school year (IHO Decision at pp. 6-7). The IHO found that the student's January 2024 IEP did not recommend ABA services despite the recommendation of an independent neuropsychological evaluation that the student receive ABA services (id. at p. 6). The IHO stated that the district "declined to 'offer a cogent and responsive explanation for [its] decisions' in creating [the] [s]tudent's IEP" (id. at p. 6 citing Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 404 [2017]).

The IHO further found that the hearing record established that the parent had met her burden to prove that Gersh was an appropriate unilateral placement for the student for the 2024-25 school year (IHO Decision at p. 8). Next, the IHO found that equitable considerations weighed in favor of awarding the parent direct funding for the cost of tuition for the student's attendance at Gersh for the 12-month 2024-25 school year (id. at pp. 9-10).

Finally, regarding the parent's request for the district to fund 15 hours per week of home-based ABA services, the IHO found the home-based services unnecessary to ensure that the student made progress in the classroom setting at Gersh and, therefore, denied the parent's request for home-based ABA services (IHO Decision at pp. 10-12).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in denying her request for 15 hours per week of home-based ABA services for the 2024-25 school year and erred in refusing to admit the prior IHO decisions regarding the student into evidence. The parent requests that the district be required to fund 15 hours per week of home-based ABA services for the 2024-25 school year.

In an answer and cross-appeal, the district argues that the IHO correctly denied the parent's request for the district to fund home-based ABA services. Further, the district argues that the IHO

correctly excluded the student's prior IHO decisions from evidence. Finally, the district argues as an alternative ground for denying relief that the parent never incurred a financial obligation to the home-based ABA provider. The district requests that an SRO dismiss the parent's appeal and affirm the IHO's decision.

In an answer to the cross-appeal, the parent argues that a contract with the ABA provider was not required.

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., 580 U.S. at 399). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support

services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

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

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. IHO's Evidentiary Ruling

The parent offered two prior IHO decisions regarding the student as exhibits during the impartial hearing, but the IHO declined to enter them into evidence (see Tr. p. 20). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

The IHO declined to receive the IHOs' decisions from the prior matters into evidence, stating that she could not "consider prior final determinations made by other IHOs in different cases to decide this case" and that she had to consider "the record . . . and the facts in this case" (Tr. p. 20). The parent's attorney made a proffer regarding the relevance of the prior decisions, stating that the purpose was not for the IHO "to consider the decision[s]" of the prior IHOs, but, instead, was to establish "the facts that [we]re in place and what stemmed as a result of those decisions" (Tr. p. 21). The IHO maintained her ruling that the decisions would not be included as evidence but stated the parent's attorney could pursue questions relating to the decisions (Tr. pp. 21-22).

While it is best practice to receive into evidence documentation of prior, recent litigation between the parties, as it may contain useful, relevant history regarding the student or the reoccurrence of particular disputes between the parties, the IHO was correct in noting that she would not be bound by the prior IHOs' fact finding or decision (unless the same dispute regarding the same time frame was being brought before a second IHO). On appeal, the parent offers the prior IHOs' decisions as additional evidence and argues that the decisions were relevant for three purposes.

First, the parent asserts that, without the documents, there is no explanation for pendency or for why the October 2022 had recommended a nonpublic school for the student. Second, the parent asserts that the decisions establish that the student's unilateral placement consisted of Gersh with home-based ABA services. However, there is no dispute between the parties about pendency or regarding the October 2022 CSE's recommendations or the components of the student's unilateral placement during the 2023-24 school year.[4] Moreover, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see (J.R. v. New York City Dep't of Educ., 748 Fed. App'x 382, 386 [2d Cir. Sept. 27, 2018] [finding the district's funding of the student's school in other years was "irrelevant"]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 414-15 [S.D.N.Y. 2005] [holding that parents must "put FAPE at issue" in each school year for which they seek tuition reimbursement by giving notice to the district], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; see also Wood v. Kingston City Sch. Dist., 2010 WL 3907829, at *7 [N.D.N.Y. Sept. 29, 2010] [noting that reenrollment at a private school does not extinguish analysis of the elements applicable in a tuition reimbursement case]; S.W. v. New York City Dep't of Educ., 646 F .Supp. 2d 346, 366 [S.D.N.Y. 2009]). Accordingly, the composition of the student's unilateral placement in a prior school year does not dictate its appropriateness or the degree to which it is may have included services that exceeded the level that the student required to receive a FAPE for the school year at issue in this matter.

Finally, the parent argues that the summary in one of the prior IHO decisions of testimony presented in that matter supports her position regarding a material issue in the present matter. However, as discussed further below, testimony presented in a proceeding involving a different school year and summarized in a decision without additional context does not constitute persuasive evidence that would warrant disturbing the IHO's decision.

