The University of the State of New York

The State Education Department
State Review Officer
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No. 20-132

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

Appearances:
Mayerson and Associates, attorneys for petitioners, by Gary S. Mayerson, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Rebecca School (Rebecca) and a home-based services program for the 2019-20 school year. Respondent (the district) cross-appeals from the IHO's determination that Rebecca and the student's home-based services program was an appropriate unilateral placement for the student . The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with the detailed facts and procedural history of this matter and the IHO's decision is presumed and will not be recited in detail. Briefly, the student has attended Rebecca since July 2017 (Tr. p. 48). According to the parents, the CSE convened on March 14, 2019, to formulate the student's IEP for the 2019-20 school year; however, the CSE never provided the parents with a copy of the resulting IEP or a "placement school site recommendation" letter identifying the location of a recommended public school placement for the student (see generally Parent Ex. J). In a letter sent via email dated June 14, 2019, the parents notified the district of their intent to unilaterally place the student at Rebecca and seek tuition reimbursement for Rebecca and

reimbursement for other services, including a home-based services program and a 12-month school year program (id. at pp. 1-4; see Parent Ex. M).

In a due process complaint notice, dated July 1, 2019, and an amended due process complaint notice dated September 24, 2019, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Exs. A; C).

An impartial hearing convened and concluded on February 5, 2020 after a single day of proceedings (Tr. pp. 1-109). In a decision dated July 3, 2020, the IHO determined that the district failed to offer the student a FAPE for the 2019-20 school year, Rebecca and the home-based services program were an appropriate unilateral placement, but equitable considerations weighed against the parents' requests for an award of reimbursement for the cost of the programs (IHO Decision at pp. 5-24).[1] The IHO denied the parents' requested relief for the denial of a FAPE for the 2019-20 school year (id.).[2]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer and cross-appeal is also presumed and will not be recited in detail. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether to accept additional evidence submitted by the parents with their request for review;

2. Whether the IHO erred in determining that Rebecca in conjunction with the home-based services program was an appropriate unilateral placement for the student during the 2019-20 school year; and

3. Whether the IHO erred in determining that equitable considerations did not favor the parents' request for relief based on the IHO's finding that the parents lacked standing to bring a claim for tuition reimbursement because the contract entered into between the parents and Rebecca did not legally bind the parents to pay tuition.

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

[1] The July 3, 2020 IHO decision does not contain page numbers. Page numbers identified herein are counted from the first page of the decision.

[2] The requested relief related to the student's home-based services program included up to 20 hours per week of 1:1 ABA instruction, two hours per week of BCBA supervision, up to five 60-minute sessions per week of individual speech-language therapy, up to five 60-minute sessions per week of individual OT, and one hour per week of individual parent counseling and training (Parent Ex. C at p. 10).

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]).[3]

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

A. Preliminary matters – Additional Evidence

The parents have submitted additional documentary evidence with their pleadings for consideration on appeal. The parents attached two proposed exhibits to their request for review; an affidavit of proposed testimony from the student's mother notarized August 10, 2020; and an affidavit of proposed testimony from the executive director of Rebecca notarized August 7, 2020.

[3] 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).

The parents also submit two exhibits with their memorandum of law; a copy of the July 3, 2020 IHO decision under review herein, and a copy of a district due process response dated April 9, 2020 (Parent Mem. of Law Exs. 1-2).

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Here, the parents assert that the district and the IHO did not dispute or discuss the enrollment and tuition contract between Rebecca and the parents during the impartial hearing, rather, the district "sandbagged" the parents and only asserted that the contract was illusory and did not bind the parents to pay tuition in its post-hearing brief, therefore, the parents were not afforded due process to assert the effectiveness of the contract. Accordingly, the parents request reversal of the IHO decision or a limited remand to the IHO so that the IHO can consider the proffered testimonial affidavits of the student's mother and the executive director of Rebecca, which the parents assert refutes the district's arguments, and the IHO's findings, that the parents lacked standing because the enrollment contract was illusory or was the product of collusion between the parents and Rebecca. However, as set forth in detail below, there is already sufficient evidence in the hearing record to render a finding in favor of the parents with respect to equitable considerations. Accordingly, the proffered testimonial affidavits are not necessary to render a decision herein and I decline to consider them.

With respect to the exhibits attached to the parents' memorandum of law, I also decline to consider them. The July 3, 2020 IHO decision is already part of the hearing record, and the offered district due process response dated April 9, 2020 could have been offered at the time of the impartial hearing and is not necessary in order to render a decision herein.

