The University of the State of New York

The State Education Department
State Review Officer
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No. 24-516

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Gutman Vasiliou, LLP, attorneys for petitioners, by Mark Gutman, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) prospectively fund the costs of their son's tuition at Gersh Academy (Gersh) and home-based applied behavioral analysis (ABA) services for the 2024-25 school year. The district cross-appeals, arguing that equitable considerations support denial of the parents' 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 January 16, 2024, found the student eligible for special education as a student with autism, and developed an IEP (see Dist. Ex.

16).[1] The CSE recommended a 12-month program in a State-approved nonpublic school consisting of a 6:1+1 special class for core academic subjects; related services of individual counseling, individual occupational therapy (OT), individual and group speech-language therapy, and parent counseling and training; full-time individual support from a behavior support paraprofessional; and an assistive technology device (id. at pp. 36, 37, 41).

A. Due Process Complaint Notice

In a due process complaint notice dated July 8, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). Specifically, the parents alleged that the district denied the parents the right to meaningfully participate in the development of the student's educational program by not following the recommendations outlined in the student's independent educational evaluations (IEE) (id at p. 3). Additionally, the parents alleged that the district failed to implement the student's IEP by not providing the student with a nonpublic school placement (id.) The parents also alleged that the district failed to provide appropriate related services to the student by failing to recommend services based on the IEEs' recommendations (id. at pp. 3-4). Further, the parents alleged that the district failed to provide the student appropriate assistive technology by not providing the student with the assistive technology device recommended in the IEP (id. at p. 4). Finally, the parents alleged that the district failed to recommend home-based services despite a recommendation for such services in the student's evaluations (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 19, 2024. In a decision dated November 2, 2024, the IHO found that the parents' claims relating to appropriateness and implementation of the student's IEP were not barred by the doctrine of res judicata because the parents' claims were for the 2024-25 school year and could not have been raised in a prior proceeding (IHO Decision at pp. 9-11). The IHO also found that the district failed to offer the student a FAPE for the 2024-25 school year by failing to implement his IEP and by failing to offer him a placement at a State-approved nonpublic school (id. at pp. 11-13).

The IHO then went on to find that the parents lacked standing to pursue the remedy of direct prospective tuition funding because the student was not enrolled at Gersh, Gersh was not providing the student with an educational program or services, and the parents had not incurred any tuition expense or financial obligation to Gersh for the payment of tuition; thus, the parents' injury from the denial of a FAPE would not be redressed by the direct prospective tuition funding they requested (IHO Decision at pp. 13-16). Alternatively, assuming that the parents' injury was redressable by direct prospective funding, the IHO found that it would be speculative, not likely,

[1] The student's eligibility for special education as a student with autism for the 2024-25 school year is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

that the injury would be addressed by a favorable decision, because Gersh was only holding a seat for the student, and Gersh's principal testified that the seat could not be held indefinitely (id.).

Finally, regarding the parents' requested relief of an order requiring the district to fund a program of home-based services for the student as recommended in his IEEs, the IHO found that unlike the claims made by the parents in the proceeding regarding appropriateness and implementation of the student's IEP, the parents' claim that the district is obligated to fund home-based services for the student was raised and adjudicated on the merits during a prior proceeding (IHO Decision at p. 16). Thus, the IHO found that the parents' claims regarding home-based services were barred by the doctrine of res judicata (id. at p. 17).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in finding that a student who has been denied a FAPE lacked standing to request funding for a private school to remedy such a denial. Additionally, the parents allege that the IHO erred in failing to order any relief despite finding a denial of a FAPE. Finally, the parents allege that the IHO erred in not considering the student's need for home-based ABA services.

