The University of the State of New York

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

No. 17-047

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:
Mayerson & Associates, attorneys for petitioners, by Maria C. McGinley, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see L.K. v. New York City Dep't of Educ., 14-CV-07971 [S.D.N.Y. June 14, 2017]) (L.K. II). This proceeding initially arose 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) previously appealed from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of their son's tuition at Manhattan Children's Center (MCC) for the 2013-14 school year, as well as the costs of the student's home and community-based program. The matter must be remanded to an IHO for further administrative proceedings, as outlined below.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

III. Facts and Procedural History

The detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in Application of a Student with a Disability, Appeal No. 14-071. The parties' familiarity with those matters and the IHO's decision is presumed (see Application of a Student with a Disability, Appeal No. 14-071); however, the facts pertinent to the judicial review that followed the local and State administrative proceedings and the consequent remand by the courts are set forth below.

With regard to the relevant educational history, the student attended a half-day mainstream preschool program during the 2012-13 school year and he received special education services pursuant to an IEP including special education itinerant teacher (SEIT) services for 25 hours per week, speech-language therapy three times a week for 45 minutes, occupational therapy (OT) three times a week for 30 minutes, and physical therapy (PT) twice weekly for 30 minutes (Parent Ex. Z at p. 1).[1] While the student was attending the general education preschool program, a Committee on Special Education (CSE) convened on March 4, 2013 to develop an IEP for the 10-month 2013-14 school year (Parent Ex. C). The March 4, 2013 IEP developed by the CSE recommended a 12:1+1 special class in a specialized school with the related services of three individual speech-language therapy sessions per week for 30 minutes each, three individual OT sessions per week for 30 minutes each, and two individual PT sessions per week for 30 minutes each (Parent Ex. C at p. 11).

The parties also needed to complete a separate IEP for the student that covered the student's attendance during last months in preschool prior to kindergarten. A Committee on Preschool Special Education (CPSE) convened on March 20, 2013 to develop an IEP for July and August 2013 (Parent Ex. D). The CPSE recommended that the student receive 25 hours of SEIT services to be delivered in conjunction with his preschool program and at home, four individual speech-language therapy sessions per week for 45 minutes each, three individual OT sessions per week for 30 minutes each, and two individual PT sessions per week for 30 minutes each (id. at p. 12).

After meeting with the CSE and CPSE, the parents executed an enrollment contract on April 2, 2013, for the student's attendance at a nonpublic school, MCC, for the 2013-14 academic school year (Parent Ex. M).[2] By letter dated July 18, 2013, the parents notified the district that they believed the March 2013 IEP was inappropriate (Parent Ex. H at p. 1). By letter dated August 15, 2013, the parents again expressed their concerns regarding the March 2013 IEP and notified

[1] Unless otherwise indicated, citations in this decision are to the record of the underlying impartial hearing.

[2] The Commissioner of Education has not approved MCC as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

the district that the student would be unilaterally placed at MCC for the 2013-14 academic school year and that they would seek tuition reimbursement as well as reimbursement "and/or funding" for the student's home-based services (Parent Ex. I at pp. 1-2).

In a due process complaint notice dated August 29, 2013, the parents requested an impartial hearing and alleged that the district denied the student a free appropriate public education (FAPE) for the 2013-14 school year (Parent Ex. B). In an amended due process complaint notice dated October 15, 2013, the parents clarified the proposed request for relief as reimbursement and/or funding for the costs of the student's tuition at MCC and the student's home-based services, consisting of four 45-minute sessions per week of speech-language therapy, four 45-minute sessions per week of OT, one 60-minute session per week of PT, up to 20 hours per week of home and community-based applied behavior analysis (ABA) services, and transportation costs (Parent Ex. A at p. 14).

After conducting a hearing related to pendency on October 10, 2013, an IHO (IHO 1) issued an interim decision dated December 12, 2013. IHO 1 determined that the student's pendency placement consisted of 25 hours per week of ABA services, four 45-minute sessions of individual speech-language therapy per week, three 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (Interim IHO Decision at p. 2; Tr. pp. 1-8). The impartial hearing reconvened on January 16, 2014, during which IHO 1 recused himself (Tr. pp. 9-13).

A second IHO (IHO 2) was appointed on January 29, 2014, and the parties proceeded to an impartial hearing on the merits on March 19, 2014, which concluded on March 26, 2014, after two hearing dates (Tr. pp. 17-335). On the first day of the impartial hearing, the district conceded that it had not offered the student a FAPE (Tr. p. 19). In a decision dated April 17, 2014, IHO 2 found that the record did not support the appropriateness of the parents' unilateral placement of the student, stating that the record contained "no information as to the student's prior levels of functioning" and thus there was "no evidence that the student ha[d] made any progress" (IHO Decision at p. 9). IHO 2 determined that the hearing record did not support a conclusion that the student's program at MCC was "specifically tailored to address [his] unique need[s]" (id.). IHO 2 ordered the CSE "to conduct complete evaluations, provide [the] parents with copies of the evaluations and create a program to address the student's needs" (id.). Because IHO 2 ruled in favor of the district with regard to the appropriateness of MCC, the IHO did not proceed to address the third Burlington/Carter criterion, namely equitable considerations (see IHO Decision).

In a State-level administrative appeal from IHO 2's decision, the parents challenged the finding that the unilateral placement was inappropriate and argued that equitable considerations supported the parent. In response, the district did "not adopt the IHO's analysis" and argued "that the IHO appropriately denied the [p]arents' request for funding for the student's home-based program. The [p]arents are not entitled to funding for the home-based program, which is primarily focused on generalizing the [s]tudent's skills." The district did not contest the appropriateness of MCC, but argued that any services beyond those offered by MCC were not necessary. The undersigned SRO reversed the portion of the IHO's decision determining that the parents failed to establish the appropriateness of the unilateral placement, and further found that equitable considerations did not support an award of full reimbursement and/or funding of the costs of the

home and community-based services portion of the unilateral placement because the evidence before the CSE showed the student had made progress with substantially less hours of services in the preceding school year and that reimbursement did not require maximization of the student's potential (Application of a Student with a Disability, Appeal No. 14-071). However, because the undersigned awarded the parents the requested reimbursement for MCC, and found that the parents were entitled to all of the home and community-based services sought through pendency, and the school year had elapsed, the specific amount of home-bases services necessary to offer the student a FAPE was not specifically determined (id.).

