



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 13-040

**Application of the [REDACTED]  
[REDACTED] for review of a determination of a hearing  
officer relating to the provision of educational services to a  
student with a disability**

### **Appearances:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for petitioner, Ilana A. Eck, Esq., of counsel

Skyer and Associates, LLP, attorneys for respondents, Jesse Cole Cutler, Esq., of counsel

## **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 district) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services recommended by its Committee on Special Education (CSE) for respondents' (the parents') son for the 2012-13 school year were not appropriate and directed the district to reimburse the parents for the costs of the unilateral placement of their son at IBI Associates (IBI). The parents cross-appeal from that portion of the IHO's decision which denied their request for additional relief. The appeal must be dismissed. The cross-appeal must be sustained in part.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C.

§ 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

### **III. Facts and Procedural History**

The student was approximately nine years old at the time of the impartial hearing. He was offered a diagnosis of pervasive developmental disorder and autism (Dist. Ex. 5 at p. 1; Tr. pp. 625). For several years, he has received special education services at a clinic, IBI, that

provided Applied Behavior Analysis (ABA) instruction on a 1:1 basis (Parent Ex. F). The student receives related services of speech-language therapy, physical therapy (PT) and occupational therapy (OT), mostly provided on a 1:1 basis, and mostly at other locations (id.). He also participated in a physical education program twice a week. These services were arranged by the parents, and consisted of approximately 49 hours of special education and related services a week.

The district re-evaluated the student in February and March, 2012. The district psychologist who performed the evaluation did not observe the student in his private educational program. This evaluation was discussed in detail at the impartial hearing below (IHO Decision at p. 5). At a CSE meeting with the parents on April 2, 2012, the district evaluation was discussed, as well as an independent psychoeducational evaluation obtained by the parents (Parent Ex. L). Also available to the CSE were a social history (Dist. Ex. 4), an IBI progress report (Parent Ex. F), progress reports from speech-language therapy (Dist. Ex. 6), PT (Dist. Ex. 7) and OT (Dist. Ex. 8). The CSE drafted an IEP based on these evaluations. The IHO described the details of recommendations for the IEP (IHO Decision pp. 8-11). The CSE agreed to continuation of 12-month services for student (IHO Decision p. 11). The parents asked for continuation of ABA methodology; the CSE Chairperson explained that behavioral principles would be applied, but that school staff members were not necessarily ABA certified, and that programs planned for the student "[were] not exclusively run or implemented by ABA people." The 1:1 paraprofessional to be assigned to student "was not to teach" the student (IHO Decision at p. 11; Tr. pp. 101, 152). None of the district participants at the CSE meeting had observed the student in his current educational program (IHO Decision p. 8).

The finalized IEP for the 2012-2013 school year was sent to the parents on May 30, 2012. (IHO Decision p. 12; Tr. pp. 19-20, Dist. Ex. 2). The district also sent a final notice of recommendation (FNR) to the parents identifying the particular school site where the district intended to assign the student (Dist. Ex. 3). The proposed IEP provided placement in a 6:1+1 special class with the support of a 1:1 paraprofessional (Dist. Ex. 2). A behavior intervention plan addressed student's "disengagement from academic and social environment . . . , failure to engage in joint behavior . . . , and vocal and motor interfering behavior" (Dist. Ex. 2 at p. 26a). The IEP did not set forth a particular methodology of instruction (see Dist. Ex. 2). During a tour of the public school site to which the student had been assigned in the FNR, the parents were briefly shown two 6:1+1 classrooms (Tr. pp. 191-96, 659-64; IHO Decision pp. 12-13; Dist. Ex. 2 at p. 1).

#### **A. Due Process Complaint Notice**

The parents' request for hearing, dated July 19, 2012, alleged that the CSE had failed to offer FAPE to the Student. The parents have provided the program of special education and related services described above, and they requested reimbursement for the cost of these services. The parents wanted the CSE to continue their program for their son, rather than accept the IEP proposed by the CSE for 2012-2013.