B. Unilateral Placement

As the district has not appealed from the IHO's determination that it failed to offer the student a FAPE for the 2019-20 school year, that issue has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Accordingly, I turn next to the issue of whether Rebecca in conjunction with the home-based services program was an appropriate unilateral placement for the student for the 2019-20 school year. The district specifically asserts on appeal that Rebecca was not an appropriate placement for the student because it utilized a Developmental, Individual-Difference, Relationship-based (DIR) methodology and failed to provide instruction using applied behavioral analysis (ABA) methodology.[4] The district contends that because Rebecca did not provide ABA, the parents had to supplement Rebecca with a home-based services program that did provide ABA instruction.

[4] According to the program director at Rebecca, "DIR is the overriding" methodology used at Rebecca (Tr. pp. 30, 32). She described DIR as a method of providing individualized instruction to improve a student's ability to master six basic developmental levels that students with autism spectrum disorders may have difficulty with,

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

broadening and deepening relationships, and providing intrinsically motivating learning opportunities (see Tr. pp. 49-51). The special education teacher who provided the student's home-based ABA instruction described ABA as a methodology often used with students with autism whereby tasks are broken down into smaller portions so that the student could acquire the skills "in a smaller format" (Tr. pp. 58, 60-61). She further indicated that ABA involves data collection, prompt systems, and reinforcements as a base to help students acquire skills and be motivated at the same time, while changing behaviors (Tr. p. 61).

> 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).

With regard to the parties' dispute over whether Rebecca and the home-based services program was appropriate to address the student's needs, the hearing record supports the IHO's determination that Rebecca—supplemented by the student's home program—was appropriate for the student in that it provided educational instruction designed to meet his unique needs, supported by such services necessary to permit him to benefit from instruction (IHO Decision at p. 20).[5]

The hearing record contains a private psychological evaluation report dated May 9, 2017 developed from a "comprehensive" evaluation of the student conducted in April and May 2017 (Parent Ex. H at pp. 1-10). The evaluators offered the student a diagnosis of an autism spectrum disorder without an accompanying intellectual impairment but with accompanying language impediments, medical conditions, and associated neurodevelopmental conditions (id. at pp. 6-7).[6] The report included a detailed set of recommendations for the student's special education program and services going forward, noting that changes were recommended because the student had "a very challenging year in his current ABA school" and had regressed in skills and become resistant to attending school (id. at p. 7). The evaluators recommended that for the 2019-20 school year, the student "should be placed in a school that emphasize[d] social relationships and sensory integration" in a continuous 12-month program that provided therapy "over the entire week's period" (id.). After school, the evaluators recommended that the student receive up to 20 hours per week of home-based ABA services provided by a special education instructor, and supervised and supplemented by a board certified behavior analyst (BCBA) who would both work directly with the student and provide parent training (id.).[7] The report stated that the goals of the students home ABA program should be "interfaced with what he is learning in school" and the evaluators recommended monthly interdisciplinary meetings with the student's therapists, teachers, and parents to review his progress and adjust his program if required (id. at pp. 7-8). Additionally, the evaluators recommended that the student receive up to five 60-minute sessions per week of 1:1 speech-language therapy, divided between the school and home locations and focusing on

[5] In addition to the home-based ABA services discussed in more detail below, the student's home-based services program consisted of two 30-minute sessions per week of both speech-language therapy and OT (see Parent Exs. V; W). On appeal the district does not put forth an allegation that the IHO erred in determining the home-based related services were not appropriate or excessive, and review of the progress reports does not yield a basis to overturn the IHO's finding on this issue (see id.).

[6] The evaluators administered the Stanford-Binet Intelligence Scale-5th Edition to the student, which they described as "a cognitive measure" that was "standardized on typically developing children who had none of [the student's] disabilities or behavioral challenges" (Parent Ex. H at p. 4). The evaluators further reported that "while [the student's] performance must be interpreted cautiously as an estimate of his function, significant delays [were] apparent" and he also exhibited "a severe expressive and receptive language disorder, limited attention and a substantial sensory processing disorder" (id. at pp. 4-6).

[7] The evaluators recommended that the student receive ABA instruction in the home setting, rather than at school to restore skills lost over the past year, reasoning that if the ABA services are provided in the home the student will feel more comfortable and less threatened and benefit from his strong bond and trust with his mother (Parent Ex. H at p. 7).

expressive, receptive, and pragmatic skills (id. at p. 8). The evaluators also recommended that the student receive up to five 60-minute sessions per week of 1:1 occupational therapy (OT), divided between the school and home locations and combining sensory integration with fine-motor and grapho-motor skills (id.). Lastly, the evaluators recommended that the student continue certain dietary restrictions and that he should be evaluated for a possible auditory processing disorder (id.).

