The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 13-078

Application of the XXXXXXXXX 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, attorney for petitioner, Ilana A. Eck, Esq., of counsel

Mayerson and Associates, attorneys for respondents, Gary S. Mayerson, Esq., and Jean Marie Brescia, 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 the decision of an impartial hearing officer (IHO) which ordered it to reimburse respondent's (the parents) for the costs of up to 10 hours of applied behavioral analysis (ABA) services, two hours of ABA supervision, and transportation costs for the 2012-13 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

In this case, the student his eligibility for special education programs and related services as a student with deafness is not in dispute in this appeal (Tr. p. 25; see 34 CFR 300.8[c][3]; 8 NYCRR 200.1[zz][2]). During the 2011-12 school year, the student attended the New York School for the Deaf (NYSD), a State-approved non-public school at district expense. On June 20, 2012 an IEP meeting was convened, no IEP was created for the 2012-13 school year (see Tr. pp. 25, 151-52). The parents provided notice to the district of their intention to enroll the student

in the NYSD for the 2012-13 school year and to obtain additional supports and services, for which they intended to hold the district financially responsible (Parent Ex. N).

A. Due Process Complaint Notice

The parents requested an impartial hearing pursuant to a due process complaint notice dated August 30, 2012, seeking 20 hours per week of applied behavioral analysis (ABA) services in and out of school; one hour per day Prompts for Restructuring Oral-Muscular Phonetic Targets (PROMPT) therapy; one hour per week ABA supervision; one hour per week individualized parent counseling and training; transportation costs to and from home and community-based services; 4 hours per month individualized parent counseling and training; and a compensatory education award (Parent Ex. A). The parents also requested an interim order determining the student's pendency entitlements during the impartial hearing (id.).

The parents asserted that the district failed to offer the student a free appropriate public education (FAPE) both procedurally and substantively (Parent Ex. A). The parents note that although an IEP meeting was convened, they did not receive an IEP for the student for the 2012-13 school year (id.). The parents assert that the district deprived the student of a FAPE for the 2012-13 school year and that their unilateral program was reasonably calculated to provide meaningful educational benefits to the student (id.). The parents asserted that they provided appropriate notice to the district of their intention to hold the district financially responsible for their unilateral placement of the student and that the parents at all times cooperated with the district (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 18, 2012 and concluded on March 12, 2012, after two nonconsecutive hearing dates (Tr. pp. 1-199). The IHO issued an interim order dated October 24, 2012 awarding the student pendency entitlements retroactive to August 30, 2012 for placement in a 6:1:1 special class in a school for the deaf and hard of hearing for a 12-month school year, in addition to speech- language services, occupational and physical therapy services, a FM unit and transportation (IHO Interim Decision at pp. 2-3).

In a decision dated April 3, 2013, the IHO noted that the student's classification was not in dispute, and there was no dispute as to the student's placement at NYSD (IHO Decision at p. 2). The IHO also noted that the district conceded prong I and that it had failed to offer the student a FAPE for the 2012-13 school year (id.). The IHO found that the parents established entitlement to reimbursement for up to 10 hours of ABA services per week on a 12-month seven day a week basis, along with two hours of weekly supervision and that reimbursement at the rate of $160 per hour for the hours of ABA provided since July 1, 2012 was appropriate(id. at p. 7). The IHO found that the parents had not met their burden of proof related to PROMPT speech services and therefore the IHO denied reimbursement for PROMPT speech services (id.). The IHO found that the parents were entitled to reimbursement for transportation in light of the student's inability to communicate and the absence of an IEP addressing a transportation recommendation (id. at p. 8). The IHO noted that there was no "equitable impediment" that would preclude reimbursement, noting that that parents had in fact attempted to initiate a timely

IEP meeting (id.). Accordingly, the IHO granted the parents' request for reimbursement for supplemental services and transportation in part (id.).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision to the extent it awarded reimbursement to the parents for up to 10 hours per week of ABA services on a 12-month basis, 2 hours of weekly ABA supervision services and reimbursement for transportation expenses for the 2012-13 school year.

The district argues that reimbursement for up to 10 hours per week of ABA is not supported by the record because the record establishes that the student was making meaningful progress with 5 hours of ABA services per week. Additionally the district argues that the evidence does not support and award of up to 10 hours because the student only received 8.5 hours of ABA services per week at the time of the impartial hearing. The district notes that the parents clarified at the hearing that they were seeking reimbursement for 10 and not 20 hours of ABA services. The district asserts that there is no proof in the record that hours beyond 5 hours per week are necessary for the student to make meaningful progress. The district argues that the IHO did not consider proof on the reasonableness of the rate to be paid for ABA services and that therefore the reimbursement at the rate of $160 per hour for the ABA services is not supported by the record. For purposes of the appeal, the district notes that does not dispute reimbursement of 5 hours of ABA services per week for the 2012-13 school year.

The district disputes the award for reimbursement for 2 hours per week of ABA supervisory services because the parents' due process complaint requested only one hour per week of ABA supervision. The district also disputes the award for reimbursement for transportation because the district had offered transportation services to the parents.