The parents sought judicial review of the SRO decision and the District Court upheld the decision, finding the district was not required to reimburse the parents for privately obtained home-based services beyond those the district would have been required to recommend to provide the student a FAPE (L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *5-*10 [S.D.N.Y. Mar. 1, 2016]) (L.K. I). The District Court also found that, because the student's "pendency entitlement required the school district to pay for all of the additional services that [the student] received during the 2013-2014 school year," it was not necessary to determine "which specific home and community-based services exceeded the requirements of the IDEA" (L.K. I, 2016 WL 899321, at *10).

The parents appealed the District Court's decision to the United States Court of Appeals for the Second Circuit (L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100 [2017]). The Second Circuit affirmed the District Court's determination that the "parents [we]re not entitled to reimbursement for services provided in excess of a FAPE" (id. at 101). However, the Second Circuit determined that the record did not clearly indicate whether the SRO and District Court intended to deny reimbursement to the parents for the additional one and a half hours per week of OT requested by the parents which was not covered under pendency (id.). The Second Circuit held that it was necessary to remand the matter to the District Court to make this determination (id.).

The Second Circuit remanded two additional issues to the District Court "for further consideration and factual development": (1) whether the cost of the privately obtained services not covered by pendency was reasonable, and if so, what amount should be reimbursed; and (2) what home and community-based services the student required "in order to receive a FAPE going forward"(id. at 101-02). The Second Circuit suggested the District Court might wish to remand the matter to the State administrative hearing process "for a complete reexamination in light of this decision and any further information that might now be available about [the student] and his needs given the passage of time since the initial due process complaint was filed" (id. at 102 [internal quotations omitted]).

After providing the parties an opportunity to respond to the three issues presented in the Second Circuit's summary order, the District Court remanded the matter to the SRO "in light of the Second Circuit's January 19, 2017 summary order" (L.K. II, 14-CV-07971).

Upon remand, I reviewed the record of the impartial hearing proceedings, prior State-level submissions and administrative decisions, as well as the Second Circuit's decision and the District Court's order of remand. As part of the review process, the undersigned, in a letter dated June 26,

2017, directed the parties to notify the Office of State Review of their respective positions regarding whether the existing hearing record was adequate to address the remanded issues. The letter also directed the parties to provide citations to specific evidence in the hearing record and present argument as to how, if at all, the administrative hearing record in its present state provides answers to the following: (1) the progress the student made with respect to ABA services during the 2013-14 school year; (2) the progress the student made with respect to speech-language therapy during the 2013-14 school year; (3) the student's need for home-based OT to receive a FAPE during the 2013-14 school year; (4) what level of home-based OT the student received during the 2013-14 school year and whether the parents were seeking OT services or relief in addition to the four 45-minute sessions per week sought in the prior administrative proceedings; (5) the progress the student made with respect to OT during the 2013-14 school year; (6) evidence describing the extent to which the home-based ABA, speech-language therapy, and OT services were needed, in addition to school-based services, in order to provide the student a FAPE; and (7) the reasonable cost of obtaining home-based ABA, speech-language therapy, and OT services in New York City during the 2013-14 school year. Noting that the Second Circuit had described the parties' continuing dispute regarding the necessity of home-based services to offer the student a FAPE for school years subsequent to the 2013-14 school year at issue in the underlying administrative proceeding, I expressed concern that the administrative hearing record did not contain evidence regarding the subsequent school years referenced by the Court, or whether any due process proceedings had been initiated or are currently pending regarding those school years. Accordingly, I further directed the district to provide copies of any due process complaint notices filed with regard to the student concerning the 2014-15 school year through to the current school year, and copies of any IHO decisions rendered in such proceedings. Along with their respective responses to the seven enumerated issues described above, the parties were required to state their positions on how the student's current needs going forward for the 2017-18 school year should be addressed by the administrative hearing system in light of the Second Circuit and District Court's remand orders, and to describe the student's current educational placement, including school and home-based components, as well as the apportionment of funding between the parties. Finally, I permitted the parties to submit memoranda of law, and requested that they pay particular attention to the Supreme Court's decision in Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988 (2017), and how its standards regarding a FAPE applied to the circumstances of this case.

IV. Arguments on Remand

In its submission, the district asserts that the hearing record is sufficient to address the issues presented on remand, and to answer all but one of the questions posed in the SRO's June 26, 2017 letter. In particular, the district asserts the hearing record contains evidence regarding the student's progress during the 2013-14 school year, that the student did not require home-based OT to receive a FAPE during the 2013-14 school year, and establishes that none of the home and community-based ABA, speech-language therapy, and OT services were necessary for the student to receive a FAPE. However, the district argues that the hearing record is not sufficient to address the issue of the reasonableness of the cost of the home and community-based services obtained by the parents during the 2013-14 school year because the only evidence relating to the cost of those services was testimony offered by the respective providers of the fees they charged. The district characterizes this testimony as "self-serving and uncorroborated" and as such, contends that the

SRO should find that the parents have failed to meet their burden of demonstrating that the rates charged by the providers are reasonable. As directed by the undersigned, the district submits as additional exhibits the due process complaint notices filed by the parents with respect to the 2014-15, 2015-16, and 2016-17 school years, a 10-day notice of the parents' intention to unilaterally place the student at public expense for the 2017-18 school year, and a July 14, 2017 order by an IHO consolidating the then-pending proceedings (Resp. Exs. 1-5).[3]

The parents argue that the hearing record is sufficient to address most of the issues on remand, but request the opportunity to present additional evidence and testimony. The parents contend that the hearing record contains evidence regarding the student's progress during the 2013-14 school year, that the student required home-based OT to receive a FAPE during the 2013-14 school year, and that the student required home and community-based ABA, speech-language therapy, and OT services in addition to his MCC program to receive a FAPE. The parents assert that additional evidence may be needed with respect to the reasonable cost of obtaining home-based services, and further assert that they were unable to find providers willing to accept the district reimbursement rate. The parents note the existence of additional evaluative information obtained after the conclusion of the impartial hearing that is not part of the current hearing record and is relevant to an inquiry regarding the student's needs going forward and the determination of what home-based services are required to provide the student a FAPE.

The parties both indicate in their submissions that the parents' claims for the 2014-15 school year are still pending, the parents' claims related to the 2015-16 school year have been settled, the parties have reached an agreement in principle regarding the parents' claims related to the 2016-17 school year but have not finalized the settlement, and the parents' claims for the 2017-18 school year have been "referred" for settlement.

