



**The University of the State of New York  
The State Education Department  
State Review Officer  
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**No. 18-049**

**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:**

Law Offices of Regina Skyer and Associates, LLP, attorneys for petitioners, by William M. Meyer, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Neal P. Solon, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for reimbursement for the costs of placing their son at IBI Associates ("IBI") for the 2016-17 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**

The student initially began receiving special education and related services through the Committee on Preschool Special Education (see Tr. pp. 148-51). By parent report, the student had received a diagnosis of an autism spectrum disorder in December 2012 (Tr. p. 147). He attended the Manhattan Children's Center (MCC) for two school years at district expense; however, the district did not recommend the student's placement at the school (Tr. pp. 151, 171). Upon turning age five, the student was found eligible for special education and related services as a student with

autism (Tr. pp. 147, 151-53).<sup>1</sup> The last Committee on Special Education (CSE) meeting regarding the student was held in May 2014 (Tr. p. 152; see Parent Ex. B at p. 2).

Over time, the parents became concerned that the student had either regressed or remained stagnant during his time at MCC, and they began to look for a new program in December 2015 (Tr. pp. 151-52, 156). Subsequently, on June 9, 2016 and June 14, 2016, IBI staff conducted an observation of the student at MCC and generated a report detailing their observations (Tr. p. 68; see Parent Exs. C; I at pp. 1-2).<sup>2</sup> The June 2016 report indicated that the student had a high level of distractibility, exhibited delayed echolalia, and presented with "global delays in areas that include[d]: language delay, behavioral idiosyncratic traits, challenges with his attentional skills and as a result, academic delays" (id. at p. 6). IBI recommended that the student receive "all of his therapies on a consistent 1:1 basis with behaviorally trained therapists, on a 12-month basis" and "an intense, behaviorally based special education program," which was not an applied behavior analysis (ABA) program, in addition to related services (id.).

In a letter dated June 20, 2016, the parents notified the district that the student did not have an IEP for the 2016-17 school year and that they intended to enroll the student at IBI at district expense if the district did not offer the student an appropriate program and placement within ten business days (Parent Ex. B). The student began to receive instruction from IBI in July 2016 (see Tr. pp. 72-73; Parent Exs. E at p. 1; I at p. 3).

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

By due process complaint notice dated October 27, 2016, the parents asserted that the district did not offer the student a free and appropriate public education (FAPE) for the 2016-17 school year (Parent Ex. A at p. 1). The parents claimed that the district failed to develop an IEP for the student for the 2016-17 school year and that a CSE meeting had not been held since May 2014 (id. at p. 2). The parents asserted that, after the district failed to respond to an August 2016 letter, in which the parents notified the district it had not provided the student with an appropriate program, the parents were forced to enroll the student at IBI for the 2016-17 school year (id.). The parents further alleged that IBI was an appropriate unilateral placement as it addressed the student's academic and social/emotional needs and was reasonably calculated to enable the student to receive educational benefits (id.). Finally, the parents sought funding from the district for the costs of the student's placement at IBI and asserted that there were no equitable considerations that would warrant a reduction or denial of their request for reimbursement (id.).

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<sup>1</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1][i]; 8 NYCRR 200.1[zz][1]).

<sup>2</sup> The student's mother testified that she received this report around July 2016 (Tr. p. 165; Parent Ex. C). Although the front page of the report lists two days of observations, the narrative contained within the report, as well as billing records from IBI, suggest a third observation took place at the IBI offices on June 22, 2016 (see Parent Exs. C at pp. 1, 5; I at p. 2).

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

Following nine adjournments, the parties proceeded to an impartial hearing on December 14, 2017 (see Tr. pp. 1-180).<sup>3</sup> On the eighth day of proceedings, the district indicated that it would not present a case-in-chief, and, at the start of the impartial hearing, the district conceded that it did not offer the student a FAPE (Tr. pp. 39, 56). In a decision dated March 13, 2018, the IHO found that the district did not meet its burden of proving that it offered the student a FAPE for the 2016-17 school year; however, the IHO denied the parents request for reimbursement for the costs associated with IBI for the 2016-17 school year, finding that the parents did not meet "their burden to show that IBI was an appropriate placement" (IHO Decision at pp. 10-15).

The IHO found that the "hearing record contain[ed] overwhelming support for the [district]'s position that the parents ha[d] not met their burden of demonstrating that their unilateral placement [was] appropriate for the student" (IHO Decision at p. 11). Specifically, the IHO noted that IBI observed the student on three occasions and recommended continued 1:1 services, but found that the observation reports and recommendation "fail[ed] to provide any objective evidence . . . to support [the] conclusions" contained therein (id. at p. 12). The IHO further determined that there was "nothing in the record that provide[d] information about the student's initial level of performance when he started at IBI" (id.). The IHO noted that IBI did not conduct a formal assessment of the student to establish a baseline or refer to any evaluative data to support IBI's proposed education plan (id.). The IHO found that "[t]he record [was] devoid of any detailed information and objective data about [the student's] specific special education needs and deficits which [was] required in order to develop an appropriate educational program to address his unique special education needs" (id. at pp. 12-13).

Additionally, the IHO found that IBI's report and recommendations failed to include "strategies or goals . . . to address [the student's] maladaptive behaviors" (IHO Decision at p. 12). With respect to progress, the IHO found that there was a lack of objective data to support the IBI progress report and the IBI co-director's testimony regarding the student's progress, noting that there was no baseline from which to make a comparison (id. at p. 13). The IHO found that the statements regarding the student's progress were "merely subjective judgments and self-serving conclusions" (id.). In reviewing the home services provided by IBI, the IHO indicated that the hearing record did not support a finding that home instruction was part of the student's prior program and specifically noted that home services were billed at a "supervisory rate" even though it was not necessary for a supervisor to provide them (id. at p. 14).

The IHO found that "the parents' testimonial and documentary evidence [was] not persuasive because [it was] riddled with numerous inconsistencies" (IHO Decision at p. 14). The IHO pointed to the fact that invoices from IBI were not marked as paid although they had been paid, the invoices were corrected twice, the invoices contained billing errors, and it was unclear why IBI changed the bills to remove indications that the student was provided with ABA therapy (id.). Additionally, the IHO noted that the IBI co-director testified that IBI billed the parents at the lower rate (\$250.00/hour) for teacher services 95-98% of the time; however, the IHO found that the invoices reflected a much higher percentage of hours billed at the higher supervisor rate

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<sup>3</sup> The IHO did not list the July 26, 2017 hearing date on the cover sheet of her decision (see IHO Decision).

(\$400.00/hour), specifically pointing to the hours billed in July and August of 2016 (*id.* at pp. 14-15).