In an answer with cross-appeal, the district argues that the IHO properly found that the parents lacked standing regarding their request for a remedy of direct prospective tuition funding. The district also argues that by the parents asking for direct prospective funding of tuition as a form of relief without the parents having a financial obligation to Gersh or the student receiving services from or attending Gersh, the parents are seeking to create an exception to precedent regarding the parents' financial obligation. The district further argues that the parents are not entitled to prospective tuition in the form of compensatory relief. The district then argues that a denial of a FAPE does not automatically entitle the parents to relief. Additionally, the district argues that the IHO properly denied the parents' request to have the district fund home-based ABA services. Finally, the district argues that if an SRO overturns the IHO's determination on standing, equitable considerations weigh in favor of the district.

In their reply and answer to the cross-appeal, the parents argue that the IHO's determination on standing does not bar the student from receiving any form of relief. Additionally, the parents argue that if an SRO overturns the IHO's determination on standing, equitable considerations favor the parents.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding

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

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

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

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

VI. Discussion

The IHO found that the district denied the student a FAPE for the 2024-25 school year because it failed to implement the student's IEP and provide him with a placement at a State-approved nonpublic school (IHO Decision at pp. 11-13). Neither party disputes this finding on appeal; thus, this issue is 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]; 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]). The parties' dispute on appeal

[2] 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).

revolves around whether the IHO erred in finding that the parents lacked standing to seek as a remedy for a violation of the IDEA the student's prospective placement at Gersh, a nonpublic school that the student was not attending and for which the parents had not incurred a financial obligation to Gersh for the current school year.

A. Prospective Placement in a Nonpublic School

Generally, an award of prospective relief in the form of prospective placement of a student in a particular type of program and placement, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). However, concerns about circumventing the CSE process arise most prominently in matters where the school year challenged has ended and, in accordance with its obligation to review a student's IEP at least annually, the CSE would have already convened to produce an IEP for the following school year (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *7 [S.D.N.Y. Aug. 17, 2022] [acknowledging that "orders of prospective services are disfavored as a matter of law" and, in the matter at hand, indicating that "the CSE should have already convened for subsequent school years]; M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *8 [N.D.N.Y. Mar. 29, 2019] [declining to speculate as to the likelihood that the district would offer the student a FAPE "in the future" and, therefore, denying prospective relief]; Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed]).

Additionally, while prospective placement might be appropriate in rare cases (see Connors v. Mills, 34 F.Supp.2d 795, 799, 804-06 [N.D.N.Y. Sept. 24, 1998] [noting a prospective placement would be appropriate where "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate"]), the pitfalls of awarding a prospective placement have been noted in multiple State-level administrative review decisions, including that where a prospective placement is obtained by the parents through the impartial hearing, such relief could be treated as an election of remedies subject only to further judicial review, where the parents assume the risk that future unforeseen events could cause the relief to be undesirable (see, e.g., Application of a Student with a Disability, Appeal No. 19-018; see also Tobuck v. Banks, 2024 WL 1349693, at *5 [S.D.N.Y. Mar. 29, 2024]).

Here, it is undisputed that there has been no unilateral placement by the parents, as the hearing record indicates the student continues to be enrolled in a district public school for the 2024-25 school year (Dist. Ex. 18 at p. 1). The parents seek the student's placement at Gersh (Parent

Exs. A at p. 3; P ¶¶ 30-31, 33). The parents did not enter into an enrollment contract with Gersh, nor have they incurred any financial obligation to Gersh (Tr. pp. 75-76). Rather, Gersh indicated to the parents that the nonpublic school is "sav[ing] a seat open for [the student] if [the parents] can secure tuition funding through the hearing process" (Parent Ex. P ¶ 31). Gersh has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see NYCRR 200.1[d], 200.7).[3]

Courts and hearing officers have treated claims for relief seeking a future educational placement in a nonpublic school numerous ways with both analogous and sometimes disparate elements in the approaches taken. One district court described a situation similar to the one in this matter insofar as:

> [the parents] have not expended any money on tuition thus far and are not, at this time, requesting any tuition reimbursement for past-made payments [i]nstead, [their] request can reasonably be understood only as a request for prospective placement reasonably intended as compensatory education. Although apparently less common, courts have ordered prospective placement under express or at least implicit treatment as compensatory education. See Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch., 565 F.3d 1232, 1252 (10th Cir. 2009) (referring to private school placement funded by the school district as "compensatory-education payments."); Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1290 (11th Cir. 2008) (approving of a district court's award of compensatory education in form of placement at private school); see also Perry A. Zirkel, Adjudicative Remedies for Denials of FAPE Under the IDEA, 33 J. OF NAT'L ASS'N OF ADMIN. L. JUDICIARY 213, 225 n.49 (2013) (citing cases ordering educational placement as compensatory education).
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> Indeed, "[t]he question of who must bear the financial responsibility for a private school placement turns upon [in part]...the inappropriateness of the alternative public school placements." Davis v. D.C. Bd. of Ed., 530 F. Supp. 1209, 1212 (D.D.C. 1982). The IDEA encourages school districts to avoid "separate schooling or other removal...from the regular educational environment" unless a child's "regular" classes cannot meet his needs. 20 U.S.C. § 1412(5)(A); see also, e.g., Burlington, 471 U.S. at 369 (IDEA "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides

[3] Authorities differ on whether a private school placement that is "unapproved" by State educational authorities is a permissible form of relief (Connors v. Mills, 34 F. Supp. 2d 795, 805 [N.D.N.Y. 1998] [noting that when a child's access to a free and appropriate public education in a substantive sense conflicts with the state's approval process, Carter instructs that the state's approval process must give way]).

> for placement in private schools at public expense where this is not possible."); Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860, 870 (D.N.H. 1992); Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1044 (5th Cir. 1989).

Smith v. Cheyenne Mountain Sch. Dist. 12, 2018 WL 3744134, at *8 (D. Colo. Aug. 7, 2018) [concluding that the ALJ's decision not to award compensatory education services was supported by the record and not erroneous and that an award of prospective nonpublic school placement as compensatory relief was likewise unwarranted]; see also Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges that IEP]).

However, in another example involving a parent from Rhode Island seeking a nonpublic school placement on a prospective basis, a district court seemed less concerned over whether relief could be crafted to provide an appropriate education in the public school and the need to avoid an unnecessary removal from public schooling and instead appeared to employ an analysis closer to, but not identical with a parental unilateral placement/reimbursement case, relying on the Supreme Court's decision in Carter to determine whether the parent's proposed private school placement, the Gove School, was 'proper under the Act' (S.C. by & through N.C. v. Chariho Reg'l Sch. Dist., 298 F. Supp. 3d 370, 381 (D.R.I. 2018); see Carter, 510 U.S. at 15; see also D.C. v. Oliver, 2014 WL 686860, at *5 [D.D.C. Feb. 21, 2014] [discussing both Reid compensatory education relief, Carter, and Forest Grove reimbursement, and finding that when a school district has failed to develop an IEP, propose a location of services and otherwise offer an eligible child a FAPE, parents may seek placement at a nonpublic school on a prospective basis and are not required to wait and see a proposed IEP in action before concluding that it is inadequate and choosing to enroll their child in an appropriate nonpublic school]; J. v. Portland Pub. Sch., 2016 WL 5940890, at *23 [D. Me. Oct. 12, 2016], report and recommendation adopted, 2016 WL 7076995 [D. Me. Dec. 5, 2016] [suggesting that LRE considerations, although required by the Act, may be of lesser importance when an administrative hearing officer is fashioning relief in the form of a compensatory educational placement in a nonpublic school setting]).