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

[3] The parents also submit as additional evidence their due process complaint notices for the 2014-15, 2015-16, and 2016-17 school years, and a 10-day notice of their intention to unilaterally place the student at public expense for the 2017-18 school year (Pet. Exs. A-D). These exhibits are functionally identical to those submitted by the district, and so for purposes of this decision citation will be made to the exhibits as submitted by the district as the party directed to supplement the administrative hearing record on remand.

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., 137 S. Ct. at 999). While the Second Circuit has emphasized that school districts must comply with the 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]).

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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[4]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student, 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; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 363-64 [2d Cir. 2006]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. 2013-14 School Year Home and Community-Based OT

On remand, the Second Circuit questioned whether the SRO and District Court intentionally denied the parents' request for reimbursement of the one and a half hours per week of home-based OT which was not part of the student's pendency placement. In their amended due process complaint notice, the parents requested reimbursement for four 45-minute sessions per week of OT (Parent Ex. A at p. 14). IHO 1's interim decision on pendency awarded three 30-minute sessions per week of individual OT (Interim IHO Decision at p. 2). The parents continued to provide additional home and community-based OT beyond the student's pendency entitlement at their expense during the pendency of the proceedings (Parent Exs. SSS; XXX).[5] The district argues that the parents are not entitled to reimbursement for the additional one and a half hours of home-based OT because the hearing record demonstrated that this service was for the purpose of generalizing skills outside of the school environment and exceeded the requirements of the IDEA.

[4] 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., 137 S. Ct. at 1000).

[5] During the 2013-14 school year, the student was entitled to one and a half hours of individual OT under pendency. The hearing record reflects that the student received one and a half hours of individual and group OT per week at MCC, a half hour OT consultation at MCC, and up to five and a half hours of home and community-based individual OT per week during the 2013-14 school year (Parent Exs. SSS at pp. 2, 10; XXX at p. 2).

In the underlying SRO decision and in the District Court's decision, the district's arguments, including those related to home and community based OT services, were considered challenges to the amount of relief requested by the parents and analyzed as an equitable consideration (see L.K. I, 2016 WL 899321 at * 5-8, aff'd, 674 Fed. App'x. at 101-102). Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). As relevant here, the IDEA provides that reimbursement may be reduced or denied upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii][III]; 34 CFR 300.148[d][3]). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 100-01; C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the [the predecessor statute to the IDEA] requires"]). As stated by the Supreme Court, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; C.B., 635 F.3d at 1160 ["[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996]).[6]

Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249

[6] To the extent the parents contend that the failure to award them reimbursement for services unilaterally provided to the student impermissibly shifted to them the burden of establishing the boundaries of a FAPE for the student, I disagree. The district conceded at the outset of the impartial hearing that it failed to offer the student a FAPE, and the Second Circuit remanded the matter for a fact-specific inquiry regarding "the precise scope of the services to which [the student] was entitled" (674 Fed. App'x at 102). The parents' complaint distills to an assertion that, once a district has failed to offer a student a FAPE, it is liable for whatever appropriate services parents choose to privately obtain, no matter how excessive or unreasonable it would be to require the district to fund them. The Second Circuit explicitly rejected this position (id. at 100-01, citing Carter, 510 U.S. at 16; Burlington, 471 U.S. at 359, 374; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 72 [2d Cir. 2014]; Frank G., 459 F.3d at 363-64; Still, 101 F.3d at 893).

F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

The student's occupational therapist at MCC testified in an affidavit that the student "greatly benefit[ted]" from additional OT outside of school, "as he has a lot of difficulty generalizing his skills across different environments and people" (Parent Ex. SSS at pp. 3, 9). At school during the 2013-14 school year, the student received two 30-minute individual OT sessions per week, one 30-minute "group" OT session per week (delivered with 1:1 support for the student), and one 30-minute OT lunch consultation (id. at p. 2). She further testified that the student was making slow, steady progress at MCC, received "an appropriate amount of OT services at school for his individualized needs," and also indicated that removing the student from class for additional therapy sessions would "hinder his academics and ability to socialize with his peers" (id. at p. 3). She also testified in her affidavit and during the hearing that the student required a home-based program in order for him to generalize skills across settings (Tr. pp. 143-44; Parent Ex. SSS at p. 9).

One of the student's home-based occupational therapists testified that her sessions with the student addressed motor planning and strengthening to complete gross motor tasks, such as jumping, stepping over objects, walking along a balance beam and holding a weight bearing position (Parent Ex. XXX at p. 3; see Tr. pp. 316-17).[7] The student was also working on self-help skills and activities of daily living (ADL) skills during home-based OT sessions (Parent Ex. XXX at p. 3). The home-based occupational therapist also indicated that the student's pre-writing skills were developing and that he had made progress using a tripod grasp and copying lines and shapes (id. at p. 4). She reported that the student was making slow, but steady progress in his OT program (id.). The home-based occupational therapist also testified in her affidavit that the student's program at MCC, "in conjunction" with his home-based program, was appropriate to meet his OT needs (id.). The home-based occupational therapist testified during the hearing with regard to the skills that the MCC occupational therapist was working on with the student and stated that those skills helped him with his academic success (Tr. p. 325).

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). 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). While I can understand that the parents may believe these services were desirable for their son, it does not follow that the district must be made responsible for all of them. The IDEA 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]).

[7] The student received home and community-based OT services during the 2013-14 school year from two providers; one who provided one and a half hours of OT services per week, and the other who provided approximately four hours of OT services per week in a sensory gym (Parent Exs. SSS; XXX). The hearing record does not include testimony, either in-person or by affidavit, from the occupational therapist who provided the student with approximately four hours of OT services per week in a sensory gym; however, it does include a June 2013 progress report authored by that provider (Parent Ex. V).