## **B. Impartial Hearing Officer Decision**

The IHO's decision, dated February 5, 2013, found that the CSE's proposed program was not substantively appropriate to the student's needs. Citing an independent evaluator's recommendations concerning the need for 1:1 direct instruction (IHO decision p. 7) and the district's own consultant's testimony that a comprehensive transition assessment should be made prior to a change of placement, the IHO found several elements of the IEP inappropriate to the student's special education needs. (IHO Decision, pp. 26-30)

The IHO ordered reimbursement of many of the parents' current program services, as documented. The reimbursement amounts were based on testimony concerning documented professional charges and going rates for each category of professional service. In addition to working directly with the student, the service providers had held regular meetings to share information and also met with the parents frequently (see M.S. v. Bd. of Educ., 231 F.3d 96 [2d Cir. 2000]; IHO Decision p. 35)

## **IV. Appeal for State-Level Review**

The district appeals from the decision of the IHO, challenging several aspects of the IHO's Burlington/Carter analysis. The district filed a verified petition, but the original petition included incorrect initials for the child and some incorrect information about the child: perhaps typographical errors. The parent's served and filed a verified answer and cross-appeal challenging, among other things, several partially adverse determinations by the IHO. The district responded with an answer to the cross-appeal. Contemporaneously with its answer to the cross-appeal, the district submitted a corrected but unsigned verified petition. The parents thereafter responded with a verified reply, which includes an objection to district's attempt to correct its verified petition.

## **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. 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; 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. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaronck Union Free Sch.

Dist., 554 F.3d 247, 253 [2d Cir. 2009]). 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., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at \*10 [S.D.N.Y. Feb. 9, 2007]). 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; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at \*7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 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]; Perricelli, 2007 WL 465211, at \*15). 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 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; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954, 2012 WL 4946429 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

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]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at \*6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), 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]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. 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; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at \*7 [S.D.N.Y. Aug. 27, 2010]).

## **VI. Discussion**

The IHO found that the district's proposed IEP for 2013-14 school year was not substantively appropriate to address his special education needs. The IEP appears to have provided for placement in a 6:1+1 special class with an individual paraprofessional to assist the student. Neither the IEP nor the assistant principal who hosted the parents' visit to the proposed school site provided information concerning whether the student's instruction would be 1:1, with ABA, or what the actual function of the 1:1 paraprofessional would be. Since this student's program would commence on the first school day in July, the parents had one month to clarify the details of the proposed IEP. While it appears that the parents were told that instruction was

unlikely to include ABA, the issue of 1:1 instruction was not addressed and the parents were told that the paraprofessional "would not teach". (IHO decision p. 11)

The parents offered independent evaluations of the student by a pediatric neuropsychologist, who appeared as a witness at the hearing. He testified that while the student had reached basic reading skills and writing skills in the average range for his age, his communication difficulties limit his progress. When he is not actively engaged by a teacher, 1 on 1, "he disengages and retreats into himself." One evaluation was performed in 2011 but the other was conducted in 2012 after the CSE meeting in question was held, and thus the information in the 2012 evaluation was not available to the CSE (Parent Exs. L; M). This evaluator also observed the student at IBI, during instruction and also during lunch. This evaluator recommended 1:1 instruction, 30-35 hours a week. (IHO Decision p. 7; Tr. pp. 332-405)

The district's expert witness has ABA credentials. (Tr. p.7 98) She commented that a transition evaluation should be planned prior to a change in the student's placement, and a transition plan should be developed. She questioned some of the data provided about the student by IBI. (Ex. F)

On the issue of reimbursement of the parents' expenses, the IHO did not order full payment. She carefully documented bills from the providers and elicited testimony concerning the going rates in the geographical area. She questioned the numbers of hours of each service and did not order full payment in some cases. She specified each category of service, and she refused to fund transportation expenses because they were not documented. (IHO decision p. 35)

Both parties made allegations related to their case. In the additional discussion of some specific allegations below, they are grouped by topic and typically identified as "district allegation(s)" and "parents' allegation(s)". Allegations not specifically addressed herein are denied.