As the IHO's evidentiary ruling would not have impacted the outcome of this matter, the IHO's decision to not receive the prior IHOs' decisions into evidence does not constitute reversible error.

B. Home-Based ABA

Initially, the district does not challenge the IHO's findings that it failed to offer the student a FAPE for the 2024-25 school year, that Gersh was an appropriate unilateral placement, and that equitable considerations weigh in favor of awarding the parent the cost of the student's twelve-month attendance at Gersh. Therefore, these findings have become final and binding upon the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v];

[4] During the impartial hearing, the parties agreed that the student's stay-put placement during the pendency of the proceedings was based on an unappealed IHO decision, dated January 4, 2024, and consisted of the student's placement at Gersh, 15 hours per week of home-based ABA from a private provider, and the district's provision of a bus paraprofessional for the student's transportation to and from Gersh (see Pendency Implementation Form).

279.8[c][4]; 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]).

Turning to the parent's assertion on appeal that the IHO failed to award home-based ABA services, a parent may generally obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006]). The IHO considered the appropriateness of the student's home-based ABA services separately from the student's day program at Gersh but determined that "there [wa]s undoubtedly a benefit to Student's receipt of 15 hours per week of 1:1 home-based ABA services" (IHO Decision at p. 10). There is no material dispute on appeal that, taking into account the totality of the circumstances, the ABA services in combination with the student's attendance at Gersh constituted an appropriate unilateral placement. However, the IHO went on to find that the home-based services were not necessary for the student to make progress at Gersh (see id. at pp. 10-12). The issue of whether the home-based ABA services constituted maximization of services is an equitable consideration.

Under the Burlington/Carter framework, the final criterion for a reimbursement award is that the parent's 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., 226 F.3d at 68; 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"]).

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 a private school or 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, as the IHO noted 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., C.M. v. Mount Vernon City Sch. Dist., 2020 WL 3833426, at *21, *28 [S.D.N.Y. July 8, 2020]; F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K., 2016 WL 899321, at *8-*10).[5]

In examining whether the home-based ABA constituted services that exceeded what was required to provide the student a FAPE, it is necessary to review evidence regarding the source of

[5] The parent argues that this position on generalization should be "reconsider[ed]" in light of Endrew F., 580 U.S. 386. However, the cases cited by the IHO do not, as the parent argues, rely on the 10th Circuit's "merely more than de minimis" standard that the Supreme Court reviewed in Endrew F. (580 U.S. at 387). While the cases cite a 10th Circuit case that discusses generalization (Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 [10th Cir. 2008]), they set forth and apply the Second Circuit's standard, which provides that a school district satisfies its obligation to offer a FAPE under the IDEA if it develops an IEP "that is likely to produce progress, not regression," and affords the student with an opportunity for more than "the opportunity for only trivial advancement" (L.K., 2016 WL 899321, at *8, quoting Walczak, 142 F.3d at 130; F.L., 2016 WL 3211969, at *1, citing M.O. v. New York City Dep't of Educ., 793 F.3d 236, 239 [2d Cir. 2015]; see Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]). The Second Circuit has found that "[p]rior decisions of this Court are consistent with the Supreme Court's decision in Endrew F." (Mr. P. v. West Hartford Board of Education, 885 F. 3d 735, 757 [2018]). Moreover, contrary to the parent's contention, at least one court has, since Endrew F., reiterated that provision for generalization of skills to other environments outside of school is not required by the IDEA (C.M., 2020 WL 3833426, at *21, *28). Accordingly, absent further authority from the courts, the general proposition that school districts are not, as a matter of course, required to provide for students' generalization of skills outside of the school environment stands.

the recommendation for the home-based services. A review of the hearing record indicates the parents obtained a private neuropsychological evaluation in May 2022 when the student was six years old (first grade) and attending a 6:1+1 special class within the district (Parent Ex. B at p. 4). The neuropsychological evaluation report described the student as non-verbal, with a history of severe receptive and expressive language delays, and noted the student had a history of sensory integration deficits, and decreased tone, coordination, dexterity, fine motor skills, and self-help skills for activities of daily living (id. at p. 1). The report stated that the student was diagnosed as having "autism [spectrum disorder (ASD)] at [two] years old during an [e]arly [i]ntervention evaluation" and began receiving services that included speech-language therapy, OT, and special instruction/ABA at that time (id.). According to the May 2022 neuropsychological evaluation report, at the time of a January 2022 CSE meeting, the student displayed significant deficits in language, academics, self-help, and motor skills and communicated via a picture exchange system (id. at p. 4). The student could identify all 26 letters of the alphabet and count to 10 but could not match words with pictures or count to 20 and had not mastered toilet training (id.). The neuropsychological evaluation report further indicated that in January 2022 the student required reminders to follow schedules, prompts to complete a task, and "[wa]s unable to control and monitor impulsive behaviors" and that "[t]eachers ha[d] utilized nonverbal prompts, verbal prompts, modeling, [and] visual supports for introducing new information, extended response time, and repeated directions" (id.). The neuropsychological evaluation report noted the student also exhibited "escape/avoidance behaviors" during non-preferred tasks and had difficulty staying seated (id.). The student's educational history, as detailed in the May 2022 neuropsychological evaluation report, did not indicate that the student received ABA services within the district program (see generally id.).