In the preceding State-level appeal, the undersigned determined that the student was receiving educational benefit from the totality of the services obtained by the parents (Application of a Student with a Disability, Appeal No. 14-071). The student's MCC providers testified that the home and community-based services addressed generalization of skills that the student learned at school, and they also testified to this student's severe delays and significant needs that required this level of intensive intervention. With regard to the appropriateness of MCC, I found that the hearing record demonstrated that the student had made progress in his school program, and further acknowledged that all of the providers attributed the student's success to the combined school and home-based programming. As discussed in detail below, overall the hearing record does not—generally speaking—provide a bright line distinguishing a need for home-based services in order for the student to receive educational benefit from his MCC school day from the notion that the more services the student receives, the more likely he is to receive greater benefit. However, this is not the case with the student's home and community-based OT for the 2013-14 school year. Those hours are segregable from those provided by MCC, and the evidence weighs in favor of the conclusion that they were not necessary to enable the student to make progress at MCC. The student's OT provider at MCC specifically testified that the student "received the appropriate amount of OT services at school for his individualized needs," and that the student benefitted from home-based services to work on generalization of skills (Tr. pp. 143-44; Parent Ex. SSS at pp. 3, 9). Therefore, evidence supports the conclusion that the student's home and community-based OT was primarily for the purpose of generalization of skills to other settings and the district is not required to reimburse the parents for the additional one and a half hours per week of home and community-based OT services beyond those to which the student was entitled pursuant to pendency in order for the student to receive a FAPE for the 2013-14 school year.[8]

B. Market Rates

As indicated above, the district did not challenge the appropriateness of the program provided at MCC during the 2013-14 school year, but argued that MCC was presumptively inappropriate if the student required home-based services in order to receive educational benefit. The district also asserted that the student's home-based services were for the purpose of generalizing skills. Before the SRO, the district raised two additional reasons why the public school should not be required to fund the student's home-based services, which were unrelated to the appropriateness of the services provided to the student. Having determined that the student's unilateral placement was appropriate, the questions of generalizing skills, maximization of benefits, and duplication of services were properly addressed within the context of equitable considerations. However, at no time was the issue of cost of obtaining services raised by the parties before the administrative hearing officers. The State-level review focused on a very different matter that was raised—the amount of services the student was receiving after school and whether those home and community-based services were appropriate to meet the student's needs

[8] The additional evidence submitted by the parties indicates that in each subsequent due process proceeding initiated by the parents, they requested reimbursement for "up to six hours of home- and community-based occupational therapy per week" (Resp. Exs. 1; 2; 3; see Resp. Ex. 4). The evidence before me was limited to the 2013-14 school year; therefore, on remand, the IHO may wish to determine, using the prospective analysis required in R.E. (694 F.3d at 188) if, "going forward," the student requires these services in order to receive educational benefit from his school program, as opposed to for purposes of generalization.

(see L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the after-school services obtained to succeed in the private placement is an appropriate equitable consideration]; Still, 101 F.3d at 893 ["The appropriate amount [of reimbursement] thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating [the student] at the [private school] and any related services and accommodations that would have been covered under the IDEA had [the district] provided [the student] with an appropriate education"] [emphasis added]). While reasonableness of cost is an equitable consideration, as noted in the District Court decision, the parents objected to the district's excessive cost argument "because it never raised that argument below" (L.K. I, 2016 WL 899321 at *7).

However, before the Second Circuit, the parents specifically raised, apparently for the first time, the argument that the district was not reimbursing them for the full cost of implementing the student's pendency program (L.K., 674 Fed. App'x at 101). The Second Circuit directed the District Court to determine whether the cost of the services covered under pendency that were privately obtained by the parents was reasonable, or if not, what amount was "required to ensure the Parents were reimbursed for the full reasonable cost of the services to which [the student] was entitled" under pendency (id. at 101-02). On this issue, there is no evidentiary record at all because the issue of cost was not raised by anyone during the impartial hearing or in the preceding State-level appeal. In particular, the hearing record contains no evidence with respect to whether the district made any attempt to implement the student's pendency placement at any point during these prolonged proceedings (see T.M., 752 F.3d at 171-72). As the hearing record is silent on this issue, it must be remanded to an IHO to make a determination in the first instance.[9]

C. Home and Community-Based Services

In its summary order, the Second Circuit stated that the question of what home and community-based services the student required to receive a FAPE "going forward" remained unanswered (L.K., 674 Fed. App'x at 102). Additionally, the Second Circuit noted that "the Parents allege and [the district] does not contest that none of [the student's] IEPs for school years 2014-15, 2015-16, or 2016-17 make provision for any supplemental services," and this dispute would likely continue in subsequent school years in the absence of a determination of the "precise scope" of the home and community-based services that are necessary for the student to receive a FAPE (id.).

In response to the question posed to the parties regarding due process complaint notices filed after the 2013-14 school year, the parties submitted additional evidence confirming that due process complaint notices have been filed for each subsequent school year and that the parents

[9] The hearing record indicates that many of the student's home and community-based service providers during the 2013-14 school year worked with the student during the 2012-13 school year (see Parent Exs. R; S; U; V; Y; TTT; UUU; XXX; YYY). It is unclear if these providers rejected the district reimbursement rate to provide pendency services to the student during the 2013-14 school year after previously accepting that rate to provide services to the student pursuant to his CPSE IEP during the 2012-13 school year.

have sent a 10-day notice letter challenging the appropriateness of the district's recommended program for the 2017-18 school year (see Resp. Exs. 1-4). The parties further responded that an IHO had consolidated the due process complaint notices covering the 2014-15 through 2016-17 school years (see Resp. Ex. 5). Since that time, the parties report that they have settled the parents' claims related to the 2015-16 school year, have reached an agreement in principle to settle their disputes for the 2016-17 school year but are awaiting a finalized a stipulation, and a 10-day notice letter rejecting the IEP developed for the 2017-18 school year has been referred for settlement. Accordingly, it appears as of the parties last report that the only claims currently pending before an IHO are those relating to the 2014-15 school year.

The parents contend that the hearing record is sufficient to determine the questions posed by the Second Circuit. In the underlying appeal, the district conceded that it failed to offer the student a FAPE and that the parents' unilateral placement was appropriate (Application of a Student with a Disability, Appeal No. 14-071). Given that posture and that the amount of reimbursement the parents were entitled to receive was examined on equitable grounds, the educational information considered by the March 2013 CSE and the progress reports prepared before the student began attending MCC were largely irrelevant to the disposition of the appeal. Nevertheless, the mandate of the Second Circuit to determine the "precise scope" of home and community-based services the student needs to receive a FAPE "going forward," warrants a full recitation of the evaluative and programmatic information that was available before September 2013, when the student began attending MCC and receiving a combined program including school, home, and community-based services (L.K., 674 Fed. App'x at 102).