The parents answer, denying the allegations of the district in the petition to the extent they assert the IHO finding was in error. The parents assert that the IHO was correct in finding that up to 10 hours of ABA services were reasonable for the student to receive meaningful educational benefit based upon the testimony and evidence presented by the parents. The parents assert that up to two hours per week of ABA supervision was correctly ordered by the IHO because up to two hours were provided and alternatively the ABA supervision services were provided at the rate on average of one hour per week and the IHO did not exceed her authority in ordering up to two hours of ABA supervision to be reimbursed. The parents argue that their transportation costs are properly reimbursed in light of the student's needs, the failure of the district to provide an IEP to address transportation and the failure of the district to offer transportation to the McCarton School where the student received ABA services. The parents also make an application in the answer for a finding that the administrative appeal is futile if a timely decision cannot be rendered. The parent does not challenge the IHO's determination regarding PROMPT speech services.

The district replies to address the parents' application for a finding of futility of the administrative appeal, arguing that such a finding would violate state law requirements.

V. Applicable Standards

A. FAPE

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 v. T.A., 129 S. Ct. 2484, 2491 [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. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

In this case, because the district has conceded that it did not offer the student a FAPE, I need not address this issue and I will move on to the issue of whether the parent's unilateral placement of the student was appropriate.

B. Unilateral Placements

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

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; Matrejek, 471 F. Supp. 2d at 419). 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 (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). 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., 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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). 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). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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 private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

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

A. ABA Services

Upon review of the facts and the parties' arguments in this case, the essence of the dispute between them focuses upon the appropriate level of ABA services outside of NYSD, and whether the level of services sought by the parents impermissibly constitutes maximization, or at least more than what the student requires for an opportunity to receive educational benefits. However, I find no disagreement among the parties that the ABA services—whether 5, 8.5 or 10 hours per week—would have a beneficial effect upon the student. However, the parents in this case accuse the district of applying a standard that is too stringent with respect assessing the adequacy of the unilaterally obtained services and I note that this dispute over the appropriate standard is not dissimilar to a dispute over the legal standard raised in another case, A.D. v. New York City Dep't. of Educ. (2008 WL 8993558 [S.D.N.Y. Apr. 21, 2008]). In A.D., the parents argued that "cuts [in ABA services] imposed by [the] IHO . . . were arbitrary and that both he and the SRO erred by placing too a high a burden of persuasion on them, requiring them to demonstrate that the level of services for which they sought reimbursement was 'necessary' instead of 'appropriate'" (A.D., 2008 WL 8993558 at *6). Contrary to the district's argument in this case that the standard for assessing the unilateral placement should be "necessary" and thus, no more than what the student required, the court explained that the standard for assessing the validity of a unilateral placement is whether the services are "appropriate" which was the standard applied by the IHO and SRO in that case (id. at *7). Unlike in A.D., the district in this case is not asserting, nor is there evidence to support that the ABA services selected are inappropriate for the student.[1] Instead, the evidence shows that the parents submitted a privately obtained psychological, physical, and neurological evaluation report by two evaluators which showed the results of an evaluation of the student was conducted on January 30, and February 14, 2012 and which recommended 10 hours of in-school ABA services and 10 hours of after school at home ABA services (Ex. I, at pp. 1, 9). Additionally, eight and one half hours of ABA services were being provided to the student at the McCarton Center at the time of the impartial hearing in March 2013 (Tr. p. 119). The provider of the ABA services that the student was receiving at the McCarton Center testified at the impartial hearing that the student was making meaningful progress at that rate of ABA services (Tr. p. 114). A finding of progress is not required for a determination that a student's private placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [evidence of academic

[1] The facts in A.D. were readily distinguishable from the instant case in that both the IHO and SRO determined that the high use of ABA services and pre-teaching was, among other things, inappropriately causing the student frustration, and depriving the student of independence, privacy, and recreational time, and it was not supporting the student's functioning in the classroom (A.D., 2008 WL 8993558 at *7-*8). The district makes no such assertions here.

progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B., 2013 WL 1277308, at *2; D. D-S, 2012 WL 6684585, at *1; L.K., 2013 WL 1149065, at *15; C.L. v. Scarsdale Union Free Sch. Dist., 2012 WL 6646958, at *5 [S.D.N.Y. Dec. 21, 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. March 31, 2009]; see also Frank G., 459 F.3d at 364).[2] However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115 [citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26-27 (1st Cir. 2002)]; L.K., 2013 WL 1149065, at *15). In this case the evidence described above supports the conclusion that ABA services unilaterally obtained by the parents were appropriate for the student and that the student was making meaningful progress with 8.5 hours of ABA services at the time of the impartial hearing.