The IHO found that the parents failed to meet "their burden to show that IBI was an appropriate placement" (IHO Decision at p. 15). The IHO determined that, based on her findings, she did not need to weigh equitable considerations (*id.*).

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

The parents appeal from the IHO's determination that they did not meet their burden to establish the appropriateness of IBI, and argue that the evidence in the hearing record supports their claim for reimbursement. The parents assert that the unilateral placement at IBI was appropriate in that it was both "reasonably calculated to be appropriate at the time it was chosen and [the student] made actual progress in this program."

The parents assert that the IHO erred in finding that IBI was required to assess the student, noting that IBI was neither required to document all of its evaluative material nor required to establish or document objective baselines or benchmarks. The parents argue that the IHO shifted the burden of proof with regard to the district's "obligation to evaluate, determine present levels of performance, and create annual goals" for the student. The parents reiterate that the district failed to offer the student a FAPE and did not provide any evidence that it evaluated the student. The parents contend that the "IHO's critiques of IBI for not having adequate evaluative measures on file improperly shift[ed] the burden for this failure onto the very unilateral program the [p]arents secured due to the [district's] failure." Further, the parents argue that "a stricter standard cannot be applied to the unilateral placement" than is applied to the district and districts are not required to articulate baselines to measure progress toward annual goals.

The parents assert that IBI was aware of the student's needs, created a detailed plan of instruction, and reported on the student's progress. Specifically, the parents contend "[t]he record is replete with evidence that IBI was aware of and specifically focused on [the student's] behaviors and created an individualized program to address them."

Next, the parents argue that the IHO erred in finding there was insufficient proof that the student made progress. The parents note that the IHO erred by indicating there was only one progress report in the hearing record as the hearing record includes three progress reports and additional information. Moreover, the parents argue that the IHO erred in finding the progress reports lacked objective data to demonstrate the student's progress, alleging instead that the reports described the student's meaningful progress in academics, expressive and receptive language, behavior, fine motor skills and handwriting, and social skills by referencing both objective and subjective measures of progress. The parents also assert that the parents enrolled the student in IBI because other schools had not accepted him but that, due to his progress at IBI, a nonpublic school accepted the student for the 2017-18 school year and he has been able to attend without 1:1 services.

The parents argue that the IHO erred in finding their documentary and testimonial evidence unpersuasive. The parents assert that the fact that some of the IBI reports were not signed or dated should "not [have] compel[ed] a finding that the documents [we]re untrustworthy, especially in

light of the subsequent testimony in support of and clarifying the documents." The parents contend that the fact that the invoices were corrected should have increased their reliability given the "candor of the disclosure." Further, the parents assert the hearing record "indicates unanimously" that the student was not recommended for or provided with ABA services by IBI. Also, the parents argue that a review of the invoices for special education instruction demonstrates that "the great majority of hours billed" (just over 82%) were billed at the lower rate of \$250.00 per hour. The parents further contend that the IHO did not make any actual findings regarding the invoices for the hours spent delivering home instruction, except that a supervisor was not required to deliver them. The parents note that the weekend services were "just over 3%" of the all the services provided to the student "and any reduction of reimbursement for these hours should not impact reimbursement of the balance of services."

Finally, the parents argue that the IHO erred by failing to weigh equitable considerations. The parents assert that an SRO should not remand the matter but should find that equitable considerations weigh in favor of granting the parents' requested relief. The parents request that they be granted full reimbursement for the costs of instruction and related services provided by IBI during the 2016-17 school year.

In an answer, the district asserts that the IHO's finding—that the parents did not meet their burden to demonstrate the unilateral placement was appropriate—should be upheld. The district argues that the IHO correctly found the evidence presented unpersuasive and that the IHO's credibility determination is entitled to due deference. Finally, the district asserts that the IHO was not required to weigh equitable considerations and that the parents failed to show that such considerations favor reimbursement, noting the parents did not show that the cost of the program was reasonable or that the weekend services were justified.

## V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 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]).<sup>4</sup>

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

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

## VI. Discussion

In this matter, the district conceded that it did not offer the student a FAPE for the 2016-17 school year; therefore, the only issues in dispute are whether the unilateral placement at IBI was appropriate and, if so, whether equitable considerations weigh in favor of reimbursing the parents for the costs of the services the student received from IBI.

Prior to discussing the merits of the unilateral placement, the district's argument—that the IHO made a credibility determination, which is entitled to deference—will be addressed. Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at \*16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). However, a review of the IHO's decision reveals that the IHO did not actually make any credibility determinations regarding the testimony of the parents' two witnesses. The IHO noted that the "testimonial and documentary evidence [we]re not persuasive because they [we]re riddled with numerous inconsistencies" (IHO Decision at p. 14). This portion of the IHO's decision amounts to explanations of the weight she afforded the evidence presented, not credibility determinations directed at the parents' witnesses (see S.W. v. New York Dep't of Educ., 2015 WL

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<sup>4</sup> 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).

1097368, at \*15 n.6 [S.D.N.Y. Mar. 12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]). Accordingly, to the extent that I agree or disagree with IHO's findings of fact, it is based on the weight accorded to the evidence, not the credibility of the witnesses' testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at \*18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*9-\*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

### **A. Appropriateness of the Unilateral Placement**

For the reasons that follow, the hearing record does not support the IHO's finding that the parents did not meet their burden of establishing that IBI was an appropriate placement for the student. The hearing record demonstrates that IBI provided the student with instruction specially designed to meet his unique needs and, therefore, that IBI was an appropriate unilateral placement for the student for the 2016-17 school year.

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). 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. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the 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; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. The Student's Special Education Needs**

In this instance, the IHO determined that the hearing record did not include sufficient objective information regarding the student's special education needs. On appeal, the parents assert that the district had the burden to present evidence about the student's needs.

One Court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (*id.* at p. 207; see Application of the Bd. of Educ., Appeal No. 08-056).<sup>5</sup>

While it is understandable that the IHO hesitated to render any findings about the appropriateness of the unilateral placement given her view that the information in the hearing

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<sup>5</sup> The IHO and the district cite Stevens v. New York City Department. of Education (2010 WL 1005165, at \*9 [SDNY Mar. 18, 2010]; see IHO Decision at p. 13; Answer at p. 4) for the Court's observation that the hearing record before it lacked information about the "nature, degree, and extent of the student's special education needs." However, the decision in Stevens does not stand for a proposition that varies from that stated in A.D., in that the Court in Stevens did not discuss with which party might be responsible for the evidentiary deficiencies in light of the district's obligation to evaluate students with disabilities and the burden of proof in administrative proceedings under the IDEA, and did not ultimately rest on that deficiency to support its determination that the unilateral placement was not appropriate; rather, the Court found that the evidence was insufficient to show that the placement was specially designed to meet the student's unique needs.

record regarding the student's needs was inadequate, under the circumstances of this proceeding—where the district conceded that it failed to offer the student a FAPE for the 2016-17 school year (Tr. p. 56) and elected to not submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—the IHO erred in placing responsibility for that deficiency on the parents, instead of the district.<sup>6</sup> Accordingly, to the extent that IBI relied upon reports or assessments of the student to identify the student's needs and develop the student's educational program, and those reports or assessments were not sufficiently accurate or complete for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D., 690 F. Supp. 2d at 208; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027).