The hearing record also includes a private independent educational review report dated May 25, 2017, consisting primarily of a review of prior records, evaluation reports, and an observation of the student while he attended his then-current private school program (Parent Ex. H at pp. 11-22). The BCBA who prepared the report identified recent regression in the student's language and social skills and recommended, among other things, that he attend a specialized school providing regular sensory-based activities, daily opportunities to develop social interaction skills, and a 12-month program (id. at pp. 20-21). The BCBA suggested that one school that offered this type of program was Rebecca, which provided instruction in the "DIR/Floortime model" (id. at p. 21).[8] The report also contained recommendations for related services and special transportation including speech-language therapy, OT, and parent counseling and training (id.). The BCBA determined that the student required 10 hours per week of individual, home-based instruction to address regressed skills and develop the student's activities of daily living (ADL), interpersonal, communication, and leisure skills (id.).

The hearing record also includes a document describing Rebecca's program and mission, which states that "Rebecca School exists to provide a model educational program for children from 3-to-21-years-old with neurodevelopmental delays in relating and communicating, including Autism Spectrum Disorder" (Parent Ex. Q at p. 1). The document described the typical classroom at Rebecca as consisting of eight students, one teacher, and three teacher assistants, and described various aspects of the curriculum and methodology (DIR and Floortime) used in the classes as well as the related services and facilities available to the student and the student's family (see id. at pp. 3-8).

In testimony during the impartial hearing, Rebecca's program director described the program at Rebecca and noted that the student's class during the 2019-20 school year consisted of nine students, ages 10-13 years old, one head teacher and a total of six adults in the room counting assistant teachers and paraprofessionals (Tr. pp. 34-37). She testified that the student received three OT sessions per week for 30 minutes and three sessions of speech-language therapy per week for 30 minutes (Tr. p. 32). She discussed the Rebecca "treatment plan" for the student and stated that the "overriding methodology that we used, the DIR, as well as the academic curriculums that we use, are all individualized for each student and for [the student]. The teacher and the educational supervisor, as well as occupational therapists, and speech and language pathologists create an individualized plan based on his needs" (id.; see Parent Ex. Y).

[8] According to Rebecca's program description, "Floortime focuses on creating emotionally meaningful learning interactions that encourage mastery of the developmental capacities" (Parent Ex. Q at pp. 1, 7). The description also stated that DIR/Floortime had helped students with autism spectrum disorders "learn to relate to adults and peers with warmth and intimacy, communicate meaningfully with emotional gestures and words, and think with a high level of abstract reasoning and empathy" and allowed Rebecca to "integrate emotional, social, intellectual, and educational goals for each child" (id. at p. 7).

The program director also discussed the student's sensory needs at Rebecca, noting that he could become dysregulated and needed significant amounts of "one-on-one" support during the day, and that group work was more difficult, yet he had made progress in sensory processing and was more aware of his needs (Tr. pp. 40-42). She also described the student's needs and detailed recent progress in the areas of safety in the community, social interaction with peers, and his ability to stay seated in a math group (Tr. pp. 33-34, 42-43).[9] Next, she discussed the parent counseling and training offered at Rebecca, noted the parents' cooperation with the program, and described the coordination between Rebecca and the student's home-based service providers (Tr. pp. 44-47, 52).

When asked her opinion as to whether the student required a home-based services program in addition to Rebecca to make educational progress, the program director responded as follows: "That he does require them. [The student] has many challenges that affect him throughout the day, and the progress that we've seen has been based on the program that has been in place, the home services, plus the school services. And that I do believe is what he needs to meet his needs." (Tr. pp. 46, 55).

The student's private special education teacher and registered behavior technician also testified at the impartial hearing with respect to the student's home-based services (Tr. pp. 56-101). The private special education teacher testified that she was the student's after-school home-based ABA provider and briefly described the ABA methodology (Tr. pp. 60-61). She noted that she provided 12 hours of ABA per week to the student and was supervised in the home program by a BCBA, and that she contributed to March 2019 and September 2019 home-based ABA instructional program progress reports drafted by the BCBA (Tr. pp. 61-65; see Parent Ex. F). She described the primary skills and needs the student's home ABA program focused on as self-care skills, communication skills, basic preacademic skills, health and safety, leisure, and motor skills, and confirmed that the program progress report accurately described the program and progress therein (Tr. pp. 63-64, 85-86; Parent Ex. F). She also described in some detail her experience with the student's needs and behaviors, describing some areas of progress, and related that when the student missed a week of the home-based program, she had to re-teach some things the student had already learned (see Tr. pp. 65-79).