A January 3, 2013 progress report from one of the student's community-based OT providers indicated that the student received three 30-minute sessions per week in a sensory gym environment (Parent Ex. X at p. 1).[10] According to this report, the student was working on increasing self-regulation/modulation skills, improving attention and participation in non-preferred/adult directed activities, improving sensory processing skills, increasing eye contact, improving functional fine motor/visual motor skills, improving motor planning, balance, coordination and strength; and that the therapist was also providing parent education and home program suggestions (id.). The report indicated that the student was making progress toward his goals and that he responded very positively to sensory integration techniques (id. at p. 2). The community-based OT provider recommended that services continue in order for the student to "reach the above stated goals" (id.).

A January 5, 2013 PT progress report stated that the student received two 30-minute sessions per week of home-based PT (Parent Ex. Y at p. 1). The student's PT provider reported that the student continued to make improvements in gross motor skills and indicated that home-based PT would focus on improving the student's areas of need to promote independence in all functional areas (id. at p. 2).

A January 5, 2013, SEIT/ABA progress report reflected that the student attended preschool for three hours per day for two days per week and for three hours and 45 minutes per day for three days per week, in a classroom containing 10 children, one teacher, and one assistant teacher (Parent

[10] This provider did not testify, either by affidavit or in person, at the impartial hearing.

Ex. Z at p. 1). According to the progress report, the student was receiving 25 hours per week of SEIT/ABA services as set forth in the student's preschool IEP (id.). The progress report also noted that the student received three 45-minute sessions of speech-language therapy per week, three 30-minute sessions per week of OT, and two 30-minute sessions of PT per week "through" the CPSE (id.). The student's SEIT/ABA providers described the student as presenting with significant delays in all areas of development (id.). They further noted that although the student had continually made progress in all areas of development, the student continued to require consistent verbal, visual and physical prompting/modeling to complete most tasks, generally struggled to maintain skills that were not consistently applied, and had difficulty generalizing learned skills across different stimuli/environments/people (id.). The student required prompting in manipulating and playing appropriately with toys and classroom materials, including items like puzzles that he could complete independently (id. at p. 2). According to the SEIT/ABA providers, without support the student would mouth, squeeze, or twirl objects (id.). The providers further noted that the student benefitted from "ABA SEIT" support, physical and verbal prompts, positive reinforcement, along with visual aids, such as picture and activity schedules, "to function more effectively in his current classroom setting" (id.). Cognitively, the SEIT/ABA providers indicated that the student had made gradual progress in all of his cognitive abilities; however, the student exhibited significant cognitive delays (id.). The student was assessed using the Hawaii Early Learning Profile (HELP 0-3 years), and reportedly performed within the 24-36 month age range for cognitive skills (id.). With regard to communication, the student's language skills were determined to be within the 15-24 month age range using the HELP 0-3 years (id. at p. 3). The student's SEIT/ABA providers stated that the student had made gradual progress in the acquisition of communication skills, however his receptive and expressive language skills were significantly delayed (id.). The student's social/emotional skills were also assessed using the HELP 0-3 years and were reported to be significantly delayed, falling within the 18-24 month age range (id.). The SEIT/ABA providers described a "dramatic decrease" in self-stimulatory behaviors with the implementation of differential reinforcement of other behavior (id at p. 4). They noted that with a decrease in sensory seeking behaviors, the student demonstrated more awareness of his environment and the people in his surroundings, was more attentive and focused, followed directions and routines with less prompting and was more motivated to communicate verbally (id.). The student also continued to make gains in the area of self-help skills (id.). Consistent prompting was needed for the student to remain focused, but with support, the student was able to put on some items of clothing independently (id.). The student required hand over hand prompting throughout much of the day and was aided by picture and activity schedules (id.). In summary, the student's SEIT/ABA providers noted that the student had made slow, steady progress throughout the year, but continued to demonstrate significant delays within all areas of development (id. at p. 5). The student reportedly made gains with teaching that was done in a highly structured, 1:1 settings with continuous high rates of reinforcement and repetition of tasks (id.). According to the SEIT/ABA providers, continued special education services were essential to provide ongoing structure, routine and consistency that was necessary to ensure continued growth and progress toward the student's IEP goals (id.). At the time of the SEIT progress report,

the student's SEIT/ABA providers recommended that the student continue to receive 25 hours of SEIT services (id.).[11]

A January 6, 2013 speech-language progress report described the student as having autism, apraxia, and significantly delayed speech-language skills (Parent Ex. W).[12] The student's speech-language pathologist indicated that she provided speech-language therapy in the student's preschool classroom for 45-minute sessions three times per week (id.). According to the progress report, the student had "little to no behavioral issues within the classroom," and was easily redirected with a "small" verbal or tactile prompt when dysregulated (id.). The student's speech-language pathologist reported that the student greatly benefitted from the technique used and had shown improvement and "a fair amount of progress" over the course of the year, although his articulation and language skills remained significantly delayed (id.). The student's speech-language pathologist further recommended that the student continue to receive speech-language therapy for the 2013-14 school year, both in school and after school (id.).

A classroom observation was completed by the district on February 7, 2013 (Parent Ex. G). According to the report, the student was observed in his preschool classroom during a speech-language therapy session (id. at p. 1). The observer noted that the student received SEIT services at school and received OT and PT outside of the school day (id.). The report indicated that the district observer also spoke with the student's SEIT provider and was informed that the student had made slow but steady, consistent progress (id. at p. 2). The student's SEIT provider also described the student to the district's observer as gentle and friendly, and further explained that the student did not display any "harsh behavior" (id.).

The hearing record also reflects that a CSE convened on March 3, 2013, to develop the student's IEP for the 2013-14 school year (kindergarten) (Parent Ex. C). The student's present levels of educational performance, management needs, and OT and PT annual goals and short term objectives appear to be taken from the January 2013 progress reports and February 2013 classroom observation (compare Parent Ex. C at pp. 1-3, with Parent Ex. Z at pp. 1-5; compare Parent Ex. C at pp. 5-7, with Parent Ex. Y at p. 3; compare Parent Ex. C at pp. 7-8, with Parent Ex. X at p. 1). For the 2013-14 school year, the CSE recommended 12-month services in a 12:1+1 special class in a specialized school with the related services of three 30-minute sessions of individual speech-language therapy, three 30-minute sessions of individual OT, and three 30-minute sessions of individual PT (Parent Ex. C at pp. 11, 15). The March 2013 CSE also recommended special transportation (id. at p. 14).