As summarized below, the evidence in the hearing record submitted by the parents in this case included a description of the student's unique needs as identified by IBI. The hearing record includes a June 2016 report detailing three observations of the student, an undated treatment plan,<sup>7</sup> an April 2017 occupational therapy (OT) progress report, a May 2017 academic progress report, and a May 2017 speech-language therapy progress report, all generated by IBI (Parent Exs. C-G). The IBI reports do not show that formal evaluations or assessments were administered or reflect standard or percentile scores; rather, the reports relay descriptions of observed behaviors without interpretation.<sup>8, 9</sup> In addition to the documentary evidence, the parents presented the testimony of the IBI co-director, as well as the student's mother, which included some additional explanations of the student's needs. While this information about the student's needs may ultimately be lacking in some respects, based on the authority described above, it is this description of the student's needs

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<sup>6</sup> An alternative that was available to the IHO was to exercise her authority to order an independent educational evaluation (IEE) of the student at district expense in order to assist the IHO in reaching a determination (34 CFR 300.502[d]; see 8 NYCRR 200.5[g][2]; [j][3][viii]). It would be far better to decide whether a unilateral placement meets the unique needs of a student based upon some reliable evaluative information regarding those needs. However, as discussed above, the lack of such information falls on the district, not the parents.

<sup>7</sup> Although it was not captioned, Parent Exhibit D was entered into evidence as "an IBI treatment plan" (Tr. pp. 54-55) and the exhibit list attached to the IHO Decision lists Parent Exhibit D as the "IBI Treatment Plan" (IHO Decision at p. 16); therefore, for purposes of this decision, Parent Exhibit D is referred to as the IBI treatment plan.

<sup>8</sup> Even if IBI had reviewed the student's progress reports from MCC following the observation of the student, as the co-director testified, these reports are not in the hearing record (Tr. pp. 63-64). The co-director testified that he was unsure what other evaluations might be in the student's record at IBI (Tr. pp. 128-130).

<sup>9</sup> For example, although the IBI observation report included descriptions of the student's delays, challenges, and interfering behaviors, the report did not elaborate upon or interpret how significant these observed issues were for the student until the summary, and then only made a conclusory statement about their severity (Parent Ex. C at p. 6).

that will be relied upon in order to examine whether IBI provided "educational instruction specially designed to meet the unique needs of [the student]" (Rowley, 458 U.S. at 188-89; see Gagliardo, 489 F.3d at 115; Frank G., 459 F.3d at 365).

According to the June 2016 observation report, the parents were concerned with the student's lack of progress at MCC and contacted IBI to observe the student at MCC (Parent Ex. C at p. 1).<sup>10</sup> Two special education teachers (a co-director and a senior associate) from IBI observed the student at MCC in a classroom with seven students and five adults (id.).<sup>11</sup> The IBI teachers reported that, during their observation, the student demonstrated "behaviors" including hitting and kicking the teacher, hitting himself, distractibility and lack of focus, jumping up and down while waiting for an activity, and humming and placing his head on a table for 10 minutes during a speech therapy group session (id. at pp. 1-3).<sup>12, 13</sup> In addition, the student placed his hands over (or his fingers in) his ears, said random words with no context, demonstrated delayed echolalia, engaged in verbal stimulatory perseverations, and had difficulty self-regulating during "downtime" (id.; see Parent Ex. D at p. 7). Other behaviors observed at MCC included the student falling to the floor, rocking, engaging in self-stimulation, hitting his chest with his fist, and dumping toys (Parent Ex. C at p. 3). In addition to the school observation, IBI also conducted two observations of the student at IBI offices (id. at pp. 4-5). The student exhibited many of the same behaviors in the office settings as he had in the classroom, including distractibility, delayed echolalia, verbal stimulation of teacher instructions, and hitting himself (id.). The observers further noted that the student "pressed his fingers on his eyes as if he was pulling them out" (id. at p. 5).

With respect to academic skills, the June 2016 observation report indicated that in a one-to-one session at MCC, the student "read well," but used his "whole hand to read and follow along" (Parent Ex. C at p. 2). Similarly, the observers noted that, in the office settings, the student was able to read words, but only with a finger under the words to guide him (id. at p. 4). They further noted that "several parameters had to be accommodated for reading to occur" including "finger led by therapist, same known book, and large fonts" (id.). According to the observers, during a literary assessment, the student identified some letters and their sounds (id. at p. 5). However, the student had difficulty sequencing a story using first, next, and last (id. at p. 4). With respect to mathematics, the observers reported that, when counting items in the MCC classroom, the student

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<sup>10</sup> According to the co-director, in June 2016, the parents also asked that IBI "reevaluate" the student for speech-language therapy and OT (Tr. pp. 94-95). The hearing record does not include any evaluations of the student's speech-language therapy or OT needs, although those areas of needs are described to some extent in other IBI documents (see Parent Ex. C at pp. 3-5).

<sup>11</sup> The IBI co-director who observed the student as part of the June 2016 observation is not the co-director who testified during the impartial hearing (Tr. p. 68; Parent Ex. C at pp. 1, 6).

<sup>12</sup> While the observation report describes the behavior in which the student engaged and some of his academic skills, the phrasing used in the report is at times confusing and unintelligible (see Parent Ex. C at pp. 2, 4-5). The unintelligibility may be the consequence of typographical errors or omissions; however, without any evidence explaining the intended meaning, I decline to speculate. On the other hand, there is no indication this impacted on the accuracy of the rest of the report.

<sup>13</sup> The student was also described as constantly singing when engaged in a task, "sitting inappropriately while transitioning into math," and "singing loudly" (see Parent Ex. C at pp. 1-6).

counted "too fast and was getting it incorrect" and that he counted to 13 but needed a prompt to slow down (*id.* at p. 3). According to the observers, when the MCC instructor attempted to work on telling time with the student, the instructor prompted the answers for the student (*id.*). Consistent with the student's performance in the MCC classroom, at the IBI offices, the student counted too quickly and missed numbers and was unable to correctly tell time to the hour (*id.* at p. 4). In addition, the student could not continue a pattern with shapes (*id.* at pp. 4-5). With respect to speech-language development, the June 2016 observation report indicated that, at MCC, the student alternately did not respond to questions, demonstrated response latencies that were "too long," responded with scripted movie lines, had difficulty following directions, and responded to his name with eye contact but no associated language (*id.* at pp. 2-3). During the observations at the IBI offices, the student demonstrated difficulty answering open-ended questions, used a monotone voice, responded prior to the completion of questions, referred to himself in the third person, engaged in verbal perseveration and delayed echolalia, and required prompts to use turn-taking language during a game (*id.* at pp. 4-5).