When asked whether the student required the home-based program in addition to that offered by Rebecca, the private special education teacher responded that, "he needs that type of program in his life, because he has deficits that are very significant, and I think that he has benefit from this type of program. I see in the progress, I have seen how he is learning, how he's becoming more independent, and he has made very steady and significant progress" (Tr. p. 79). When asked whether the student receiving ABA instruction during the school day would help reinforce the ABA instruction he received at home, the private special education teacher opined that "it could," but she also testified that students "learned differently in different environments" and with different teaching styles (Tr. pp. 89-91). Lastly, the private special education teacher confirmed that there

[9] The hearing record also contains two written progress reports from Rebecca, one dated June 2019 concerning the end of the 2018-19 school year and the other dated December 2019 written during the 2019-20 school year, which describe aspects of the student's program and goals at Rebecca and document progress in most areas of instruction and skill building that the student's program was aimed at achieving (see Parent Exs. X; DD).

was no reason the student could not work on one methodology during the day, such as DIR, and another , such as ABA, in his after school program (Tr. p. 99).

In a cross-appeal the district asserts that the student's clinicians "repeatedly recommended ABA" instruction for the student "as an effective instructional methodology" and because that is not the method of instruction Rebecca employs, the parents failed to prove that Rebecca was an appropriate unilateral placement. While, as described above, the evidence in the hearing record indicates that evaluators and providers recommended ABA instruction for the student and that he made progress using ABA instruction (see Tr. pp. 63-65, 69-78; Parent Exs. F; H at p. 7; W), another evaluator recommended the student attend a school such as Rebecca that offers a DIR/Floortime model, and Rebecca providers also documented progress the student made at the school while being provided with instruction using DIR/Floortime (see Tr. pp. 34-35, 42-43, 45; Parent Exs. E; H at p. 21; X; Y; DD). In light of the above, review of the evidence in the hearing record shows that the student did not require the ABA methodology to the exclusion of other methodologies, rather, he benefitted from instruction using both DIR/Floortime and ABA techniques, and contrary to the district's assertion, the hearing record confirms that the IHO correctly found that Rebecca and the student's home-based services program was an appropriate unilateral placement for the student for the 2019-20 school year.

C. Equitable Considerations

The parents contend that the IHO erred in finding that equitable considerations barred tuition reimbursement. The IHO was persuaded by the district's claim, raised for the first time in its post hearing brief, that the parents lacked standing in the matter because the parents were not obligated to pay the student's tuition (IHO Decision at pp. 20-24; see Dist. Ex. 4 at pp. 7-11). According to the district the enrollment and tuition contract between Rebecca and the parents was illusory because the parents did not make enough money to pay the student's annual cost of tuition and they were therefore not bound by the contract (Dist. Ex. 4 at pp. 7-11). The IHO agreed and found that "this case has really been brought on behalf of the private school and the after school provider" (IHO Decision at pp. 20-24).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. 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. 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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to the parties' disagreement over equitable considerations, to the extent the IHO held that the parents could not assert a claim for direct funding or tuition reimbursement because they lacked standing and had not incurred a financial obligation to Rebecca, this holding is reversed for substantially the reasons stated by other decisions issued at the administrative review level concerning tuition contracts and their impact on the issue of equitable considerations (see Application of a Student with a Disability, Appeal No. 13-134; Application of a Student with a Disability, Appeal No. 12-230; Application of a Student with a Disability, Appeal No. 12-217; Application of a Student with a Disability, Appeal No. 12-166; Application of a Student with a Disability, Appeal No. 12-152; Application of a Student with a Disability, Appeal No. 12-063; see also E.M. v. New York City Dep't of Educ., 758 F.3d 442, 449-61 [2d Cir. 2014] [holding that a parent's contractual obligation to pay private school tuition and the parent's implied promise to a private school to use her best efforts to recoup the cost of tuition was sufficient to support constitutional standing]).[10]

[10] The IHO also writes in his decision, apparently in dicta after concluding that the unilateral placement was appropriate but the parents lacked standing based upon equitable considerations, that without the home-based services Rebecca "may" be inappropriate because it lacked ABA (IHO Decision at p. 23). The IHO further noted that the parents were asking the district to "fund two programs" in the form of the Rebecca School and the home-based services programs (see id.). To the extent that this constitutes a finding that the parents' unilateral program was excessively costly, I note that equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). As relevant here, the IDEA provides that reimbursement may be reduced or denied upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii][III]; 34 CFR 300.148[d][3]). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services

In its post-hearing brief, the district also cited to a 2012 decision wherein this IHO had ruled that a parent lacked standing in a matter concerning a different student who attended Rebecca where a nearly identical tuition contract was at issue (Req. for Rev. at p. 3; see Dist. Ex. 4 at pp. 7-8). Notably, that determination was reversed on appeal by an SRO, finding that the IHO's determination related more to the availability of relief than to a traditional standing argument and that the relief requested was available (see Application of a Student with a Disability, Appeal No. 12-166 [finding that an award of tuition would redress the denial of a FAPE in circumstances where a nonpublic school has provided an appropriate education to the student and the parents have not made any payments to the nonpublic school]).