### **A. Preliminary Matters**

With respect to the issues arising on appeal, it was only after the parents pointed out that the district's verified petition included incorrect initials for the student in question and some incorrect information that the district submitted a revised, unsigned petition. The district requested that if the undersigned declined to consider the amended petition, then in the alternative I should strike the first six paragraphs in the original petition. As the district did not seek leave from the undersigned to amend the petition, only discovered its error after the parent pointed it out in responsive papers, and the proposed amended petition is unsigned and fails to conform to the form requirements in the practice regulations, I will sustain the parents' objection and deny the district permission to file an amended petition; however, I will grant district's alternative request to strike the first six paragraphs of the original petition: the amended, unsigned petition has not been considered.

### **B. 2012-13 IEP**

Among other allegations, with regard to the adequacy of the 6:1+1 special class and 1:1 paraprofessional support offered in the IEP, the district argued that the IHO gave inadequate weight to the opinion of the school psychologist, improperly relied upon a 2012 evaluation that post-dated the CSE meeting, and improperly found that the IEP should have required the district to use ABA methodology with the student. The district also contends that the IHO improperly reached the issue of OT services and, in any event incorrectly concluded that the OT services were inadequate.

The district's potentially strongest argument—that the IHO erred because she relied upon information that postdated the development of the IEP—ultimately lacks merit (see Parent Ex. M). A careful reading of the IHO's decision indicates that she clearly recognized that the June 2012 private evaluation was not before the CSE (IHO Decision at p. 20) and, further, the evidence shows that the exact same language that the district complains of in the IHO's analysis was also contained in neuropsychologist's 2011 report, which, in turn, the school psychologist explicitly testified was reviewed by the CSE (IHO Decision at p. 29; Parent Ex. L at p. 9; Tr. pp. 26-27). Next, having examined the hearing record, while I find that the IHO's comment that the school psychologist did not have "any specialized training or experience in treating children with autism" was overbroad,<sup>1</sup> the IHO was nevertheless clear that she credited the school psychologist's testimony, but in the process of resolving the reasonable, but conflicting viewpoints she accorded greater weight to the opinion of the private neuropsychologist (IHO Decision at pp. 29-30) and I find, after reviewing the evidence, that this is an insufficient reason to disturb conclusion reached by the IHO under the circumstances in this case.

With regard to whether the student's IEP should have limited the use of methodologies to ABA only, the selection of educational methodologies to be used with an individual student is generally reserved for the school professionals charged with implementing the student's educational program and is not always discussed in CSE meetings. (K.L. v. NYC Dept. of Educ., 2012 WLC 4017822, at \*12 (S.D.N.Y., Aug. 23, 2012) (citing Rowley, 458 U.S. at 208), appeal docketed 12-3893 (2d Cir. Sept. 28, 2012) ; see Application of a Student with a Disability, Appeal No. 12-045). I agree with the district insofar as the evidence shows that the student receives benefit from the use of ABA, but it does not establish that the student could only receive educational benefit if ABA was used exclusively (Tr. p. 580). The district prevails in its arguments only in part on the point about methodology, but nevertheless fails to offer sufficient reason to overturn the IHO's conclusion that the student required 1:1 direct instruction.

### **C. Unilateral Placement**

The crux of the district's challenge to the IHO's determination that IBI was appropriate for the student is that it is not the student's LRE. The IHO addressed the student's program at IBI. She noted and considered the student's limited contact with other children and the large

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<sup>1</sup> More to the point would be whether the school psychologist had experience in the education of children with autism in accordance with the requirements of the IDEA, not the treatment in accordance with clinical standards; however, both viewpoints may have value and may be considered by the IHO. The district's allegation that credentials were not raised in the due process complaint is a distortion of the IHO's point which simply articulates how she weighed evidence. At no time did the parents allege a violation of the IDEA due to the school psychologist's lack of adequate credentials.

amount of 1:1 services with an adult (IHO Decision pp. 19-20), however the Second Circuit recently held that while the restrictiveness of a unilateral parental placement may be considered in determining whether the parents are entitled to an award of tuition reimbursement, parents are not held as strictly to the standard of placement in the LRE as school districts (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836-37 [2d Cir. 2014]). The district also supported a recommendation for a fairly restrictive setting and, therefore, the LRE factor does not weigh so heavily that I would reach a different outcome and, therefore, the request to overturn this aspect of the IHO's decision will be denied.