According to the summary and recommendations included in the observers' June 2016 report, the student "present[ed] with global delays in areas that include[d]: language delays, behavioral idiosyncratic traits, challenges with his attentional skills and as a result, academic delays" (Parent Ex. C at p. 6). Further, the observers indicated that the student required repetition in order to acquire new skills and that, in order to "maintain progress, [the student] require[d] a great deal of creativity while addressing deficits where he can utilize skills within all environments and in his learning set" (*id.*). Without further elaboration, the observers opined that, given the "severity" of the student's issues, as well as his chronological age, all of his therapies should occur "on a consistent 1:1 basis with behaviorally trained therapists, on a 12 month basis, so that he does not show signs of regression" (*id.*). The observers further opined that the student required "an intense, behaviorally based special education program and not a discrete trial ABA program[] where academics and a language based model are the emphasis as well as getting rid of behaviors" (*id.*).

As noted earlier, the hearing record also includes an undated and unsigned report referred to as the IBI treatment plan (Parent Ex. D; see Tr. pp. 54-55). The IBI co-director testified that this document was a progress report of what IBI was working on with the student for the school year (Tr. p. 84; see Parent Ex. D).<sup>14</sup> The IBI co-director testified that, "to the best of [his] knowledge," this report was completed in late October or early November 2016 (Tr. p. 84).<sup>15</sup>

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<sup>14</sup> Similar to the June 2016 observation report, the treatment plan included phrases, sentences, and paragraphs that are confusing or unintelligible (Parent Ex. D at pp. 1-11). For example, the treatment plan provides that "This program requires [the student] to be able to count objects really various quantities together using certain mathematical terms like more or less and see he will also in counter question is the deal with portions, groups, and pairs. Basic word problems are presented with basic numbers under three with real objects and a written that word problem" (*id.* at p. 10).

<sup>15</sup> The IBI co-director testified that the treatment plan was drafted by the other IBI co-director, and he later testified that he "was not positive" of the date the document was created, that he did not know when this report was completed, and, based on the reported age of the student on the first page of the document, it was "probably" July 2017 (Tr. pp. 84, 115-17; Parent Ex. D at p. 1). While the student history section of the report identifies the student's age as seven years eight months (his approximate age at the time of the hearing), in the sections

The IBI treatment plan included fine motor and sensory goals targeting the student's ability to "utilize sensory strategies during fine motor and handwriting within academic tasks"; complete two to three step sensory, gross motor, or fine motor directives; improve fine motor skills for pre-letter writing activities; improve sizing, formation, and directionality of uppercase letters, including when printing his name; and improve visual motor skills (Parent Ex. D at p. 5). The treatment plan stated that the student became overly stimulated and could become overly silly if unregulated (*id.* at p. 6). With respect to social development, the treatment plan noted that, although the student presented as a child that was very happy and engaged, he "[did] not necessarily verbally initiate or sustain a conversation" (*id.* at p. 5). Moreover, the treatment plan noted that the student required "minute to minute verbal reminders, guidance, and semantics to what was appropriate to a situation" and that he withdrew or engaged in inappropriate social behavior in moments of awkwardness (*id.* at pp. 5-6).

With respect to the student's "overall profile," as of the June 2016 observations, the co-director of IBI testified that the student: would tact (label things); would go off on tangents; and was not able to focus or sit and do any type of academics for any length of time (no longer than 30 seconds to one minute) (Tr. pp. 64-65; see Tr. p. 60). Further, the co-director testified that the student: was "a little self-abusive at times," requiring physical prompts to stop; was very rigid and demonstrated "a lot of idiosyncratic behaviors," which interfered with his ability to focus; was not able to express his wants and needs; was below his same age-peers cognitively; and could not function in a school setting without support (Tr. pp. 65-66). According to the co-director, the student also had difficulty generalizing skills between settings (Tr. pp. 97-98).

Based on the above, while lacking more formalized measures of the student's strengths and weaknesses and at times containing language that is unintelligible, the reports from IBI sufficiently identify the student's needs. Additionally, although the district raised objections during the impartial hearing to the form of the reports (that they were unsigned or undated) and the lack of objective assessments, the district failed to present any evidence of the district's view of the student's special education needs or otherwise show that the IBI reports failed to accurately or completely identify the student's needs. As previously noted, it is the district's responsibility to evaluate the student in the first instance. Having failed in that obligation—and having failed to present any evidence controverting the reports produced by IBI—the lack of additional information about the student's needs will not be held against the parent (see A.D., 690 F. Supp. 2d at 208; Application of the Dep't of Educ., Appeal No. 13-198). Accordingly, the IHO's determination that the parents failed to meet their burden to show the appropriateness of the unilateral placement due to the lack of detailed information and objective data about the student's needs is reversed and the unilateral placement will be assessed to determine if it met the student's needs, as identified in the IBI reports.

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describing the student's social skills and the summary and recommendations, the student's age is reported as six years old, which would have been consistent with the co-director's initial testimony that the report was created in October or early November 2016 (Parent Ex. D at pp. 1, 5, 11). The co-director's testimony that the report was generated in late October or early November 2016 is further supported by statements made in the report (*id.* at pp. 6, 11). For example, the treatment plan included a "transition plan for integration to school," which targeted November 20th as the date for the initial transition to take place (Tr. pp. 83-85; Parent Ex. D at p. 11).

## **2. Specially Designed Instruction**

Based on her determination regarding the lack of detailed information about the student's needs, the IHO did not squarely address whether or not IBI provided the student with specially designed instruction except to find that the IBI observation report did not include "strategies or goals . . . to address [the student's] maladaptive behaviors" (IHO Decision at p. 12; see Parent Ex. C). The parents argue that IBI developed a detailed plan of instruction and that, contrary to the IHO's findings, IBI specifically focused on and addressed the student's behaviors.

Specially designed instruction is defined as "adapting, as appropriate to the needs of an eligible student . . . the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Although not always detailed or clearly stated, the hearing record contains sufficient evidence regarding the manner in which IBI addressed the student's identified special education needs. Documentary evidence, albeit limited, regarding the student's program at IBI, along with the testimony of the IBI co-director and the student's mother, provides a sufficient basis for finding that the unilateral placement adapted the content, methodology, or delivery of instruction to meet the student's unique special education needs.