B. Relief

The inquiry in this case does not end there, however, because the IHO awarded up to 10 hours of ABA services per week (IHO Decision at pp. 7-8). Courts have repeatedly recognized the "broad discretion" that hearing officers and reviewing courts must employ under the IDEA when fashioning equitable relief, and as noted recently, courts have also "repeatedly rejected invitations to restrict the scope of remedial authority provided in Section 1415(i)(2)(C)(iii)" (see Mr. and Mrs. A v. New York City Dept. of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see also Forest Grove v. T.A., 129 S.Ct. 2484 [2009]). 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 they may take advantage of deficiencies in the district's offered placement to obtain maximization of their child's potential 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 C.F.R. § 300.148). As one circuit court recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; see Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009] [explaining that "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable]; rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA]).

[2] To be clear, however, I note, that the Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a private placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

The provider of the ABA services that the student was receiving at the McCarton Center testified that he had been making meaningful progress when he was receiving 5 hours of ABA services per week (Tr. p. 126). The ABA services provider also testified that the increase from 5 hours per week to 8.5 hours per week was made after seeing the student's meaningful progress at the 5 hour per week level, and because the student's schedule permitted the increase (Tr. pp. 125-26). While the evidence supports that the student was making progress at the 5 hour level as well as the 8.5 hour level, I find that that 8.5 hours is the upper limit based upon the evidence in the hearing record. Under the circumstances of this case, I find that the parents were not required to limit the ABA services with exacting precision to the minimum level of services necessary to produce education benefit. On the other hand, while the private evaluators recommended 10 hours of ABA services per week after school (Parent Ex. I at p. 9), in view of the evidence above that the student was actually receiving 8.5 hours per week rather than 10 hours and making progress, I find it would be improper to award the parents reimbursement for 1.5 hours of services in excess of those he actually received as such an award of services would be more akin to damages, which are not permissible under the IDEA (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]). Instead, where the evidence shows that 8.5 hours of ABA services was appropriate, the district will be required merely "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; C.B., 635 F.3d at 1160). Reimbursement does not require maximization of the student's potential, although the parents can of course choose to provide extra services on their own (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65).[3]

Regarding ABA supervisory services, the evidence shows that the supervisor works with the student and other therapists "about two hours" per week (Tr. p. 87). Review of the remaining evidence supports an award of one hour per week insofar as the recommendation for two hours appears to be premised upon the private evaluators recommendation for a total of 20 hours of ABA services (Parent Ex. I at p. 9) and it is clear that the parents' due process complaint requested reimbursement for only one hour per week of ABA supervision (Parent Ex. A at p. 9). Accordingly the appropriate level of relief is one hour per week of supervisory services..

Regarding the district's challenge to the rate of reimbursement for the ABA services to be reimbursed, the IHO decision states that reimbursement for ABA services, which include the supervisory services, are to be reimbursed at the rate of $160 per hour (IHO Decision at p. 7). The IHO decision appears to have been based upon testimony and evidence proffered by the parents which included invoices with billing rates from the McCarton Center (Tr. p. 153; Parent Exs. Q; U). The invoices evidence rates ranging from $160 to $200 per hour for ABA services, including ABA supervision (Parent Ex. U). The IHO reached the conclusion that the $160 per hour for ABA services for which she awarded reimbursement, which included the ABA supervision, was appropriate relief based upon the evidence in the hearing record (IHO Decision at pp. 7-8). I also note that the parents have not challenged the $160 rate awarded by the IHO

[3] Additionally, I note that the parents explained in their answer that they did not request ABA services on a "seven-day-a-week" basis as ordered by the IHO, but only requested weekly ABA services. The evidence in the record does not provide a basis for prescribing the student's services on particular days of the week and the IHO's gratuitous language regarding "seven-day-a-week" services was unnecessary. The parents and the private providers are more than capable of appropriately scheduling the arrangements.

through a cross-appeal of her decision, and I find no reason in the evidence to depart from the IHO's decision and lower the rate as requested by the district. Accordingly, the district's arguments on this issue are rejected.

Regarding transportation, the record is clear that there was no IEP in place setting forth the transportation services for the student. The IHO's order directing reimbursement for the transportation costs of mileage and tolls was supported by the evidence in the hearing record proffered by the parents and I decline to disturb it (Tr. p. 155-58; Parent Ex. U at pp. 22-24).

VII. Conclusion

Based upon the evidence, I find that the parents are properly reimbursed for up to 8.5 hours ABA services per week, at a rate of $160 per hour, for the 2012-13 12-month school year; up to one hour of ABA supervision per week, at a rate of $160 per hour, for the 2012-13 12-month school year; and for transportation expenses related to the parents' mileage and tolls for the 2012-13 12-month school year.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO Decision dated April 3, 2013 is modified by reversing those portions which directed that the parents be reimbursed for up to 10 hours of ABA services and 2 hours of ABA supervision services; and

IT IS FURTHER ORDERED that the district is directed to reimburse the parents for 8.5 hours per week of ABA services and 1 hour per week of ABA supervision services for the 12-month 2012-13 school year.

Dated: **Albany, New York**
September 27, 2013

JUSTYN P. BATES
STATE REVIEW OFFICER