Both parties cite to the case, Mr. and Mrs. A. v. New York City Dep't of Educ. (769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of the private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]) in support of their arguments on appeal.[11] Relatedly, the IHO made much of the language in the contract which provided that "[I]f payment is not received by June 1, 2020, a new Payment Schedule may be put in place and the remaining balance may become due immediately" (IHO Decision at pp. 16-18, 20-22; Parent Ex. I at p. 5). In the IHO's view this wording was sufficient to create ambiguity enforced against Rebecca, as the drafter, such that Rebecca could not enforce the terms of the contract and the parents would escape any liability (IHO Decision at p. 21). However, that reasoning has been explicitly rejected by the Second Circuit, which held in E.M. that enrollment contracts are subject to a "plain language interpretation," that courts are loath to refuse to enforce agreements on indefiniteness grounds, and that so long as the contract's essential terms (the educational services to be provided and the amount of tuition) were plainly set out in the written agreement, the contract is enforceable as a matter of law (E.M., 758 F.3d at 458). Here the "essential terms" of the enrollment contract are plainly set out in the written enrollment contract

beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 100-01; C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the [the predecessor statute to the IDEA] requires"]). As stated by the Supreme Court, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; C.B., 635 F.3d at 1160 ["[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996]). However, given that the IHO determined that the program at Rebecca, supplemented by the home-based services program, was an appropriate unilateral placement for the student, a finding with which I agree for the reasons set forth above, and given that the IHO did not identify any specific services as excessive so that they can be excluded from the parents' selected program without making the overall program inappropriate, there is no basis to reduce any award on this basis (see IHO Decision at pp. 20, 23).

[11] The IHO suggested that Mr. and Mrs. A leaves an IHO with discretion to reduce or deny tuition funding where there is collusion between parents and private schools to artificially inflate the cost of tuition (see IHO Decision at p. 21). However, the IHO did not make a finding of collusion and there is no evidence in the hearing record to support such a finding.

executed between the Rebecca School and the parents (Parent Ex. I). The contract offers enrollment at Rebecca for a specified time period, a tuition amount with a payment schedule, and the explicit obligation of the parents to remain responsible for tuition costs in the event they are unable to obtain prospective payment of tuition by the district (id. at pp. 1-6). Accordingly, the IHO's finding that equitable considerations were a bar to tuition funding because the parents lacked standing is reversed.

As a final matter, there appears to be no dispute that the parents lacked the financial resources to directly pay for the student's tuition at Rebecca and the cost of the home-based services program (see Parent Exs. A at p. 10; I; T; see also E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a 'direct-payment' remedy" and holding that "where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework"]; Mr. and Mrs. A., 769 F. Supp. 2d at 406 [finding it appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a nonpublic school where equitable considerations favor an award of the costs of the nonpublic school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).[12] Accordingly, the district shall be required to reimburse the parents for any amounts paid to Rebecca for the student's tuition for the 2019-20 school year, and the home-based services program, and shall directly fund the difference between what has been paid and what is due.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2019-20 school year, and that the unilateral program at Rebecca and the home-based services program were an appropriate unilateral placement, and having reversed the IHO and found that equitable considerations weighed in favor of the parents' request for relief, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 3, 2020 is modified by reversing that portion which found that equitable considerations weighed against the parents' requested relief and reversing that portion which denied reimbursement or direct funding for the unilateral placement of the student at Rebecca and the home-based services program for the 2019-20 school year; and

IT IS FURTHER ORDERED that the district is required to reimburse the parent for any amounts paid for the costs of the student's tuition at Rebecca and the cost of the home-based

[12] During the impartial hearing, the parents had called the student's mother to give testimony concerning, among other things, the family's financial status (Tr. pp. 101-03). However, the IHO decided, over the parents' objections, to dispense with testimony from the student's mother, reasoning that the "tax information" was already a part of the hearing record (id.; see Parent Ex. T).

services program for the 2019-20 school year upon proof of payment by the parents, , and must directly fund the balance of the costs of those programs upon reasonable proof of delivery of services during the 12-month 2019-20 school year.

Dated: **Albany, New York**
November 9, 2020

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STEVEN KROLAK
STATE REVIEW OFFICER