According to the IBI co-director, IBI provides one-on-one instruction to children with special needs, as well as "academics and related services," including speech-language therapy and OT (Tr. pp. 61-62). IBI offered, in its offices: curriculum-based programming; a gym with a swing, slide, and balls used for OT; a social group area; a game room for student breaks; and four or five smaller offices for 1:1 or 2:1 work on academic programming (Tr. pp. 126-27). The student's program at IBI "covered" math, reading, gym, and social group time, along with recess and lunch, which took place with other children at IBI (Tr. pp. 133-35). According to the co-director, all of the "therapists" working with the student were "licensed" special education teachers, and, according to the credentials found on the signature pages of the OT and speech-language progress reports, the OT and speech-language providers were licensed (Tr. p. 128; Parent Exs. F at p. 3; G at p. 3). The co-director testified that, although IBI worked with 12 families, at any given time, there could be two or three other students in the IBI offices (Tr. p. 134). The co-director explained that it depended on the time of day because not all students came to the offices from 9 to 3, rather, "[s]ome just c[ame] for a couple of hours" (id.).

The IBI co-director testified that, following IBI's observations of the student, staff felt that he required one-to-one instruction for special needs because of his behavior (Tr. p. 69). The student also required speech-language therapy and OT (id.). According to the co-director, IBI wanted to create an academic program for the student, along with a behavior modification program, so that he would be able to focus more on his academics and reduce his echolalia and rigidity (id.). The co-director explained that IBI decided to come up with a program to help the student "become ready for a school program," which they initiated in summer 2016 (Tr. pp. 69, 72). The co-director reported that, for the summer, the student received instruction in IBI's offices (Tr. p. 74). Staff was working on academics, social groups, and video modeling with the student and he went to the park for exposure to peer relationships (id.). The co-director testified that it was a "full-day

program for [the student] to get those skill levels up to a point where he could be in a school setting" (id.).<sup>16</sup>

IBI developed an academic program for the student that started with reading and math (Tr. p. 73). The co-director explained that, for reading, IBI would have the student read (or "[they] would read for him") a paragraph from a book and the student would recall or retell what had been read (id.). Staff would then ask the student specific questions about what had been read, which would "allow [the student] to retain the knowledge" (id.). Staff would return to the reading later to see if the student had actually retained it (id.). With respect to the student's math program, the director reported that staff "would use one-to-one correspondence where [they] would do more or less" (id.). He further explained that they "would do groupings" and "mix it up so it—so it wasn't like a rote program," such that they "would do four or five different things at once, [and] do it really fast-paced so [the student] really didn't have time to go off on a tangent" (Tr. pp. 73-74).

The co-director recalled that, in the beginning of November 2016, the student was accepted into a nonpublic school (NPS), which he described as "a small mainstream school, where they have a highly structured day" (Tr. p. 75). The student was registered in a kindergarten class of ten children (Tr. pp. 75-76; 81). The co-director explained that IBI started the student out on a part-time basis at the NPS so that he could become familiar with the school; initially, the student attended the school for just lunch and recess (Tr. p. 75). The co-director noted that lunch and recess were "low intensity times" where the student could have some engagement with typically developing peers and that, from there, IBI would "morph" the student into a more sustained day at school (id.).

According to the co-director, although the student's chronological age would have placed him in first grade, the student attended kindergarten at the NPS because IBI "decided to bring him back a little bit because [they] wanted him to succeed" (Tr. pp. 76, 81-82). He further explained that they "wanted [the student] to be in a program where [he] would be able to accomplish the work, . . . [and] be able to sit and attend to the work with all the other multifaceted stimuli going on around him within the classroom because it wasn't a one-to-one setting" (Tr. p. 76). While at the NPS, the student was receiving one-to-one instruction and support from IBI staff (Tr. pp. 76-77). The co-director indicated that the student received one-to-one instruction because of his idiosyncratic behaviors and rigidity and opined that the student needed one-to-one support to be able to focus on and complete his work and to move around with the class (Tr. p. 77). The co-director reported that IBI staff paid particular attention to the antecedents of the student's behaviors in order to prevent the student from engaging in behaviors such as physical and verbal tantruming (see Tr. pp. 78-79). With respect to academics, the co-director explained how IBI staff tried to teach the student the concept of something, for example "cup," in a way that "encompassed the whole thing" (Tr. p. 79). The goal was for the student to understand the concept of cup, as opposed to just labeling an item "cup" (see Tr. pp. 79-80). According to the co-director, over the course of the school year, the student began attending the NPS for longer periods of time until he was

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<sup>16</sup> According the May 2017 progress report from IBI, for summer 2016, the student received "one-to-one intensified special education services (utilizing behavior modification services with mainstream academic curriculum)" (Parent Ex. E at p. 1).

attending for four full days (from 9:00 am to 3:00 pm) per week with full-time support from IBI (Tr. pp. 80-81).<sup>17</sup> To address the student's fine and gross motor needs, the co-director testified that, in OT, the student started out using "really thick crayons and pencils" when forming letters; and to address the student's sensory needs, a compression vest was used periodically (Tr. pp. 98-99).

In addition, the co-director also testified that, at the request of the parents, IBI provided "weekend therapy" to the student (Tr. p. 97).<sup>18</sup> The weekend program was the same as the program provided to the student at school; however, it was "toned down" with "more outdoor things going on" (*id.*). The co-director explained that the weekend sessions occurred every two to three weeks for a few hours and included parent training, as well as some academic instruction (Tr. pp. 137-38).<sup>19</sup>

In addition to the co-director's testimony, the treatment plan detailed some of the strategies that were used by IBI to address the student's needs during the 2016-17 school year (see Parent Ex. D).<sup>20</sup> Specifically, IBI identified the following eight "[a]cademic, [s]ocial and [a]voidant [b]ehaviors" along with a "plan of action" for most: rigidity, referring to self in the third person, physical self-stimulation, double counting, echoic responses, issues within reading, self-directed behaviors, and verbal latency in responding (*id.* at pp. 7-9). The treatment plan identified rigidity, physical self-stimulation, echoic responses and self-directed behaviors as idiosyncratic behaviors (*id.* at p. 8). With respect to the student's rigidity related to circling answers on worksheets, the corresponding plan of action called for varying instruction by using phrases such as "point, find, tell me, underline," or put an "X" next to answers instead of making circles (see *id.* at p. 7). With respect to the student's rigidity with food changes, the plan of action called for the use of a "shaping program" that included rotating foods (*id.*). For rigidity related to scheduling, the plan called for the use of preemptive language and the purposeful implementation of "'curve balls'" (*id.*). To address the student's tendency to refer to himself in the third person, the plan of action outlined a series of prompts to employ if the student did not self-correct (*id.*). In addition, to address the student's physical self-stimulatory behavior, such as hand-flapping and making noises, a corresponding plan of action called for the student to calm his body by placing his hands in his pockets and counting while staff provided him with replacement words appropriate to the situation

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<sup>17</sup> The May 2017 progress report from IBI indicated that the student was attending the MCC for four full days of school within a general education kindergarten class with one day of one-to-one teaching (Parent Ex. E at p. 1).