It is well-settled that hearing officers have broad discretion to fashion equitable relief, which under the appropriate circumstances may extend to prospective placements at nonpublic schools, to remedy a district's failure to provide a FAPE (see, e.g., Forest Grove, 557 U.S. at 240 n.11 [2009]; Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp.2d 403, 422-23, 427-30 [S.D.N.Y. 2011]). The purpose of a prospective placement remedy would be to ensure that the student receives a placement that meets the student's educational needs and provides a FAPE where the district has failed to find an appropriate placement to implement the student's IEP. Moreover, it is true that this matter is distinct from those where the courts have noted some of the pitfalls of prospective relief because the school year at issue here – the 2024-25 school year – is not yet over and the district has had the opportunity to develop an IEP, identify a placement for the student and implement the IEP. However, while noting the authority above that has grappled with the issue, and recognizing that the evidence in the hearing record indicates that Gersh arguably would have passed muster under the prevailing authority governing the appropriateness of unilateral

placements if the student actually had been placed there by the parent,[4] [5] I nonetheless am constrained to find that the IHO reached the proper conclusion that the prospective placement of

[4] 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).

[5] For example, with respect to the student's needs, the January 2024 IEP reflected the results of a December 2023 neuropsychological evaluation which found that on the Differential Ability Scales-II (DAS-II), the student's general cognitive ability score of 61 (.5 percentile) was in the very low range, with composite standard scores of 31 (0.1 percentile) on the verbal cluster, 88 (21st percentile) on the nonverbal cluster, and 69 (2nd percentile) on the spatial cluster (see Parent Ex. M; Dist. Ex. 16 at p. 2). The January 2024 IEP also indicated that on the Wide Range Achievement Test-Fifth Edition, the student's word reading skills were in the low average range, his

the student at Gersh for the remainder of the 2024-25 school year was not an available remedy to the parent. Although an award to amend a student's IEP and provide the student with specified services during a particular school year may be appropriate prospective relief that does not intrude on the CSE's role if it is tied to a determination that the district failed to offer the student a FAPE for that same school year, which is still ongoing (see Application of a Student with a Disability, Appeal No. 22-132 [declining to disturb an IHO's order directing that specified services be added to the IEP and provided to the student for the remainder of the school year at issue where the district did not allege on appeal that the IEP amendments would be inappropriate, and had failed to develop an appropriate IEP for the student for the school year in question]), the prospective placement of a student at a specific private school for the remainder of a school year where the district has denied the student a FAPE raises questions that go beyond the usurpation of the CSE's role in educational programming.

First, while it is final and binding that the district denied the student a FAPE by failing to place him in an approved nonpublic school as recommended by his IEP for the 2024-25 school year, on my independent review of the hearing record I do not find sufficient evidence, as was the case in Connors, that the district and the parent both agree that the district unequivocally cannot find an approved placement for the student, a circumstance that, if present, would arguably place

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sentence comprehension was in the extremely low range, his reading composite skills were in the very low range, and his spelling skills were in the average range (Dist. Ex. 16 at pp. 2-3, 15). The student's math computation skills were in the extremely low range and well below grade expectation (id. at pp. 2, 15). The January 2024 IEP reported that measures of the student's overall expressive and receptive language indicated that his skills were "well below age expectations, suggesting severe difficulty with words and understanding language" (id. at p. 15). The student exhibited echolalia, and his vocalizations were primarily related to his wants and needs (id. at p. 14) The January 2024 IEP further reported that the student's instructional team reported "escalating behavioral challenges . . . during individual sessions," and noted that "the way therapy [was] provided ha[d] been altered in some instances due to [the student's] physical aggression towards familiar adults" (id. at p. 18). He required "constant supervision and support of school staff to ensure his safety and the safety of his peers," and the support of a behavior support paraprofessional to ensure his safety and support his participation in academic and non-academic activities (id.). The January 2024 IEP stated that an ABA skills assessment and the findings of the December 2023 neuropsychological evaluation "consistently support[ed] the need for a full-time ABA program as well as in-home ABA" services, and noted that the student required 30 hours of school-based "behavior therapy" per week and 10 hours of home-based behavior therapy per week targeting his repetitive behaviors (id. at p. 16).