Intelligence testing, administered to the student as part of the May 2022 neuropsychological evaluation, yielded a full-scale IQ score of 55, which was below the first percentile and fell in the "[v]ery [p]oor range" compared to the student's same-aged peers (Parent Ex. B at pp. 5, 8). According to the neuropsychological evaluation report, the student met the DSM-V criteria for intellectual disability, severe, given the combination of the student's impaired cognitive, adaptive functioning, and academic abilities, as well as met the DSM-V criteria for ASD, "Level 3 for social/communication and Level 2 for restricted/repetitive behaviors, with accompanying intellectual and language impairment" (id. at p. 9). The May 2022 neuropsychological evaluation report recommended that the student be placed in a special education school that provided instruction "infused with ABA principles" and that he attend a class of no more than six students with his own 1:1 paraprofessional (id.). The evaluating neuropsychologist opined that "[d]ue to the absence of appropriate educational services while [the student] has been attending a [district] program, [the student] require[d] compensatory education programming" that included 1:1 ABA services for 25 hours per week with "15 hours [of] home-based and 10 hours [of] school-based" instruction (id. at p. 10).

In addition to the neuropsychological evaluation, the hearing record also includes a March 2023 ABA skills assessment that was completed as an independent educational evaluation during the 2022-23 school year (Parent Ex. P at p. 1). The March 2023 ABA skills assessment, like the May 2022 neuropsychological evaluation, recommended the student attend a full-time private ABA program and receive compensatory ABA hours to place the student in the position he would have been in had the district provided appropriate special education services (id. at pp. 19-20). The March 2023 ABA skills assessment report recommended compensatory services of 10 hours

of ABA services per week for the denial of a FAPE for the 2020-21 and 2021-22 school years with a total of 920 compensatory ABA hours (id.). The March 2023 assessment report indicated that the student was extremely dependent on others and a "trained provider would be able to provide [the student] with the necessary tools that c[ould] be generalized from his home and into his classroom setting" (id.).

Although the parent argues that the student required home-based ABA services and cites both the May 2022 neuropsychological report and the March 2023 ABA skills assessment as recommending these services, the recommendations in these reports were for compensatory home-based ABA services for the purposes of remedying the district's denial of a FAPE in prior school years and do not support the proposition that home-based ABA services were necessary for the student to continue to make progress in the classroom at Gersh for the 2024-25 school year (Parent Exs. B at p. 10; P at p. 20; see VW v. New York City Dep't of Educ., 2022 WL 3448096, at *6 [S.D.N.Y. Aug. 17, 2022] [finding that "[b]ecause compensatory education is retrospective," it does not inform as assessment of "which services may be appropriate for a student for the upcoming school year."]; M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] [finding that a student's progress made as a result of compensatory services delivered to remediate a past denial of FAPE should be separated and not considered in assessing appropriate services for an upcoming school year]).[6] The parent does not point to a recommendation for home-based ABA services to be part of the student's programming on a going-forward basis as part of the overall program that the student required in order to receive educational benefit, rather than as an addition to the day program to make-up for a past deprivation of FAPE.[7]

[6] The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014]; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]).

[7] The parent does point to testimony from a prior impartial hearing involving the student summarized in an IHO decision. However, as discussed above, that summary of testimony is not reliable or relevant for these purposes. While the parent is correct that hearsay evidence is admissible in administrative proceedings under the IDEA (see Jalloh v. D.C., 535 F. Supp. 2d 13, 22 [D.D.C. 2008]; Sykes v. D.C., 518 F. Supp. 2d 261, 268 [D.D.C. 2007] [noting, in addition to case law allowing hearsay evidence in administrative hearings, that "the IDEA supports this precedent by not explicitly banning hearsay evidence from administrative proceedings held pursuant to the statute"]; Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 2d 1093, 1101 [C.D. Cal. 2000]; see also Application of the Dep't of Educ., Appeal No. 12-075, Application of a Student with a Disability, Appeal No. 12-007, Application of a Child with a Disability, Appeal No. 03-053, Application of a Child Suspected of Having a Disability, Appeal No. 93-018), it must be sufficiently relevant and probative to be relied upon to support a decision by the IHO (see Shanahan v. Justice Ctr. For Protection of People with Special Needs, 198 A.D.3d 1157 [2021]). However, given that the testimony, offered in July 2022 when the student was attending a different program and was only briefly quoted in an IHO decision, it is insufficiently relevant or probative on the issue of whether the home-based ABA services exceeded the level of services the student needed to receive a FAPE for the 2024-25 school year at issue in this matter.