<sup>18</sup> The home-based weekend services are discussed further below with regard to equitable considerations.

<sup>19</sup> The co-director testified that parent training included training the student's nanny and grandparents if they were in the room (Tr. p. 137).

<sup>20</sup> The IBI treatment plan also included some statements regarding the student being: "very advanced" with respect to routine situations; "by far the most well rounded and actively engaged six-year-old in a number of sports and activities"; "very much cued in and knowledgeable within his circle of family and friends"; and a "very self-sufficient and independent boy" with respect to ADLs (Parent Ex. D at pp. 2, 5-6). These statements are in sharp contrast to the statements made in the "summary and recommendations" section of the June 2016 observation report which described the student as having "global delays"; and his issues as severe (compare Parent Ex. C at p. 6, with Parent Ex. D at pp. 2, 5-6).

(*id.*).<sup>21</sup> With respect to the student's self-directed behaviors (most noted during "downtime"), the plan of action called for staff to present the student with "known, preferred activities with guidance" (*id.* at p. 9). For example, the plan suggested offering the student an iPad with rules such as he must talk/comment on an activity/movie with calm body (*id.*). The plan included: consequences for self-stimulatory behaviors including having the iPad removed; instructions to discuss "what to do instead of what not to do" with the student; and a directive to offer short intervals of rewards in order to increase independent downtime (*id.*).

The treatment plan identified double counting, issues within reading, and verbal latency in responding as academic issues/behaviors (Parent Ex. D at pp. 7-9). With respect to reading instruction, the IBI treatment plan targeted the student's reliance on his finger as a guide when reading (*id.* at p. 8). The plan recommended the use of a visual dot at the beginning of a sentence so as to fade finger reading (*id.*). Other recommended reading strategies included: breaking down pictures and text; varying books daily so as to not have the student rely on his memory; and, working on recall "momentarily within context of story and afterwards" (*id.* at pp. 8-9). With respect to mathematics, the IBI treatment plan addressed the student's tendency to "double count" through overcorrection with a pointed index finger and recounting, as well as varying instruction with every occurrence of the task (*id.* at p. 8). To address the student's verbal latency in responding, the IBI treatment plan noted that the student was allowed two seconds to process an answer prior to being provided with a choice of two answers (*id.* at p. 9). To address regulation issues, the student was systematically integrated into the NPS to allow him the opportunity to regulate among and around larger groups (*id.* at p. 6). To address social needs, the student was provided guidance, prompting, and language replacement to sustain social interactions; as well as video role modeling (*id.* at pp. 6, 11).

In addition to plans of action for specific behaviors, the IBI treatment plan included general instructional procedures to be implemented to replace repetitive responses, rigidity, and scripting, including the use of written words for instructions, shaping, and "varied modalities for standard mainstream kindergarten and first grade curriculum" (Parent Ex. D at p. 11). Additionally, although not described in detail, the IBI treatment plan included the use of rewards for targeted behaviors and task completion, including use of an iPad, block building, puzzles, and music (*id.* at p. 7). Further, in general, the plan suggested addressing many of the student's behaviors through ignoring, pre-emptive verbal or visual cues, and "'positive replacement procedures,'" including replacing inappropriate language with language appropriate to the situation (*id.* at pp. 6-7). With respect to attention and focus, the plan indicated that verbal cueing had been used to increase the student's amount of time on task (*id.* at p. 4).

The progress reports completed by IBI in May 2017 also detail strategies employed by IBI staff to address the student's needs. According to the academic progress report, IBI used one-to-one teaching and ABA, behavior modification, behavior plans, and verbal replacement strategies as part of the student's instructional program (Parent Ex. E at pp. 1-2). In addition, IBI developed a reading program for the student that focused on teaching reading fluency and reading comprehension simultaneously (*id.* at p. 4). In math, IBI modeled addition problems for the

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<sup>21</sup> Although working on echoic responses was identified as a need for the student, the treatment plan did not indicate how IBI addressed this need, but rather commented on how he was progressing (Parent Ex. D at p. 8).

student (*id.*). The student's IBI speech-language pathologist reported using moderate levels of verbal prompting and clinician modeling to help the student formulate grammatically correct sentences, phonemic cues to assist the student with producing a simple narrative related to a pictured sequence, and repeated directives to facilitate the student's ability to follow 2-3 step directives (Parent Ex. F at pp. 1-2). The IBI occupational therapist reported that the student was "extremely sensory seeking" and described various tactile and weighted materials with which the student engaged including theraputty, multitextured fidgets, a lap pad, and ankle weights (Parent Ex. G at p. 4). She noted that yoga was employed to improve the student's core strength and a therapy ball (weighted and unweighted) was used to improve the student's visual motor skills when throwing, catching, or kicking a ball (*id.* at p. 2).

Upon consideration of the foregoing, while the evidence in the hearing record, as a whole, lacks detailed information regarding the content or methodology of instruction, it does sufficiently describe the delivery of services in a one-to-one support format, incrementally phasing the student into a mainstream school setting, and an individualized treatment plan for the student. Accordingly, the hearing record supports finding that IBI was an appropriate unilateral placement for the student for the 2016-17 school year as there is sufficient evidence that instruction was specially designed to meet his unique needs.

### **3. Progress**

Finally, the parents argue that the IHO erred in finding there was no objective data establishing that the student made progress. A finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at \*9-\*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; see also Frank G., 459 F.3d at 364).<sup>22</sup> 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 Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

The Second Circuit has held that, in determining whether a student made progress, an SRO must examine the record for objective evidence (E.S. v. Katonah-Lewisboro Sch. Dist., 487 Fed. App'x 619, 622 [2d Cir. July 6, 2012]; see Hardison v. Bd. of Educ., 773 F.3d 372, 387 [2d Cir. 2014] [stressing the importance of "objective evidence" in determining whether a parent's unilateral placement was appropriate]).

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<sup>22</sup> 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"]).