With respect to the program offered at Gersh, Gersh staff "saw that [the student] require[d] a highly specialized program and specifically, a program that utilize[d] ABA methodology throughout the school day" (Parent Ex. Q ¶ 27). According to the principal, Gersh staff acknowledged that the student "was recommended for a small class size, along with related services including speech therapy, occupational therapy and counseling . . . [and] determined that Gersh [wa]s able to provide a placement that line[d] up with the recommendations of [the student's] independent neuropsychological evaluation" (id. ¶¶ 27-28). To confirm that the student was an appropriate fit for the school, the student and his parents visited Gersh and as part of the intake, Gersh staff reviewed the documents provided by the student's parents and a special education teacher and related service providers administered assessments to determine his social, academic, and behavioral needs (id. ¶ 29). Gersh staff determined that Gersh "would be an appropriate placement" for the student and offered him a seat for the 2024-25 school year (id. ¶ 30).

this matter squarely within the realm of rare cases where a prospective placement at a private school of the parent's choosing might be warranted.[6]

Second, although some courts have noted that evidence of the general educational milieu of a unilateral placement can be relevant for purposes of awarding tuition reimbursement, and in some cases may constitute special education, the same authority recognizes that such considerations nonetheless do not abrogate the requirement that the appropriateness of a unilateral placement continues to rest on a finding of specialized instruction which addresses a student's unique needs (see W.A. v. Hendrick Hudson Cent. School Dist., 927 F.3d 126, 148-49 [2d Cir. 2019] [indicating that "a resource that benefits an entire student population can constitute special education in certain circumstances" but cautioning that features such as small class size might be the sort of feature that might be preferred by parents of any child, disabled or not], cert. denied, 140 S. Ct. 934 [2020]; T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2017]); see also Bd. of Educ. of Wappingers Cent. School Dist. v D.M., 831 Fed. App'x 29, 31 [2d Cir. 2020] [acknowledging an SRO's statement that the standard for an appropriate unilateral placement had become less demanding but reiterating that the appropriate analysis is the "totality of the circumstances" standard]). Here, while there may be evidence in the hearing record that generally matches the proposed educational program, supports and services offered at the prospective placement to the student's needs, the appropriateness of the placement, under a Burlington-Carter analysis, remains unduly speculative where the student has not actually attended the placement or received any instruction from the private school thereby rendering the hearing record devoid of evidence of actual specialized instruction provided to the student as opposed to evidence of the general educational milieu provided to all students at Gersh.

Finally, while the standard regarding proof of a parent's inability to pay has been relaxed in matters where direct funding by the district of a unilateral placement is sought as relief (see Mondano v. Banks, 2024 WL 1363583, at *12 [S.D.N.Y. Mar. 30, 2024]; Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]), under the Burlington/Carter framework, proof of an actual financial risk incurred by

[6] The district contends that it issued a Nickerson letter to the parents and that the parents failed to act after receiving such letter. A "Nickerson letter" is a remedy for a systemic denial of a FAPE that resulted from a stipulation and consent order in a federal class action suit and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982]). As a remedy, a Nickerson letter was available to parents and students who were class members in accordance with the terms of the consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]).

parents is a prerequisite to obtaining funding of the cost of a student's unilateral placement (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. at 374 [stating that "financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district]; see also Forest Grove Sch. Dist., 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Here, it is undisputed that the parents are seeking prospective placement of the student at Gersh, but have not entered into any verbal or written contract or agreement that would render them financially obligated to pay for the student's attendance at the school. Accordingly, as a result of the foregoing and based on the unique circumstances present in this matter, I find no record basis or legal authority sufficient to disturb the finding of the IHO that the parents were not entitled to an award of prospective placement of the student at Gersh for the remainder of the 2024-25 school year.[7]

B. Home-Based ABA Services

Next, I turn to the parents' contention that the IHO erred in finding that the parents' claim regarding home-based ABA services was barred due to the doctrine of res judicata.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).