By letter dated July 18, 2013, the parents notified the district of their disagreement with the program recommended by the March 2013 CSE (Parent Ex. H at pp. 1-2). The parents included

[11] As noted above, at the time of the report, the student was attending the preschool general education program for three hours forty-five minutes per day at most and spent the balance of the day in the home setting, which is not atypical for preschool students, whether disabled or not. Of the three SEIT/ABA providers who jointly issued the report, the lead author testified at the hearing (see Parent Exs. Z; TTT).

[12] This provider did not testify, either by affidavit or in person, at the impartial hearing.

progress reports from the student's home and community-based providers dated May 2013 through June 2013 and requested another CSE meeting to review those documents (id.).[13]

A May 31, 2013 speech-language therapy progress report was prepared by one of two speech-language pathologists who provided therapy to the student four sessions per week (Parent Ex. R at p. 1; see also Tr. pp. 43, 57; Parent Ex. UUU at p. 2). According to the progress report, the student presented with severe deficits in expressive, receptive, and pragmatic language as well as with a severe motor planning disorder that significantly impacted his ability to produce age appropriate, intelligible speech (id.). The speech-language pathologist reported that the student had made gains in all areas of speech and language, and most notably in motor planning, which had improved speech production (id. at p. 2). The progress report reflected that the student was now able to produce many words and phrases that he was not able to produce before beginning intensive therapy (id.). The speech pathologist recommended that the student continue to receive interventions four to five times per week to address his "significantly delayed motor sub systems as well as expressive and receptive language delays" (id.).

A June 9, 2013 SEIT/ABA progress report appears to be an updated version of the January 5, 2013 SEIT/ABA progress report (compare Parent Ex. S at pp. 1-4, with Parent Ex. Z at pp. 1-4). In an overview section, the progress report included an additional sentence that the student required a constant, structured, rigorous academic and social program in school and after school in order to succeed and maintain the capabilities the student had acquired (compare Parent Ex. S at p. 1, with Parent Ex. Z at p. 1). With regard to cognition, changes to the report included the omission of some skills reported in January 2013, and the addition of skills such as following "several simple" one-step directions, receptively labeling 20-30 objects with vocal approximations, knowledge of all letter sounds, and progress with imitating "point to point correspondence with c-v-c words" (compare Parent Ex. S at pp. 1-2, with Parent Ex. Z at p. 2). In the area of communication, the student was beginning to independently use two words to request desired items, using "I want" rather than "give me" (compare Parent Ex. S at p. 2, with Parent Ex. Z at p. 3). The progress report also indicated that the student's language skills now ranged from 15-26 months according to the HELP 0-3 years, a change from 15-24 months in the January 2013 progress report (compare Parent Ex. S at p. 2, with Parent Ex. Z at p. 3). Other changes included that the student was now able to vocally imitate approximately 20-30 single words (an increase from 20 single words), and was now learning to respond to social intraverbal questions (compare Parent Ex. S at pp. 2-3, with Parent Ex. Z at p. 3). Within the domain of social/emotional development, the progress report reflected that the student's skills range according to the HELP 0-3 years also increased from 18-24 months to 18-26 months, and included a statement that the student was comfortable sitting next to peers and receptive to sharing toys and materials (compare Parent Ex. S at p. 3, with Parent Ex. Z at pp. 3-4). The student's reported self-help skills were unchanged, and the section on gross and fine motor skills was omitted (compare Parent Ex. S at

[13] Parent Ex. H consists of the parents' two-page letter to the CSE and copies of each of the progress reports (see Parent Ex. H pp. 1-18). Each of the progress reports sent with the July 18, 2013 letter were entered into the record as separate exhibits (compare Parent Ex. H at pp. 3-4, with Parent Ex. R at pp. 1-2; compare Parent Ex. H at pp. 5-6, with Parent Ex. AA at pp. 1-2; compare Parent Ex. H at pp. 7-9, with Parent Ex. T at pp. 1-3; compare Parent Ex. H at pp. 10-12, with Parent Ex. U at pp. 1-3; compare Parent Ex. H at pp. 13-16, with Parent Ex. S at pp. 1-4; compare Parent Ex. H at pp. 17-18, with Parent Ex. V at pp. 1-2). For clarity, citation to the progress reports will be to the separate exhibits.

pp. 3-4, with Parent Ex. Z at pp. 4-5). The summary and recommendations section attributed the student's steady progress to the "principles and tactics used in ABA therapy" (Parent Ex. S at p. 4). The student's SEIT/ABA providers further stated that the student would likely regress in all current levels of functioning at school, at home, and within the community without receiving ABA services in school and after school (id.). Additionally, they noted that the student regressed when not receiving ABA over short periods of time, by reverting to sensory seeking behaviors, stereotypy, and perseveration (id.). For the 2013-14 school year, the SEIT/ABA providers recommended that the student attend a highly structured, ABA school-based program providing 1:1 and small group instruction (id.). They also stated that the student required after school ABA services in order to generalize, maintain, and progress with skills learned in school to the home and community environments (id.).

According to a third speech-language pathologist, in a progress report dated June 17, 2013, the student received four speech-language therapy sessions per week in preschool and "8 speech sessions a week at home/in an office (private)" (Parent Ex. T at p. 1).[14] The student's current level of functioning was measured using the Preschool Language Scales, Fifth Edition (PLS-5), and reported scores indicated a severe overall language disorder (id.). This speech-language pathologist reported that the student continued to make progress, but "require[d] intensive speech therapy both in and out of school" that focused on increasing spontaneous communication, improving his ability to follow directions, improving motor coordination for speech clarity, increasing diaphragmatic strength to support longer utterances, and increasing his attention span (id. at p. 3).

A June 18, 2013 SEIT/ABA progress report prepared by the supervisor of two of the student's home-based ABA providers indicated that the student received 15 hours per week of SEIT services in a mainstream, preschool setting, "as well as approximately 25 hours per week of an intensive and home-based ABA program" (Parent Ex. AA at p. 1; see Tr. p. 284). The stated purpose of the report was to outline the student's then-current functioning levels and provide the goals and focus of the student's home-based program (Parent Ex. AA at p. 1). At the time of this progress report, the student was five years, two months old and exhibited scattered skills in four reported domains (cognitive skills, comprehension skills, expressive skills, and social and adaptive behaviors), with age equivalencies ranging from "2.8-3.0" to "4.10-6" (id. at pp. 1-2). For the 2013-14 school year, the home-based SEIT/ABA supervisor recommended that the student attend a classroom setting that could provide 1:1 ABA support with a teacher skilled in prompting, fading prompts, reinforcement procedures, and reductive behavior supports (id. at p. 2). The SEIT/ABA provider further stated that due to the student's difficulty with generalization, a home program to supplement school would be vital to ensuring that the student's gains were "generalized in home and community settings" (id.).