While not dispositive, the evidence in the hearing record reveals that the student demonstrated some progress with respect to behavioral, social, sensory, fine motor, speech-language and academic skills (Tr. pp. 82-83, 98, 109, 143, 161, 172; see Parent Exs. E; F; G). The May 5, 2017 IBI progress report indicated that the student had made marked progress in all areas especially with academics and language (Parent Ex. E at p. 2). Further, the report indicated that the student had made steady gains throughout the school year, and "more drastically in the past three months" (id. at p. 5). With respect to behaviors, the academic progress report stated that the student made meaningful progress and noted the very low rate of idiosyncratic behaviors exhibited by the student, as well as the fact that any behaviors demonstrated were not disruptive to others (id. at p. 2). According to the IBI progress report, the student no longer engaged in verbal self-stimulatory behaviors, purposeful burping, "hands in pants," and intermittently hitting his chest (id.). With respect to attending skills, the student made gains such that he required fewer reminders to stay on task; gains were further evidenced by the student's connectedness "to every situation," including his schedule, peers, and activities (id.). With respect to social skills, the student-initiated conversations and easily engaged in a "WH" format conversation; however, the student required guidance with "continued language beyond the standard questions" (id. at pp. 2, 5). In reading, the IBI progress report indicated that the student actively engaged "in age appropriate reading/story content" (id. at p. 4). With respect to mathematics, the student was "coming along with his math skills" and performed "mental math" for single digit addition but required modeling to demonstrate the work (id.). According to the IBI progress report, the student wrote an addition equation, began to skip count, and was working on single digit subtraction problems, as well as mastering simple word problems (id.).

With respect to speech-language therapy, the May 2017 IBI speech-language therapy progress report (speech report) indicated that the student had made steady progress in his acquisition of speech and language skills and, further, that the student's mean length of utterance had increased to five words from one to two words (Parent Ex. F at p. 1). The speech report further indicated that, in the area of pronoun acquisition, the student made "a great deal of progress" using accurate pronouns in spontaneous utterances (id. at p. 2). According to the speech report, the student had difficulty following three-step, unrelated directives, but the student's performance improved when given verbal repetition of directives, and he responded positively to gestural and verbal cues (id.). In addition, the speech report indicated that, socially, the student was making progress by beginning interactions with a social greeting and responding positively to verbal prompts to discontinue perseveration (id.).

With respect to fine motor skills, the May 2017 IBI OT progress report (OT report) indicated that the student had improved his tripod grasp and was making slow, yet steady progress with respect to handwriting, motor planning, sensory processing, improving work behaviors, and visual motor skills (Parent Ex. G at pp. 1-2). However, reports of the student's overall progress were somewhat tempered by the occupational therapist's observation that the student had difficulty performing skills due to "his high rates of verbal and physical stereotypy and his constant seeking out of sensory input specifically tactile, proprioceptive and vestibular input" (id. at p. 2). The occupational therapist also noted that the student exhibited "some non-compliance behavior" when he did not want to complete presented work, frequently did not visually attend to worksheets and writing materials, required moderate verbal and physical direction to remain on task during a two-

to-three step therapy-directed exercise, and continued to self-direct and exhibit self-stimulatory behaviors when structure was reduced (*id.* at pp. 1-2).

The co-director testified that "expressively and receptively [the student] actually gained skills," "was able to converse more," and "was able to express his needs more" (Tr. p. 98). Further, the co-director testified that the student progressed to the point that he was able to attend school for a full day program and participate "without any tantruming" or other "issues" and, ultimately, go onto the next school year without one-to-one support (Tr. p. 109). Additionally, he noted that the student "was exceling in his math" and "his reading" and "gained skills in all those areas" (Tr. p. 145). The parent testified that the student made substantial progress and further commented that he was able to attend and focus, as well as "be in a classroom setting with typical kids" (Tr. 161). In addition, at the time of the impartial hearing, the parent noted that the student had been accepted to a "special needs" school that had rejected him the previous school year, prior to him attending the NPS with support from IBI (Tr. 172).

Based on the foregoing, the hearing record includes some uncontested evidence from IBI showing the student made progress with respect to improved behaviors, attention, reading, mathematics, following directions, social interactions, and fine motor skills. As detailed above regarding the student's needs, the IHO's determination that the parents failed to present evidence of a baseline from which to measure progress was in error, since it was the district's obligation to evaluate the student and present its view of his needs at the impartial hearing. While the IHO correctly found that the lack of objective data makes it difficult to accurately determine the extent of the student's progress (see R.H. v. Bd. of Educ. Saugerties Cent. Sch. Dist., 2018 WL 2304740, at \*6, \*7 [N.D.N.Y. May 21, 2018] [finding insufficient evidence of the student's progress at the unilateral placement where the hearing record did not include objective evidence, such as report cards, progress notes, work samples, standardized assessments, or progress towards written goals]), under the particular circumstances of this case, the progress reports sufficiently detail the student's areas of improvement (see Application of the Bd. of Educ., Appeal No. 16-063). Overall, considering the totality of the circumstances, IBI was an appropriate unilateral placement for the student.

## B. Equitable Considerations

Having determined that the services provided by IBI were specially designed to meet the student's unique needs, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. The IHO did not render a decision on equitable considerations (IHO Decision at p. 15). The district asserted that the hourly rates charged by IBI were unreasonable.<sup>23</sup> The evidence supports a finding that the parents are entitled to reimbursement for the costs of IBI for the 2016-17 school year; however, the requested amount of reimbursement must be reduced for the reasons discussed below.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir.

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<sup>23</sup> The district did not argue at the impartial hearing that the cost of the program was unreasonable. The first time the issue was raised was in the district's post-hearing brief (IHO Ex. II at p. 14).

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"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Initially, the district failed to convene a CSE for the student and did not create an IEP for the 2016-17 school year. The district did not present any evidence of the parent's failure to cooperate with the district or that the parents were in any way at fault for the district's failure to convene a CSE. In fact, the district did not present any evidence at the impartial hearing. Further, the parents provided timely notice of their intent to enroll the student at IBI and to seek funding at public expense (see Parent Ex. B).

However, turning to the district's assertions about the unreasonableness of the costs of the unilateral placement, the district's argument that there is no justification in the hearing record for the services provided to the student at home on weekends appears to be justified. While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]); see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral

placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires").

The hearing record demonstrates that the student received 35.5 hours of weekend home-based instruction during the 2016-17 school year (see Tr. pp. 96-97; Parent Ex. I at pp. 6, 8-9, 12-13, 18, 20, 22, 24-25). According to the IBI co-director, the student's father requested the weekend services to "just get [the student] going" and to train the student's nanny (Tr. p. 97). The co-director stated that IBI "morphed the programs we were doing in the office to the home . . . so it would be consistent" (id.). The co-director testified that the weekend services were "toned down" and there were "more outdoor things going on" (id.). Based on the above, the student's home-based instruction were supplemental services that appeared to be for the purpose of generalizing skills to other environments, and there is no evidence in the hearing record that the services were necessary for the student's educational progress.<sup>24</sup> Accordingly, the district should not be required to reimburse the parents for these services, as they would not have been required to provide them in the first instance.