The parents cross-appeal that portion of the IHO's decision which denied their request for transportation from their home to the unilateral placement, IBI. While the CSE notes the need for special transportation in the IEP, it did not complete the form to describe what was needed to be specialized to address the student's needs and the parents are quick to point to the district's obligation to provide transportation (Dist. Ex. 2 at p. 23). However, the parents did not endeavor to describe if anything was specialized about the taxi service they used to transport the student, why they made that choice, or attempt to quantify it in any way (see Tr. pp. 489, 665, 727), and they don't point to authority which holds that they do not have to identify the costs or attempt to justify the transportation selection they made unilaterally in a Burlington/Carter context. Under these circumstances, I find insufficient reason to overturn the IHO's determination that the record was underdeveloped on this issue and that transportation reimbursement was not warranted under these circumstances.

As for the parents' challenge to the IHO's reduction of a speech language provider's rate by \$33 per hour (IHO Decision at pp. 34-35), the district cross-examined the provider regarding her actual rate and elicited some information regarding how it compared to the rate of other providers in the market; however, the district did not successfully elicit any information that suggested her rate was inconsistent with market rates, and the district seemed to inadvertently help establish the parents' case by eliciting responses suggesting her rate was consistent with market rates (Tr. pp. 783-83). While the IHO ruled that a lesser rate charged by another provider was the appropriate rate of reimbursement (see Tr. p. 953), unlike the testimony above, there were no questions posed during that testimony regarding how that provider's lower rate compared market rates.<sup>2</sup> Accordingly, I find the evidence favors the parents' view against the \$33 reduction and I will award the parents the higher rate actually charged to the parents.

Next the parents' cross-appeal the IHO's decision to limit reimbursement of the student's ABA therapy from IBI to 25 hours per week. The parents' rationale includes the proposition that the IHO was limited to the information before the CSE in fashioning equitable relief. This is hardly the case. While an IHO must not rely on evidence post-dating the CSE and IEP development process to evaluate the adequacy of the IEP proposed by the district under the prospective analysis principal adopted in R.E., the IHO has broad discretion to rely upon any relevant evidence when fashioning equitable relief, and in this case the 25 hours of ABA therapy directed by the IHO was within the range of services recommended for the student by the parents' own expert in June 2012, shortly after the CSE in question and just prior to the 2012-13

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<sup>2</sup> It would have been helpful if the IHO had asked how the lower rates compared to other rates in the market, but she did not, leaving the reason(s) she favored the lower rate over the higher rate unexplained and the conclusion unsupported when the entire record is considered.

school year period for which the parents requested reimbursement requested in this case (Tr. p. 386; Parent Ex. M at pp. 5-6; see also Tr. pp. 847, 919-20). I find that in this case there was a discretionary range in the evidence presented to the IHO and there was no error on the part of the IHO in fashioning this relief. Similarly, the IHO was within her discretion to award reimbursement for five hours of speech-language therapy per week, and the parents' argument to the contrary is rejected (IHO Decision at pp. 32-33; Tr. pp. 764, 786; Parent Exs. L at p. 9; M at p. 6).

#### **D. Equitable Considerations**

The district's argument that equitable considerations did not support the parents because they did not intend to send the student to a public school is without merit. The "pursuit of a private placement [i]s not a basis for denying the[m] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school" (C.L., 744 F.3d at 840). The CSE proposal for the year 2012-2013 was inadequate to the student's special education needs as discussed above. While including minimal contact with other students, with and without disabilities, the program provided by the parents includes a variety of individualized services in the form of specially designed instruction that have resulted in educational progress by the student. The district's challenge to the IHO's determination regarding equitable considerations must be rejected.

#### **VII. Conclusion**

In accordance with the foregoing, I find that there is insufficient reason to overturn the IHO's conclusion that the district failed to offer the student a FAPE or that reimbursement relief should be denied on the basis that IBI was not the student's LRE. Furthermore equitable considerations favor the reimbursement relief granted by the IHO as well as the higher rate of reimbursement sought by the parents for the student's unilaterally obtained speech language therapy.

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 SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the portion of IHO's decision dated February 5, 2013 which granted the parents reimbursement for speech-language therapy is modified by increasing the reimbursement rate by \$33 dollars per hour.

**Dated:** Albany, New York  
February 27, 2015

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**