Here, the IHO relied upon a prior IHO decision dated October 10, 2023 to determine that the parents' home-based ABA claim was barred by res judicata. However, the prior IHO decision related to claims asserted in a July 10, 2023 due process complaint notice regarding the 2021-22,

[7] It is understandable that the parents are frustrated with the district's failure to locate an appropriate approved nonpublic school, and the district is reminded that even if it continues to encounter difficulties in placing the student, it nonetheless remains its obligation to do so. As a result, it may become necessary for the district to expand the geographic scope of its search or otherwise seek guidance or assistance from the New York State Education Department in order to find an appropriate placement.

2022-23, 2023-24 school years (see Dist. Ex. 3). Thus, even assuming for the sake of argument that the first two elements of the res judicata principles were established, the parents' assertion that the January 2024 CSE failed to offer the student home-based ABA services for the 2024-25 school year, was not raised, nor could it be raised, in the prior proceeding involving different school years. The January 2024 CSE meeting had not even occurred at the time that the prior October 10, 2023 decision was rendered. Therefore, the IHO erred in not addressing the parents' claim for home-based ABA services for the 2024-25 school year by inappropriately applying the doctrine of res judicata.

An ABA skills assessment report dated December 1, 2023, recommended home-based ABA services for generalization of skills in different settings; this assessment also recommended an award of compensatory 1:1 ABA services for the district's denial of FAPE for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. K at pp. 1, 15, 17-18). A functional behavior assessment and behavior intervention plan dated December 1, 2023, echoed the recommendations for home-based ABA services that the ABA skills assessment recommended, again recommending home-based ABA services for generalization of skills in different settings; additionally, this assessment also recommended compensatory ABA services for the district's denial of FAPE for the 2021-22, 2022-23, and 2023-24 school years (Parent Ex. L at pp. 1, 25-26, 27-28). Lastly, a neuropsychological evaluation report dated December 12, 2023, included a recommendation for home-based ABA services (Parent Ex. M at pp. 17-18). While this report did not explicitly state that the home-based ABA services should be for the purpose of generalization of skills, the report stated that its findings were "consistent" with those of the December 1, 2023 ABA skills assessment, which recommended home-based ABA for generalization of skills in different settings (compare Parent Ex. K at p. 15, with Parent Ex. M at pp. 17-18). Additionally, the neuropsychological evaluation report included an award of compensatory 1:1 ABA services based on the absence of appropriate educational services provided by the district (Parent Ex. M at p. 19).

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]).

Here, the hearing record demonstrates that both the December 1, 2023 ABA skills assessment and the December 1, 2023 functional behavior assessment and behavior intervention plan recommend home-based ABA for the purposes of generalization (see Parent Exs. K at p. 15; L at pp. 25-26). Thus, I find that the recommendations for home-based ABA services are for the purpose of generalization. As a result, the parents are not entitled to funding for the costs of the student's home-based ABA services because the evidence supports that they would be either for

the purpose of generalization of the student's skills or would otherwise be excessive and beyond what the district is required to deliver to enable the student to make progress.[8]

VII. Conclusion

In sum, the IHO's finding that the district failed to provide a FAPE to the student is final and binding and she correctly found that the parents were not entitled to an award of the prospective placement of the student at Gersh for the remainder of the 2024-25 school year. Regarding the parents' request for the district to fund home-based ABA services, I find that the parents are not entitled to funding of these services by the district because they were for the purpose of generalization of the student's skills.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 16, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER

[8] While the parents also contend that the finding of a denial of FAPE necessitates an award to the parents, and there was a general request for compensatory education in the due process request notice (Parent Ex. A at p. 4), the parents did not raise any arguments concerning compensatory education during the impartial hearing, including in their closing arguments, and instead limited the relief sought to prospective placement of the student at Gersh.