Next, review of the IBI billing statements reveals that a portion of the relief the parent seeks includes reimbursement for the costs of evaluations of the student, as well as observations, attendance at meetings, and telephone conferences (Parents Exs. I at pp. 1-2, 5, 11-15, 18-19, 21-23; J at p. 1; K at p. 9).<sup>25</sup> The evaluations identified in the IBI billing statements included the June 2016 observations and a June 2016 OT evaluation (Parent Ex. I at pp. 1-2; J at p. 1).<sup>26</sup> In addition,

<sup>24</sup> 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, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at \*11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at \*8-\*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at \*13-\*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at \*11 [S.D.N.Y. Mar. 31, 2014]; see also 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 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

<sup>25</sup> The invoices reflect that the parents were billed \$12,145 for these additional services (Parents Exs. I at pp. 1-2, 5, 11-15, 18-19, 21-23; J at p. 1; K at p. 9).

<sup>26</sup> The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent disagrees with an evaluation conducted by the district unless the district requests a hearing and establishes the appropriateness of its evaluation (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at \*5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]). In this instance, although there is evidence that the parent obtained IEEs through the unilateral placement, there is no indication in the hearing record that the parent either requested an evaluation from the district or disagreed with an evaluation conducted by the district. Because the parent did not request an evaluation from the district or disagree with an evaluation conducted by the district, the parent is not entitled to reimbursement for the cost of the evaluations at public expense (see 34 CFR 300.502[b][1]; 8 NYCRR 200.5[g][1]).

the IBI billing statements indicate charges for school, OT, and speech-language observations (Parent Ex. I at pp. 5, 11-13; K at p. 9), as well as charges for the production of the May 2017 progress reports (Parent Ex. I at p. 23). Finally, the billing statements included charges for attendance at meetings, including a meeting to discuss the June 2016 observations and the student's May 2017 CSE meeting, and unspecified telephone conversations (*id.* at pp. 2, 5, 11-12, 14-15, 18-19, 21-23). There was no explanation in the hearing record regarding why these charges were necessary for the provision of services to the student or for the student to benefit from instruction. As these additional charges are segregable from the cost of the special education and related services provided by IBI and the hearing record includes no further evidence regarding these costs, the district is not required to reimburse the parents for them (see L.K., 674 Fed. App'x at 101; see also Deal v. Hamilton Cnty. Dep't of Educ., 2006 WL 2854463, at \*4 [E.D. Tenn. Aug. 1, 2006] [reimbursement for ancillary expenses related to the provision of ABA services reduced because the description of the services was unclear and did not permit a determination as to whether they constituted reimbursable related services]).

Additionally, the district objects to the amount charged by IBI for the services provided, specifically that rates were based on the individual providing the service rather than the service being provided. The IBI co-director testified that the parents were charged three different hourly rates depending on who provided the student with services: the related services rate (\$220.00), the special education teacher rate (\$250.00), and the rate for a special education supervisor (\$400.00) (Tr. pp. 102-03, 141). The co-director testified that the supervisor would go into the classroom with the other therapist in order to see what was going on and come up with a treatment plan (Tr. p. 103). He explained that the rate was higher to account for work done "afterhours," such as reviewing documents, updating the program, and coming up with a treatment plan (*id.*). However, a review of the hearing record shows that there was one treatment plan developed during the 2016-17 school year for the student and there is no evidence that this document (or any other documents) were reviewed or periodically updated, which would be expected considering that a significant number of hours were billed at the supervisor rate.<sup>27</sup> Nevertheless, 12 hours of services were identified as co-treat sessions and were billed at \$400.00 per hour (Parent Ex. I at pp. 3, 12). However, as the explanation as to the supervisor rate was not further supported by the documentary evidence included in the hearing record, the parents are only entitled to reimbursement at the rate of \$400.00 per hour for 12 hours of services that can be identified from the hearing record as services related to supervision of the therapist (Tr. pp. 103-04) and the remaining special education services should be limited to \$250.00 per hour.

Further, the co-director testified that, when two service providers were working with the student, IBI would only bill the parents for one provider (Tr. p. 104). The co-director testified that the parents were reimbursed money as they were "double billed" during the school year because

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<sup>27</sup> The co-director testified that 95-98% of the hours charged were at the lower rate (Tr. p. 102). However, this testimony was not correct as IBI charged the parents for 160.25 hours at the rate of \$400.00, including weekend hours (see Parent Ex. I).

they were charged for both providers at the same time (Tr. pp. 106-08).<sup>28</sup> The district is not required to reimburse the parents for charges that are attributable to errors in billing.<sup>29</sup>

A review of the invoices in the hearing record demonstrates that the parents were billed for 997.75 hours of services, this includes all services provided to the student (see Parent Exs. I; J; K). After removing the additional services discussed above that were not required for the provision of a FAPE and accounting for discrepancies in billing, IBI's billing statements indicate the total amount the parents should be reimbursed for consists of 862.25 hours of special education services and 58.5 hours of related services (see id.).

In summary, the parents are entitled to reimbursement for the special education services and related services provided to the student at the hourly rate of \$250.00 for special education services, \$400.00 for 12 hours of supervision, and \$220.00 for related services. However, the parents are not entitled to reimbursement for weekend services, evaluations, observations, billing errors and other non-special education/related services. Further, the hearing record does not support reimbursement for all of the special education services at the rate of \$400.00 per hour. The parents are entitled to reimbursement for 850.25 hours of special education services at the rate of \$250.00 per hour, 12 hours of supervision at the rate of \$400.00 per hour, and 58.5 hours of related services at the rate of \$220.00 per hour. This would entitle the parents to reimbursement of \$230,232.50. The parents submitted proof of payment and are granted reimbursement for the 2016-17 school year in the amount of \$230,232.50 (see Parent Ex. L).<sup>30</sup>

## VII. Conclusion

### **THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the district reimburse the parents \$230,232.50 for the partial cost of the unilateral placement at IBI for the 2016-17 school year.

**Dated:**      **Albany, New York**  
**May 30, 2018**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**

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<sup>28</sup> The co-director also testified that invoices in the record were "corrected" (Tr. p. 108). They were corrected for a clerical error that indicated the student received ABA services and to correct double billing (Tr. pp. 105-08).

<sup>29</sup> In several instances, the parents were charged 2.5 hours, when services were only provided for 1.5 hours (Parent Ex. I at pp. 5, 16, 21, 22). Further, the parents were "double billed" for 4.5 hours (Parent Exs. I at pp. 12, 21, 24; K at p. 19). In addition, some billing statements included charges for time indicated as "no charge" (Parent Ex. I at p. 12), or the hours billed did not add up to the total hours listed on the billing statement (id. at p. 23).

<sup>30</sup> Parent Ex. L was not admitted into evidence at the impartial hearing (Tr. pp. 49, 54-55; IHO Decision at p. 16). However, in a letter dated May 14, 2018 from the district to the Office of State Review, the district indicated that the exhibit was reviewed by the district and was intended to be entered to the hearing record; therefore, they did not object to the evidence being considered.