Moreover, as the IHO found, the evidence in the hearing record shows that the student received educational benefit due to his attendance at Gersh, which "utilized ABA methodology through the school day" (IHO Decision at p. 10, citing Parent Ex. Q ¶¶ 29-30, 35-36). Review of the student's January 2024 Gersh annual review related services and academic report and the 2023-24 Gersh progress report shows that the student made progress towards goals at school, and also mastered goals in the areas of academics, OT, PT, and speech-language therapy (see Parent Ex. O; see generally Parent Exs. I-L).

Regarding the home-based ABA services provided to the student during the 2024-25 school year, the hearing record does not include documentary or testimonial evidence directly from the provider or agency that delivered the services (see generally Tr. pp. 1-73; Parent Exs. A-B; E-S; Dist. Exs. 1-12). The parent testified that the student received home-based ABA services, identified the provider by name, and stated that she believed he was the BCBA from the "Manhattan Psychologic Group" (Tr. p. 62).[8] The parent reported that the home-based ABA service provider "help[ed] with the toileting and toilet training and academic[s] also" (Tr. p. 64). The parent further testified that the home-based ABA provider helped "when [the student] ha[d] stimming, how to calm down and any behavior, how to tackle it" (Tr. p. 64). In relation to when the services were provided, the parent testified that the student received services after school "three times a week, Monday, Tuesday, and Wednesday, [for] two hours" (Tr. p. 64). As there is no evidence from the home-based ABA provider or agency, it is unclear from the record if the student received the entirety of 15 hours of home-based ABA services per pendency; or, if as per parent report, the student received only six hours (Tr. p. 64).

The parent in affidavit testimony reported that the student, after attending Gersh for a year, had made continuous progress (Parent Ex. R ¶ 18). The parent testified that the student, with the support of Gersh and home-based ABA services, "ha[d] learned how to manage his behavior better than he ever ha[d]" (id.). The parent indicated that Gersh provided her with progress reports (id.). She opined that the student's ABA supports were "extremely important, too" and stated that he needed to learn how to use the right skills at home and opined if he did not have home-based ABA services he would regress in school (id.).[9]

However, aside from the parent's conclusory testimony on the question of the student's need for the home-based ABA services for the 2024-25 school year, the evidence tends to support the IHO's conclusion that the student could receive educational benefit at Gersh without the home-based ABA. While the parent argues that there was no evidence to suggest that the home-base

[8] The Manhattan Psychology Group conducted the student's April 2023 ABA skills assessment (see Parent Ex. P at p. 1). The parent testified that she thought she would have signed a contract with the home-ABA agency as she did get invoices and signed those; however, she also stated she could not remember specifically as she signed a lot of paperwork (Tr. pp. 63-64).

[9] The Gersh educational coordinator testified that Gersh interacted with the student's home-based ABA provider stating generally "whenever a student, or him in particular, has a therapist at home, we're very involved" and stated "[t]his way we're on the same page, we us[e] the same language, and we're working on the same goals" (Tr. p. 52). However, the coordinator did not offer any specifics regarding the student's home-based services. Review of the student's January 2024 Gersh annual review related services and academic report and the 2023-24 Gersh progress report shows that the student made progress towards goals at school, and also mastered goals in the areas of OT, PT, academics, and speech-language therapy (see Parent Ex. O; see generally Parent Exs. I-L).

services were not a critical part of the student's educational development, the converse is also true, and the parent carried the burden of proof when it came to evidence regarding the unilateral placement (Educ. Law § 4404[1][c]). As the evidence in the hearing record includes no data, reports, or information pertaining to areas addressed by the home-based ABA provider or agency for the 2024-25 school year, I find no basis to disturb the IHO's conclusion that the home-based ABA exceeded the level of services that the student required to receive a FAPE for the 2024-25 school year.

VII. Conclusion

There is insufficient basis in the hearing record to disturb the IHO's determination that the home-based ABA services exceeded the level of services the student required to receive a FAPE and that, therefore, the district was not required to fund them as part of the unilateral placement of the student. Given this determination, it is unnecessary to reach the district's cross-appeal.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 8, 2025

SARAH L. HARRINGTON
STATE REVIEW OFFICER