The student's home-based occupational therapist provided a progress report dated June 25, 2013, in addition to the information detailed above (Parent Ex. U). At the time of the progress report, the student received three 30-minute sessions of OT according to his preschool IEP and an additional four to six hours of community-based OT, allocated between sessions in a sensory gym and sessions provided by the home-based occupational therapist (id. at p. 1). According to the

[14] This provider did not testify, either by affidavit or in person, at the impartial hearing.

progress report, then-current sessions addressed motor planning of novel tasks and sequencing activities, as well as strengthening to complete gross motor tasks (id.). The progress report further indicated that when attending to task and visually focused, the student was able to perform most self-care tasks independently (id.). When unfocused, the student required maximum assistance to sequence and complete self-care tasks (id.). With regard to fine motor function, the student was assessed using the Peabody Developmental Motor Scales-Second Edition (PDMS-2), scoring in the grasp subsection revealed a 45 percent delay and an age equivalency of 34 months (id. at p. 2). On the visual motor integration subsection, the student's scores yielded an age equivalency of 31 months, which represented a 50 percent delay (id.). The student's home-based occupational therapist also prepared goals and recommended that 1:1 OT sessions continue to address the student's needs such as core strengthening to improve gross motor skills, fine motor coordination, and balance to enable the student to participate safely and independently in classroom activities (id.). Additionally, the occupational therapist stated that graphomotor and other fine motor tasks required intensive work to enable the student to achieve an age-appropriate skill level (id.). With regard to progress, the report indicated that the student responded well to therapy sessions and continued to improve in motor milestones (id.). In addition to recommended goals, the home-based occupational therapist also included a list of activities for "home carryover" (id. at p. 3).

An OT progress report dated June 2013 was prepared by the student's community-based sensory gym OT provider (Parent Ex. V at p. 1).[15] According to the progress report, the student presented with diminished muscle tone, moderate gross and fine motor delays, compromised motor planning, compromised bilateral motor coordination, decreased proximal stability and weight shifting, delayed equilibrium reactions, and sensitivity to movement (id. at p. 3). Major areas of concern were reported to include poor ability to self-regulate, calm, attend, focus, and tolerate instructions (id.). In addition, poor tactile and proprioceptive modulation and discrimination adversely affected the student's ability to acquire age appropriate skills (id.). The occupational therapist recommended continuation of services at the sensory gym to address the student's decreased sensory processing skills (id.).

The foregoing reports represent the educational information that was available before the filing of the initial due process complaint notice on August 29, 2013. A determination of what home and community-based services are required for the student to receive a FAPE relies upon a hearing record that clearly and specifically sets forth segregable services with corresponding objective evidence demonstrating that home-based services are required for the student to derive educational benefit from his regular school day. The evidence in the hearing record in its current state falls far short of this standard.

The first opportunity to clearly delineate the elements of the student's combined program was during the pendency hearing on October 10, 2013. Relying on the student's CPSE IEP, the parents requested a pendency placement consisting of weekly provision of 25 hours of SEIT/ABA services, three 30-minute sessions of individual OT, four 45-minute sessions of individual speech-language therapy, and two 30-minute sessions of individual PT (Tr. pp 6-7). Dissimilar to the half-day general education program that the student attended during preschool, the student transitioned into a full day kindergarten special education program at MCC in September 2013 (Parent Ex. M

[15] This provider did not testify, either by affidavit or in person, at the impartial hearing.

at p. 1). The district did not object to the parents' pendency request, which in effect, added all of the preschool special education services from the preschool IEP to a full day 1:1 ABA instruction placement and related services at MCC (Tr. p. 7). To further compound the lack of clarity, the district conceded that it did not offer the student a FAPE and decided not to present any documentary evidence at the hearing (Tr. p. 19).

Additionally, the parents continued to supplement the student's MCC program and pendency placement with additional home and community-based services, for some of which they are not requesting reimbursement. As stated in the previous appeal regarding this student, the hearing record indicates that the student made progress during the 2012-13 school year while receiving significantly fewer hours of home and community-based services and attending a general education preschool program with SEIT services (Parent Exs. D; R-Z; AA). However, the hearing record also reveals that the parents supplemented the services the student received pursuant to his CPSE IEP during the 2012-13 school year with privately-obtained speech-language therapy and OT services (Parent Exs. T at p. 1; U at p. 1). The result is a hearing record that reveals a conflation of services with no objective way to distinguish where a basic floor of opportunity in which the student can make progress ends and where maximization of the student's potential begins (see M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017]). Another contributing factor to this opacity may possibly have been the result of the parties' various litigation strategies and the district's concessions, but the net result was that it impeded development of the "precise scope" of any needed home and community-based services beyond that already provided by MCC.

In addition to being incomplete, the hearing record contains multiple inconsistencies. Further, the parents' position that the hearing record is sufficient to determine the amount of home-based services the student requires to receive a FAPE is belied by their request to supplement the record with the type of evaluative information that was omitted from the hearing. The hearing record in its current state contains assessment information which appears primarily in anecdotal progress reports without the benefit of context. For example, the January 2013 and June 2013 SEIT/ABA progress reports reflect that the student's age equivalent range of skills increased by two months in two domains as measured by the HELP 0-3 years (compare Parent Ex. Z at pp. 2, 3, with Parent Ex. S at pp. 2, 3). However, the corresponding skill(s) in which the student demonstrated improvement are not reported, nor is any part of the HELP 0-3 years assessment included in the record (Parent Exs. S at pp. 2, 3; Z at pp. 2, 3). Progress reports from the student's providers contain conflicting information that was never clarified during the impartial hearing. For example, one report indicated that the student was receiving 15 hours of SEIT/ABA services in preschool and an additional 25 hours of SEIT/ABA services at home during the 2012-13 school year, while another indicated that the student received 15 hours of SEIT/ABA services in school and 10 hours of ABA services after school (compare Parent Ex. AA at p. 1, with Parent Ex. S at p. 1).

The SEIT/ABA progress reports do not indicate how the age equivalencies of the student's skills were determined, and no discrete trial data was included in any of the progress reports (Parent Exs. S; Z). The March 2013 IEP included the parents' concern that the student was not generalizing skills he demonstrated in the home to the classroom (Parent Ex. C at p. 2). However, the record

does not contain any information or claims describing which particular skills the student is not performing in school that he performs at home.

The progress reports from January 2013 through June 2013 are strikingly similar to the affidavits documenting the student's present levels of performance at the time of the hearing in March 2014 (compare Parent Exs. S, Z, with Parent Exs. RRR, TTT, UUU). The student appears to be working on the same skills and goals in March 2014, while receiving a full day of services at MCC and the services set forth as pendency. The hearing record also reflects that the student demonstrated progress during the 2012-13 school year, while receiving significantly fewer hours of home and community-based services and attending a half-day preschool program with SEIT services (Parent Exs. D; R-Z; AA). The one consistency throughout the hearing record is that each of the student's providers report slow, gradual, progress (Parent Exs. D; R-Z; AA; RRR at p. 13; SSS at p. 3; TTT at p. 3). Finally, while the overall intention of the services appears to include promoting the student's independence and/ or avoiding greater restrictiveness, there is no indication that any attempts have been made at fading the student's level of services; rather, the additional evidence indicates that for each subsequent school year in which the parents selected their vision of private programming over the public school's approach, the parents have requested reimbursement for as many or more hours of home-based services as they requested in their initial due process complaint notice (Tr. pp. 262-75; Parent Ex. A at p. 14; Resp. Exs. 1 at p. 15; 2 at p. 15; 3 at p. 11; 4 at p. 1).

As discussed above, the only issue on remand that can be determined from the hearing record in its current state is that the parents are not entitled to reimbursement for the additional one and a half hours of OT obtained for the student during the 2013-14 school year for which they requested reimbursement. The remaining issues must be remanded to an IHO.

Although the parents requested a hearing before an SRO, while the District Court remanded the matter for State-level administrative review, there was no corresponding order requiring an SRO to hold a hearing and State regulations explicitly authorize an SRO to remand a matter to an IHO to take additional evidence or make additional findings (8 NYCRR 279.10[c]; see F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that an SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).[16] To the extent that the Second Circuit has requested findings relating to the student's needs during school years not at issue in the underlying impartial hearing, it would be more in keeping with the administrative hearing procedure envisioned by the IDEA and State law to require the parties to develop the record at the district level, prior to proceeding to State-level review.

To that end, it is noteworthy that the parties have settled or are nearing settlement for two of the school years subsequent to that year at issue here; it appears, therefore, that the parties have reached agreement—at least the type of agreement that can be reached within the context of

[16] While the parents assert that I am precluded from remanding the matter to an IHO for further proceedings, they have cited to no authority for this proposition.

litigation—as to what constitutes an appropriate program for this student. An additional concern that is unaddressed by the hearing record in its current state is that the parents have continued to request an increasing number of hours of home and community-based services in their subsequent due process complaint notices (Resp. Exs. 1-3). The parents argue that the requested increases are based on the student's needs, but the hearing record in its current state does not and cannot address whether the requests are in response to a lack of progress made under the student's current combined MCC and home and community based program, or are intended to enable the student to reach his full potential.[17] This concern must be addressed below and in light of the IDEA's requirement that a student be educated in the LRE. "The norm in American public education is for children to be educated in day programs while they reside at home and receive the support of their families" (Walczak, 142 F.3d at 132). The increasing amounts of 1:1 home and community-based services requested by the parents over the subsequent school years seem to lead toward greater restrictiveness in the student's placement, and if it is determined that the student was making progress at MCC alone, as the parents contend, any need to expand the 1:1 services in this combined program could potentially implicate LRE concerns that need to be addressed by the parties.[18]

VII. Conclusion

Having previously found that the IHO erred in determining that the parents did not meet their burden of establishing that their unilateral placement of the student was appropriate and that equitable considerations did not support an award of full reimbursement and/or funding of the parents' unilateral placement, I now further find that the parents are not entitled to reimbursement for the one and a half hours of home and community-based OT that was not reimbursed as part of the student's pendency placement.

Having reviewed the hearing record with regard to the remaining two issues remanded by the Second Circuit and District Court, I find that the hearing record in this matter is insufficient in its present state to determine those issues. For these reasons, the matter is remanded to the same IHO who is currently presiding over the parents' November 2015 and June 2016 due process complaint notices to take additional evidence as necessary to make determinations regarding the reasonableness of the cost of the parents' privately-obtained services to implement the student's pendency placement, and the "precise scope" of home and community-based services the student requires to receive a FAPE, which remain unresolved by the parties. Absent factual stipulations from the parties the IHO should require the parties to submit evidence relating to the follow questions to aid in the determination: (1) the relative amounts of progress the student made during the 2012-13, 2013-14, and 2016-17 school years, and the amount of services the student received

[17] By way of example, the MCC educational coordinator testified by affidavit in March 2014 that home-based services were particularly important "[g]iven [his] young age" (Parent Ex. RRR at p. 13). At this juncture, more than four years after the initiation of the impartial hearing underlying this proceeding, it is unclear whether the witness would consider it necessary for these services to continue to be provided for the same reason.

[18] These concerns do not apply to the parents' decision to maintain the student in his combined program as a pendency placement, as the parents have the right to maintain the student in that educational program—regardless of its restrictiveness—under both State and federal laws and regulations (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]).

for those school years; (2) what services would be necessary to offer the student a FAPE in a public school program; (3) the extent, if any, to which the student would regress in an entirely school-based program in the absence of home and community based services; (4) the skills in which the student can make progress only through home and community based services (if any); and (5) whether the student would be able to make sufficient progress in the school environment if attending an entirely school-based program. When taking evidence on these questions, the IHO and the parties would do well to consider the basis of any proffered opinion, that is, the evaluative material and particular performance data upon which such opinion(s) is based. An opinion stated on these highly nuanced issues without a specific basis in fact is not useful and essentially unreliable with respect to determining an appropriate program for this student.

IT IS ORDERED that the first question—regarding the student's need for an additional 1.5 hours of home and community-based OT services for the 2013-14 school year—that was remanded by the Second Circuit and District Court is answered in the negative; and

IT IS FURTHER ORDERED that the district shall provide the student with the services to which he is entitled pursuant to pendency through the date of this decision; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO presiding over the parents' currently-pending due process proceedings for further proceedings in accordance with the body of this decision.

Dated: **Albany, New York**
September 25, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER