The University of the State of New York

The State Education Department
State Review Officer
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No. 20-195

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 Susan K. Wagner, Esq.

Howard Friedman, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 Keswell School (Keswell) for the 2019-20 school year as moot. Respondent (the district) cross-appeals from that portion of the IHO's decision that ordered it to fund the student's tuition costs at Keswell as the student's stay-put placement during the pendency of the proceedings. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

According to the parents, a CSE last convened and developed an IEP for the student on February 2, 2015, and recommended that the student attend a 12-month school year program in a 6:1+3 special class placement at a State-approved nonpublic school, along with speech-language therapy and transportation (see Tr. p. 23; Parent Ex. A at p. 2).[1] The parents indicated that no IEP

[1] The parents offered a copy of the February 2015 IEP as evidence; however, the district declined to stipulate to

had been developed for the student since that date (see Tr. p. 23). The student began attending Keswell in July 2016 (see Parent Ex. J at p. 1).[2]

On April 5, 2019, the parents entered into an enrollment contract for the student's attendance at Keswell for the "full twelve month extended day (8:45am-4:45pm) school program" for the 2019-20 school year, which included applied behavior analysis (ABA), speech-language therapy, and occupational therapy (OT) (Parent Ex. D).

In a letter to the district dated May 31, 2019, the parents indicated that they had not "heard from [the district] regarding a meeting for [the student]" (Parent Ex. E at p. 1). In a letter to the district dated June 14, 2019, the parents indicated that "to date," no CSE meeting had been held to develop an IEP for the student for the 2019-20 school year (Parent Ex. C at p. 1). Accordingly, the parents advised the district of their intent to continue the student's placement at Keswell "for the 2019-2020 twelve month school year" and seek public funding of the costs of the student's tuition (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2019, the parents alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A). Initially, the parents invoked the student's right to a stay-put placement during the pendency of the proceedings, alleging that the pendency placement lay in the February 2015 IEP and consisted of a 6:1+1 special class placement at a State-approved nonpublic school, along with three 30-minute sessions of individual speech-language therapy and transportation on a 12-month basis (id. at p. 2).

Turning to their substantive allegations, the parents asserted that the district failed to convene a CSE to develop an IEP for the student for the 2019-20 school year, despite the parents' requests for the same (Parent Ex. A at pp. 2-3). The parents also alleged that the district failed to identify a school location for the student to attend for the 2019-20 school year (id. at pp. 3, 7). Related to these allegations, the parents also asserted that the district failed to provide the parents with prior written notices, meaningfully communicate with the parents or the student's then-current providers in advance of a CSE, sufficiently evaluate the student or consider private evaluations, or conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) (id. at pp. 3-4). While alleging that no IEP was developed, the parents also separately asserted that the district failed to identify the student's present levels of performance, develop appropriate annual goals, promote the student's generalization of skills to a new educational setting, address the student's need for a sensory diet and access to sensory equipment, address the student's need for 1:1 teaching throughout the school day, or offer an ABA program, related services, assistive

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its introduction (Tr. p. 14). The IHO indicated that the parents could "renew an application for consideration of the document provided a foundation [wa]s laid and the document [wa]s properly authenticated" (Tr. p. 15). The parents did not offer the document as evidence again during the impartial hearing.

[2] The circumstances surrounding the student's attendance at Keswell during the 2016-17, 2017-18, and 2018-19 school years are not explained in the hearing record; accordingly, it is unknown whether or not the student attended Keswell at the expense of the parents or the district or if the appropriateness of the school had ever been the subject of an impartial hearing.

technology, extended school year services, transportation services, or parent counseling and training (id. at pp. 5-7).

The parents also alleged that the student's unilateral placement was appropriate and that equitable considerations weighed in favor of their requested relief (Parent Ex. A at p. 8). The parents sought "reimbursement and/or funding" for the costs of the student's attendance at Keswell for the 2019-20 school year (id.). In addition, the parents requested "compensatory education for any and all educational services [the student] [wa]s entitled to that the [district] failed to provide, including his pendency entitlements" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on May 4, 2020 and concluded that day (Tr. pp. 1-120). During the impartial hearing, the district indicated that it would not be presenting testimonial or documentary evidence regarding its offer of a FAPE to the student for the 2019-20 school year (see Tr. p. 8).

In a decision dated November 5, 2020, the IHO held that the district's failure to present any evidence at the impartial hearing "amount[ed] to a concession that the agency did not offer the student a FAPE" (IHO Decision at pp. 8-9). The IHO further found that the "documentary and testamentary evidence submitted by the Parent [was] credible and uncontroverted" (id. at p. 10).

However, the IHO found that the parents' request for the costs of the student's tuition at Keswell had become moot as of the date of the IHO's decision given that the 2019-20 school year had ended and the student had been entitled to attend Keswell at district expense pursuant to pendency (IHO Decision at pp. 14-16, 27-28). Specifically, the IHO found that it was undisputed that the student's pendency placement was based on the February 2015 IEP "in conjunction with the student's operative placement at the time that pendency was invoked, which [wa]s the student's current private school" (id. at p. 14). In addition, the IHO found that the student's pendency placement "cover[ed] the entirety of the student's 12-month 2019-2020 school year" (id.). The IHO also found that the matter did not fall within an exception to the mootness doctrine in that it was not "capable of repetition, yet evading review" and summarized or discussed related caselaw (id. at pp. 17-26).

Based on the foregoing, the IHO ordered that, retroactive to the date of the parents' due process complaint notice on July 1, 2019 and through the entirety of the 12-month 2019-20 school year, the district was obligated pursuant to pendency to fund "the cost of the student's receipt of all of the services detailed in his IEP dated February 2, 2015, which include: (a) the student's 6:1:3 placement at his present private school; (b) 3x30 individual speech therapy sessions per week; and (c) transportation to and from school, all as part of a twelve-month school year, as it constitutes the student's operative placement at the time that pendency was invoked" (IHO Decision at p. 27 [emphasis in the original]). The IHO also ordered the district to "immediately re-evaluate the student in all areas of his suspected disabilities not evaluated within the last two years" and reconvene the CSE to consider such evaluations and develop an IEP for the 2020-21 school year (id.). Finally, the IHO held that "any of the other relief sought by the Parents not addressed by this 'Order on Pendency, Mootness & Dismissal' [wa]s found to be either resolved by the parties,

withdrawn by the Parent, outside the scope of the IHO's authority or unsupported by the record" (id. at p. 28).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in dismissing their claims as moot by operation of pendency. Specifically, the parents allege that the IHO conflated the pendency placement with the unilateral placement and appeared to "believ[e] (erroneously) that the student's automatic and unconditional pendency entitlements were the same as the relief that the [parents] w[ere] seeking." The parents assert that the pendency placement included a 6:1+3 special class placement at a State-approved nonpublic school, whereas the student received instruction in a 1:1 student-to-adult ratio at Keswell during the 2019-20 school year. The parents assert that Keswell provided specially designed instruction to meet the student's needs and that the student made progress across all domains during the 2019-20 school year. The parents request that a determination be reached on the merits of the appropriateness of the unilateral placement and their request for tuition reimbursement for the student's attendance at Keswell for the 2019-20 school year. Alternatively, the parents request that the matter be remanded to the IHO.

In an answer, the district responds to the parents' appeal with admissions and denials. In a cross-appeal, the district asserts that the IHO erred in finding that Keswell was the student's pendency placement. First, the district asserts that the IHO erred in reaching the question of pendency absent either a hearing on the issue or evidence of an agreement between the parties. Further, the district alleges that there was no legal basis for the IHO's determination that the district was obligated to fund the student's attendance at Keswell, "an entirely different nonpublic school that New York State has not approved to provide special education and services to students with disabilities." Rather, the district asserts that Keswell was a unilateral placement and that the Second Circuit Court of Appeals has recently clarified that parents may not "port pendency from one school to their preferred school under the guise of pendency." The district alleges that the IHO erred in finding that Keswell was the operative placement for purposes of pendency. Next, to the extent that the IHO relied on an erroneous pendency determination to find the parents' claims moot, the district asserts that the parents failed to meet their burden to show that Keswell was an appropriate unilateral placement for the student for the 2019-20 school year.

In an answer to the district's cross-appeal, the parents respond to the district's allegations with admissions and denials. The parents argue that they met their burden to show that Keswell was an appropriate unilateral placement for the student for the 2019-20 school year. The parents also note that the district did not raise any issue relating to equitable considerations that would warrant a reduction or denial of equitable considerations. Accordingly, the parents request that the district be required to reimburse them for the costs of the student's tuition at Keswell for the 2019-20 school year.[3]

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[3] In a reply, the district asserts that the parents' answer to the cross-appeal should not be considered since it was not accompanied by an affidavit of verification as required by State regulation. The parents filed their answer to the district's cross-appeal (with an affidavit showing service on the district on December 30, 2020), along with two affidavits of verification signed by the parents (with a separate affidavit showing service of the verifications on the district on January 4, 2021). Considering the circumstances surrounding the filing of the pleadings in this

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]).

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matter during the COVID-19 pandemic and that the parents subsequently served and filed affidavits of verification, as a matter within my discretion I decline to reject the parents' answer to the cross-appeal on this ground (see Application of a Student with a Disability, Appeal No. 20-049; Application of the Dep't of Educ., Appeal No. 20-027; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; see also J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015] [noting that "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored"]).

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student 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

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

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. Pendency and Mootness

On appeal, the parties agree that the IHO erred in finding that Keswell was the student's pendency placement.

It is altogether unclear why the IHO made a determination regarding the student's pendency placement. Although in the due process complaint notice the parents generally invoked the student's right to a stay-put placement during the pendency of the proceedings, asserting that the student's last agreed upon placement was set forth in the February 2015 IEP (see Parent Ex. A at p. 2), neither party raised the question of pendency on the record during the impartial hearing and there is no interim decision or agreement on pendency in the hearing record (see generally Tr. pp. 1-120).[5] The only mention of pendency during the impartial hearing was the IHO's statement without further elaboration that "[t]he reason of request for a pendency in this case, the Parent asserts that the Department of Education did not create an IEP for this student for the 2019/2020 school year" (Tr. p. 7). "If there is dispute as to the status of the student during the impartial hearing (i.e., pendency), this issue should be raised immediately with the IHO" (see " Questions and Answers on Impartial Due Process Hearings for Students with Disabilities," at p. 15, Office of Special Educ. [Jan. 2018], available at http://www.p12.nysed.gov/specialed/dueprocess/documents/impartial-hearing-guidance-jan-2018.pdf). However, absent a dispute, the IHO should not sua sponte make determinations about the student's pendency, particularly without giving the parties notice of his intent do so or receiving evidence on the issue.

Moreover, the IHO's conclusion that Keswell was the student's pendency placement is factually and legally flawed. The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]). Pendency has the effect of an automatic injunction, and the party requesting it

[5] According to the parents, the IHO and the parties engaged in an off-the-record discussion, during which time it was discussed that "pendency . . . at that point was not being implemented or utilized and hence there was no need for a pendency hearing as part of the proceeding" (Req. for Rev. at p. 3 n.3).

need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Recently, the Second Circuit has further explained that a parent may not unilaterally move a student to a preferred nonpublic school and still receive pendency funding, since it is the district

that is authorized to decide how (and where) a student's pendency services are to be provided as per the text and structure of the IDEA and given that the district is the party responsible for funding the pendency services (Ventura de Paulino, 959 F.3d at 532-35). The Court observed that:

> If a parent disagrees with a school district's decision on how to provide a child's educational program, the parent has at least three options under the IDEA: (1) The parent can argue that the school district's decision unilaterally modifies the student's pendency placement and the parent could invoke the stay-put provision to prevent the school district from doing so; (2) The parent can determine that the agreed-upon educational program would be better provided somewhere else and thus seek to persuade the school district to pay for the program's new services on a pendency basis; or (3) The parent can determine that the program would be better provided somewhere else, enroll the child in a new school, and then seek retroactive reimbursement from the school district after the IEP dispute is resolved

(id. at 534). Therefore, the Court concluded that "[r]egardless of whether the educational program that the Students are receiving at [the new nonpublic school] is substantially similar to the one offered at [the prior nonpublic school], when the Parents unilaterally enrolled the Students at [the new nonpublic school] for the 2018-2019 school year, they did so at their own financial risk" (id.).

Here, the parents agree that they enrolled the student at Keswell at their own financial risk as a unilateral placement and that the student was not entitled to attend Keswell at district expense pursuant to pendency. The parties are in agreement that the February 2015 was the student's last agreed upon placement and there is no evidence in the hearing record of an agreement between the parties regarding the student's placement at Keswell or an unappealed IHO decision ordering the district to fund the student's tuition at Keswell during another school year. Accordingly, there is no basis for a finding that Keswell was the student's pendency placement. The IHO's finding that the student's pendency placement lay in the February 2015 IEP "in conjunction with the student's operative placement at the time that pendency was invoked, which [wa]s the student's current private school" is particularly perplexing (IHO Decision at p. 14). As described above, a student's "then current placement" has been found to mean either the most recently implemented IEP, the operative placement, or the placement at the time of the previously implemented IEP (Dervishi, 653 Fed. App'x at 57-58), not some hybrid of these options. Moreover, courts have typically only relied on the "operative placement" to determine pendency when there is "no previously-implemented IEP," which is not the case here (see Melendez v. New York City Dep't of Educ., 420 F. Supp. 3d 107, 122-23 [S.D.N.Y. 2019]). And, applying the rationale set forth in Ventura de Paulino, courts have explicitly rejected reliance on the operative placement to find that a unilaterally chosen nonpublic school constitutes pendency absent an agreement between the parents and the district (Araujo v New York City Dep't of Educ., 2020 WL 5701828, at *3 [S.D.N.Y. Sept. 24, 2020], reconsideration denied, 2020 WL 6392818 [S.D.N.Y. Nov. 2, 2020], citing Ventura de Paulino, 959 F.35 at 536). Accordingly, the IHO erred in finding that the district was obligated to fund the student's attendance at Keswell for the 2019-20 school year pursuant to pendency.

Having erred in his pendency determination, the IHO then also erred in relying on said determination to find that the parents' request for tuition reimbursement was moot.[6] The IHO rested on a sua sponte pendency determination, which was factually and legally erroneous, and, therefore, failed to reach the substantive merits of the parents' request for tuition reimbursement. Having no substantive decision from the IHO to review, I considered remanding this matter. When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). However, given that this matter has already been pending for well over a year and the hearing record is sufficiently developed on the issue of the appropriateness of Keswell to make a determination, I will exercise my discretion and reach the merits of the parents' request for tuition reimbursement in this instance.

B. Unilateral Placement

As noted above, during the impartial hearing, the district did not argue or offer evidence that it offered the student a FAPE for the 2019-20 school year, and the IHO determined that it failed to meet its burden in this respect (see Tr. p. 8; IHO Decision at pp. 8-9). The district has not appealed the IHO's finding that it failed to offer the student a FAPE for 2019-20 school year and, therefore, that determination has become final and binding on the parties and shall not be reviewed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Accordingly, the next issue to be determine is whether Keswell was an appropriate unilateral placement for the student.

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[6] A dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X, 2008 WL 4890440, at *12; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). A claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig, 484 U.S. at 318-23; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040).

The district claims that the record evidence does not support the conclusion that Keswell was an appropriate placement for the student. Initially, the district asserts that none of the student's teachers at Keswell were Board Certified Behavior Analysts (BCBAs) or Licensed Behavior Analysts (LBAs), which the district opines is particularly noteworthy given the rigorous requirements for providing ABA in New York State. The district further asserts that the degree of standardization at Keswell does not support the conclusion that the school provided the student with individualized instruction specifically designed to meet his unique needs. Moreover, the district argues that the general information provided about Keswell was insufficient to prove the placement's instruction was specially designed to meet the unique needs of the student. Lastly, the district asserts that claims of the student's progress at Keswell are belied by the lack of objective evidence of progress in the progress reports entered into the hearing record.

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] [finding that "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 Needs

A brief discussion of the student's special education needs is necessary to evaluate the appropriateness of the parent's unilateral placement of the student at Keswell for the 2019-20 school year.

As an initial matter, I note that the hearing record does not include any evaluations or progress reports that detail the student's academic, speech-language, social/emotional, or motor needs in June 2019. Because the district elected not to enter into the hearing record any evaluative information or assessments from the student's records, it effectively abandoned its foremost opportunity to put forth its own viewpoint of the student's special education needs and the extent to which the unilateral placement either addressed or failed to address those needs. Accordingly, if the reports and assessments relied upon by the nonpublic school in developing the student's educational program were not sufficiently accurate or complete for the purposes of determining the student's needs, at this point in the proceedings, 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. v. Bd. of Educ. of the City Sch. Dist. of the City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

The documentary evidence most contemporaneous with the parent's notice to the district of her intent to unilaterally place the student at Keswell for the 2019-20 school year is a behavior reduction plan, created by Keswell in June 2019 (Parent Ex. F). The behavior reduction plan indicated that the student demonstrated self-stimulatory and aggressive behaviors (id. at p. 1). More specifically the plan indicated that the student engaged in mouthing, described as placing non-edible items and fingers in his mouth; visual stimulation, described as crossing his eyes or looking out from the corner of his eyes, at times paired with tilting his head; and hand/arm waving, defined as extending one hand or arm to the side or front and waving (id.). The student also exhibited non-complaint behaviors such as dropping, grabbing, throwing, not responding to instruction, and giving incorrect responses to previously learned material; and elopement, defined as leaving the assigned location without permission or function (id.). In October 2019, protesting, defined as perseveration on augmentative and alternative communication (AAC), banging hands on table, and self-stimulatory motor resistance were added to the student's behavior reduction plan (Parent Ex. G at p. 1).

In addition to the behavior reduction plans, the hearing record includes a December 2019 progress report that details the student's progress toward an integrated education plan developed by Keswell for the student for the 2019-20 school year (Parent Ex. P).[7] With respect to the student's learning style, the integrated education plan stated that, in order to acquire and maintain skills across all domains, the student required a consistent, predictable, highly structured environment using ABA with 1:1 instruction (id. at p. 1). The education plan further stated that skill acquisition required fast paced instruction, repetition, and skills to be broken down into small incremental steps in which visual and physical support was systematically faded over time (id.). According to the education plan, the student did not learn new skills in a group format, and it was necessary to provide him with a personal visual schedule paired with a dual token system throughout the day (id.). The education plan noted that the student engaged in maladaptive behaviors that interfered with skill acquisition (id.).

The education plan indicated that the student needed to improve his pre-academic skills such as following a photographic or written activity schedule; motor imitation; fine motor skills and handwriting; visual performance; beginning math such as counting, 1:1 correspondence and telling time; reading skills such as matching and labeling letters and reading simple words; and spelling skills such as naming letters in three letter words (Parent Ex. P at pp. 6-12).

According to the education plan, the student was non-verbal and required the use of an AAC device to effectively communicate (Parent Ex. P at p. 5). The student used the application Proloquo2go on his iPad or iPhone to request food and preferred toys and activities, to comment on his environment, and to respond to simple questions (id.). The plan indicated that the student needed to improve his expressive and receptive language skills including verbal acknowledgement, following directions, making spontaneous requests, tacting (labeling) pictures, answering questions using AAC, and attending (id. at pp. 1-6).

With respect to community skills, the education plan indicated that the student had difficulty walking past dogs in the community and would kick his shoes off in an effort to escape or avoid the encounter (Parent Ex. P at p. 6). The education plan indicated that as part of adapted physical education the student needed to increase his engagement in sports and the student needed to learn how to engage in developmentally appropriate play and leisure skills within the school and community (id. at pp. 10-12). The student also needed to improve his social skills for interacting with peers including turn taking (id. at p. 13).

Turning to activities of daily living, the education plan indicated that the student needed to develop greater independence with toileting, grooming, dressing, and eating (Parent Ex. P at pp. 15-16). Next, the education plan highlighted the student's needs as they related to behavior skills indicating that the student to learn how to wait quietly, increase eye contact, and decrease self-stimulatory and non-compliant behaviors (id. at pp. 17-19).

In addition to the Keswell integrated education plan, the hearing record included a December 2019 speech and language progress report and a January 2020 OT progress report from

[7] Although the hearing record suggests that the education plan was initially developed at the beginning of the school year, a copy of the plan, as it existed in July 2019, was not made part of the hearing record (see Tr. pp. 98-99; Parent Ex. P).

the school which provided additional insight into the student's needs (Parent Exs. I; J). The long and short-term goals included in the December 2019 speech and language progress report suggested that with respect to receptive language the student had difficulty understanding linguistic concepts, sequencing, "wh" questions, and syntax (Parent Ex. I at pp. 1-3). In addition, the student had difficulty with language processing and inferencing skills (id. at p. 2). With respect to expressive language, the progress report suggested that the student had difficulty with the formation of phrases, vocabulary, and the use of syntax (id. at pp. 3-4). The speech and language progress report also indicated that the student needed to improve his social language and leisure skills (id. at pp. 4-5). The January 2020 OT progress report indicated that the student demonstrated delays in sensory processing and motor planning and had difficulty performing gross motor skills (Parent Ex. J at pp. 1, 3-4). The report noted that the student had decreased strength, balance, and coordination (id. at p. 1). The report further noted that fine motor and visual perceptual skills continued to be an area of great difficulty for the student due to his poor hand-strength and eye-hand coordination (id. at p. 2). According to the OT progress report the student had difficulty performing self-care skills such as donning clothing and manipulating zippers (id.).

According to the student's mother, the student demonstrated delays in his language and motor development (Tr. p. 19). She reported that the student was initially diagnosed as having a pervasive developmental disorder – not otherwise specified (PDD-NOS) and later with an autism spectrum disorder (Tr. p. 22). The student's mother reported that the student was nonverbal and communicated through pointing, sign language, and the use of an iPad (Tr. pp. 22, 32). The parent indicated that the student would sometimes bite a or squeeze a person's hand in order to gain their attention, would spin and at times his eyes would roll, tended to elope "quite a bit," and nibbled at his hands and fingers when excited (Tr. pp. 21-22). The student's mother testified that the student had deficits in reading, math, and speech and that his cognitive skills, fine motor skills, handwriting, and safety awareness were delayed (Tr. p. 32).

The associate director of the lower school at Keswell reported that the student had deficits in his receptive and expressive language skills, with his receptive language skills being stronger (Tr. p. 73). She explained that the student required all instructions to be systematically taught to him and, although the student could follow numerous one-step instructions, expanding to two-step instructions was very challenging for the student and required direct instruction (id.).

2. Specially Designed Instruction

Contrary to the district's claim, a review of the hearing record shows that Keswell addressed the student's identified special education needs.

A Keswell School program description, entered into evidence by the parent, indicated that Keswell is "a therapeutic and educational model for children with Autism Spectrum Disorder (ASD) that integrates ABA, Speech therapy and Occupational therapy" (Parent Ex. L). The school is composed of lower and upper schools; there are 28 children ages 3-11 in the lower school and 26 students ages 12-21 in the upper school (id.). The school runs from 8:45 a.m. to 4:45 p.m. and provides instruction using a 1:1 student-to-teacher ratio (id.). According to the program description, the educational model at Kewell consists of a multi-disciplinary team approach in which the disciplines works together to advance a child's learning and behavioral control (id.). The school develops individual positive behavior support plans designed to decrease a student's

maladaptive behaviors and increase functional, pro-social behaviors and communication (id.). The school employs ABA therapy to enhance students' focus and attention, establish eye contact, practice language development, and teach cognitive and life skills (id.). The program description indicated that Keswell developed assessment-based goals and used data-driven decision making (id.). The school considers the teaching of play and leisure skills to be an integral part of learning, so that child-directed play and leisure can be used to build relationships as well as to encourage language problem-solving and community participation (id.). According to the program description, the speech-language therapists at Keswell lead the team in language and AAC and work closely with the occupational therapists to encourage language during sensory integration therapy (id.). Each child receives speech-language therapy individually, in a dyad, in a small group, or within a consult model, depending on their need (id.). As detailed in the program description, the occupational therapists as Keswell provide sensory integration therapy and focus on fine motor, graphomotor and typing, feeding, community, ADL, and vocational skills (id.). The occupational therapists work with classroom staff to plan daily exercise routines and to discuss movement and tactile techniques designed to increase attention, focus, and verbalizations during class time (id.). The occupational therapists also provide input on needed accommodations for vocational and community settings (id.). The program description indicated that Keswell offered daily adapted physical education which was designed to build a strong body and strong mind, as well as team spirit (id.). Socialization occurred throughout the day and during dyads and small groups (id.). The program description explained that social groups run by speech-language pathologists were designed to enhance friendship skills and students were taken out into the larger community to generalize their acquired skills (id.). The school had an open-door policy for parents and caregivers that allowed for ongoing family training (id.). With regard to life skills, the school worked on developmentally appropriate training from very young childhood (play) to young adulthood (vocational skills) (id.). According to the program description fading of 1:1 support was always a goal of the school (id.).

The associate director of the lower school at Keswell testified that the student had attended the school since July 2016 (Tr. p. 63). She reported that the student received 1:1 instruction every day from 8:45 a.m. to 4:45 p.m. (Tr. p. 64). The associate director opined that the student required ABA because he required skills to be broken down into "very, very small, incremental steps with full support built in" (id.). She noted that the student demonstrated behaviors that interfered with his ability to learn and therefore he required ABA to learn new skills and at the same time decrease his interfering behaviors (Tr. pp. 64-65). The associate director testified that there were five students (total) between the ages of 7-9 in the student's classroom and the student-to-teacher ratio was 1:1 (Tr. p. 65). She explained that there was a general classroom schedule that all of the student's followed (Tr. 66). The student's weekly schedule included ten 45-minute periods per day made up of morning routine, peer centers and chores, snack, gym, morning meeting, lunch, community outing, story, group game/movement, art/science, snack (including music and play and leisure), and/or hobby groups (Parent Ex. K). The schedule also reflected a 30-minute afternoon meeting at the end of the day which included toileting and packing up (id.). The associate director testified that the student received speech-language therapy one time per day for 45 minutes as a push-in service, individual OT four times per week for 45 minutes as a pull-out service, and one small-group OT session pushed into the classroom with ABA support (Tr. pp. 66-67). The associated director testified that the student's related services were not reflected on the weekly classroom schedule and the time at which the student received related services varied each day (Tr. p. 66). The associate director confirmed that the student presented with interfering behaviors

and reported that Keswell had assessed the student's behaviors and developed two behavior reduction plans (Tr. pp. 67, 69-70). The first plan was developed in June 2019 for the 2019-20 school year (Tr. p. 70; Parent Ex. F). However, the student subsequently began demonstrating protesting behavior and the plan was amended in October during parent/teacher conferences (Tr. p. 70). The associate director described and defined the student's maladaptive behaviors (Tr. pp. 70-71). She reported that the student's behavior reduction plans were developed by collecting data on the frequency, duration, and function of the student's behaviors and were used to measure the rate of behavior so that staff would have something to measure their interventions by (Tr. p. 72). She noted that once the function of the student's behavior was determined staff created interventions and tracked how effective they were (id.).

According to the January 2020 OT progress report, the main focus of the student's OT sessions was sensory processing (Parent Ex. J at p. 1). The report indicated that movement activities, such as obstacles courses, exercises, and use of the treadmill, were implemented throughout the student's school day in order to improve his self-regulation and arousal levels (id. at pp. 1-2). The activities were typically completed prior to transitioning to table-top activities in order to improve the student's attention (id. at p. 1). The student also participated in yoga as a means of improving his body awareness and overall strength (id.). The OT progress report noted that weight bearing tasks in the gym, such as animal walks or using the scooter board were used to build upper extremity strength needed for fine motor skills (id. at p. 2). The report further noted that preparatory activities such as manipulating theraputty, stretching theraband and using tongs were employed to improve the student's dexterity (id.). According to the report, the student was working on tracing and copying simple shapes and also the "Frog Jump" letters from the Handwriting Without Tears program (id.). The progress report indicated that to address the student's gross motor needs the therapist created an exercise circuit for the student (id. at p. 4). To target the student's balancing skills the therapist used a balance beam, stepping-stones, and a Bosu ball (id.).

The parent testified that she communicated with the staff at Keswell on a daily basis, that she received a report from staff everyday as well as suggestions regarding things staff wanted the parent to work on at home (Tr. p. 34).

The hearing record indicates that, in March 2020, Keswell closed-down and switched to remote instruction due to the COVID-19 pandemic (Tr. pp. 41-42, 89-90). During the impartial hearing, the district argued that Keswell was not appropriate because of the amount and quality of instruction that the student received after the shut-down (see Dist. Ex. 1 at pp. 3-4). However, on appeal, the district has not pursued this argument. Nevertheless, the evidence regarding the remote instruction delivered to the student during the COVID-19 shut-down is summarized herein.

The associate director described the student's remote learning plan (Tr. p. 89). She reported that beginning the week of March 16, 2020 work skills were sent home to the student's parents to work on (Tr. p. 90). The following Monday, March 23, 2020, the student began participating in a combination of live instruction via teleconferencing and working on work packets that were sent home (id.). The associate director indicated that, at the time of her testimony in May 2020, the student was participating in several live instruction sessions throughout the course of the day with the "full support of one of his parents" to help him attend to skills, respond appropriately to instruction, and to redirect any interfering behaviors (id.). The associate director reported that the

student was being provided OT by his occupational therapists through live, remote sessions and the same was true for speech-language therapy and ABA instruction (Tr. p. 109). She acknowledged that remote instruction had been an adjustment for the student and without his mother's help he would not be able to do it (Tr. pp. 110, 111). She noted that the student exhibited escape-related behaviors during the remote sessions (id.). According to the associate director, the student's teachers provided him with reinforcement during the live remote sessions by verbally reinforcing the student and also reinforcing him with his most preferred videos (Tr. p. 111).

The associate director agreed that in order for an ABA program to be successful it required an intense amount of time and further agreed that the American Academy of Pediatrics recommended a minimum of 25 hours of ABA a week (Tr. p. 111). She indicated that a combination of live sessions and the work the school was sending home and parent training allowed the parent to replicate sessions when his teachers were not in live sessions with him (Tr. pp. 111-12). She indicated that throughout the live sessions Keswell staff was providing direct instruction but was also training the parent as to how the program should be run, what kind of questions to ask, what the student response should look like, and how often staff provided reinforcement using a token system (Tr. p. 113). In addition staff was providing instruction to the parents on how to redirect interfering behaviors so that not only could they help staff during the live session but also so they able to work with on skills with their child outside of the live sessions (Tr. p. 114). The parent training took place between 8:45 a.m. and 4:45 p.m. and was encompassed within the Keswell training sessions (id.). The associate director testified that she was involved in the student's remote learning and that she met weekly with the student's classroom supervisor and had been a part of several of his live instructional sessions (Tr. p. 91). She opined that during the shut-down related to the COVID-19 pandemic, Keswell was trying to address the student's needs to the greatest extent possible, given the circumstances (Tr. p.115). However, she further opined that after the shutdown was over the student would continue to need full-day, 1:1 instruction in order to make meaningful progress (Tr. p. 116).

The student's mother reported that Keswell closed on or around March 16, 2020 due to the pandemic and that the student had been staying home with her (Tr. p. 42). She explained that Keswell had provided her family with a very structured schedule to follow and that there were Zoom sessions and remote learning, which had really helped them (Tr. p. 43). The parent reported that Keswell worked with the family every day and that the student was still progressing and doing very well under the circumstances (id.). The parent estimated that during remote learning the student spent four to five 30-minute sessions per day and on one 15-minute session per day with his teachers (Tr. pp. 43-44). She further estimated that the student received speech four to five times per week and indicated that speech and OT accounted for two of the student's four to five daily sessions (Tr. p. 45). The student's mother testified that she, the student's father, or her brother sat with the student during remote learning sessions (id.). She stated that she and the student's father tracked the student's behavior when he was not in school (id.). She explained that when they saw the progress the student was making during his sessions they would sometimes, with his teachers, change the sessions (Tr. p. 46). The student's mother reported that the parents charted the student's behavior, meaning they kept track of what the student did well and what he needed more help with (Tr. p. 48). The student's mother explained that with regard to collecting data, as a parent she just took down notes on what the student could improve on and what his progress was (Tr. p. 53). She acknowledged that she did not have a degree in behavioral analysis and was not licensed (id.).

According to the student's mother, all of the student's instruction from Keswell was provided over the computer (Tr. p. 48). She reported that in addition to a laptop the student used his iPad and iPhone to access the remote instruction (id.). The student's mother testified that the student received physical therapy at Keswell (Tr. p. 49). She explained that by physical therapy she meant when the student worked on sit-ups, push-ups or different positions to get his body stronger (Tr. p. 50). She confirmed that the student did not have a physical therapist at Keswell (Tr. p. 51).

With regard to Keswell providing the family with suggestions for things to do at home, the student's mother reported that, for example, the student had trouble squeezing things or gripping a pen to write and Keswell staff suggested that they use a special grip or clay to help the student with that (Tr. p. 49). Staff also showed the family certain ways for the student to hold a pen or pencil to keep from dropping it so that he could write his name (id.). Keswell provided additional suggestions with regard to the student carrying things around the house including to use both hands (id.). The student's mother reported that at the suggestion of Keswell the family worked with the student on sit ups or yoga poses to help strengthen his trunk (Tr. p. 50).

Turning to the district's claim that Keswell was inappropriate because the instructors at the school were not BCBAs or LBAs, as noted above, it is well established that a private school need not employ certified special education teachers (see Carter, 510 U.S. at 13-14). The associate director reported that the ABA therapists in the student's classroom provided the student with ABA therapy and confirmed that none of them were licensed behavior therapists (Tr. pp. 99-100). She further confirmed that, although she supervised the ABA therapists, she was also not a licensed behavior analyst (Tr. p. 100). The associate director testified that the student's classroom supervisor at Keswell a held master's degree in special education and his head teacher was pursuing a master's degree in special education and her BCBA (Tr. p. 81). In addition, one ABA therapist in the student's classroom held New York State certification for special education, another held a bachelor's degree and was pursuing certification as a registered behavior technician, and a third held a master's degree in special education and was pursuing her BCBA (id.). A fourth ABA therapist held a bachelor's degree (id.). The associate director reported that the student's speech therapist and occupational therapists were all certified (Tr. pp. 81-82). Moreover, she opined that the student received high quality instruction, that his instructors were well trained and that Keswell was an appropriate school for the student (Tr. pp. 82, 87-88).

Here, the hearing record shows that although the student's ABA therapists were not BCBAs or LBAs two of the therapists working with the student had either a degree or certification in special education and, also, two therapists were pursuing additional training in ABA. In addition, according to her resume, the associate director of Keswell had participated in ABA training and had worked as an ABA therapist or supervisor since 2002 (Parent Ex. O). Based on the above, the lack of certification of the student's ABA therapists does not warrant a finding that the parent's unilateral placement was inappropriate.

Next the district claims that the parent's unilateral placement at Keswell was not appropriate because it did not provide the student with instruction specially designed to meet his unique needs; however, the hearing record does not support this assertion. Based on the associate director's testimony, it is clear that some aspects of the program at Keswell were the same for all students. For example, the associate director confirmed that all students at Keswell received a 12-

month program and in her clinical opinion student's with autism required a 12-month program (Tr. p. 92). She further confirmed that the frequency and duration of speech-language therapy was the same for all students in the class, as was the frequency and duration of OT (Tr. p. 96). She acknowledged that Keswell did not have a physical therapist on staff nor did the school provide physical therapy (Tr. p. 96). In addition, the associate director confirmed that the weekly schedule submitted into evidence was the schedule for all students in the class but noted that each student had their own individualized related service sessions (Tr. p. 96).

However, the associate director's testimony also showed that the content of the student's educational program was specific to him. The associate director testified that the student and his classmates did not have identical goals and objectives, rather the education plans were individualized (Tr. p. 101). She explained that the student's Keswell education plan was individualized in that it was created based on the results of an assessment of the student using the Assessment of Basic Language and Learning Skills (ABLLS) (Tr. p. 80). With respect to goals, the associate director testified that once the ABLLS was completed at the end of the previous school year, the results were presented in a grid-like format (id.). Staff looked for areas where there were gaps in the student's learning, or in which the student's skills had plateaued, and then attempted to fill the gaps and move the student forward with his skill set (Tr. pp. 80-81). In terms of the student's instruction, the associate director reported that the student's teacher did not create daily or weekly lesson plans for him rather staff worked off a data sheet (Tr. pp. 105-06). The associate director explained that the data sheet was created using the student's individualized skills and the targets that he was working on at the time (Tr. p. 106). She opined that the goals on the student's Keswell IEP were meaningful (Tr. p. 81).

The associate director's testimony, coupled with the progress reports in the hearing record, show that the student's program at Keswell was individualized and the fact that all of the students' programs shared common aspects does not provide a basis for finding the student's program at Keswell inappropriate.

3. Progress

To the extent that the district argues that the hearing record lacks objective evidence of the student's progress at Keswell during the 2019-20 school year, 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).[8] 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

[8] The Second Circuit has found that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral 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"]).

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 hearing record in this matter supports a finding that the student received academic and social/emotional benefit while attending Keswell. The Keswell integrated education plan progress report detailed numerous skills mastered by the student between July 2019 and December 2019. The report indicated that the student was "constantly improving" his receptive and expressive communication skills and that since July he had successfully learned how to identify items from a larger set (moving from a field of three to a field of five), select sets of items with a specific characteristic such as color, identify items of clothing based on weather, and select appropriate objects for holidays (Parent Ex. P at pp. 2, 5). With respect to expressive language skills, the progress report indicated that, using AAC, the student had learned to request that others perform an action, identify two parts of three objects, label four items from one class, answer "yes" and "no" correctly when presented with a vocal antecedent, and fill in an item given a function (id. at pp. 3-5). With respect to community skills, the December 2019 progress report indicated that the student mastered a task related to identifying traffic signs (using AAC) when presented in a school environment (id. at p. 6).

In terms of pre-academic skills, the education plan progress report indicated that the student continued to make "large strides" in this area (Parent Ex. P at p. 11). The student mastered skills related to completing his activity schedule using a number schedule, imitating motor movements, and copying the pre-writing shapes of circle and square (id. at pp. 6-7, 12). According to the progress report the student had also mastered functional fine motor tasks such as removing lids from large jars and pasting shapes on outlines accurately and independently (id. at pp. 7-8, 12). The progress note indicated that the student had done "a great job within visual performance," noting that the student originally had difficulty completing the bottom row of a square puzzle but was now able to do so independently (id. at p. 12). In addition, the student was able to independently replicate a new block design (id.). The progress report characterized the student's progress in math as "significant" and highlighted his mastery of counting most numbers 1-10 using 1:1 correspondence, counting out objects from a larger set, telling time to the hour, and receptively identifying a penny and quarter (id. at pp. 8-9, 12). With regard to reading, the progress report indicated that the student was able to add many new words to his reading repertoire and that he mastered the ability to match two words and receptively identify five words (id. at pp. 9, 12). The student also mastered the ability to read several simple words using AAC and to match six words to pictures (id.). In addition, the student demonstrated progress in spelling where he was able to name letters in a word (reading from left to right) and in his ability to match upper and lower-case letters (id. at pp. 10, 12).

Turning to social and leisure skills, the December 2019 progress report indicated that the student mastered walking five feet to take a preferred item from an adult (Parent Ex. P at p. 14). In terms of daily living skills, the progress report indicated that the student demonstrated "consistent and significant progress with regard to toilet training" but other than donning his socks did not indicate that the student had mastered any ADL objectives (id. at pp. 15-16). The progress report included sections of the student's behavior plan and the frequency of some behaviors as of December 2019 (compare Parent Ex. P at pp. 17-22, with Parent Exs. F; G). The progress report indicated that the student's average daily frequency of protesting behaviors had decreased from 11 in July to two in December (Parent Ex. P at p. 21). However, without data for the student's other

interfering behaviors it is difficult to determine if or by how much they were reduced (see id. at pp. 17-20, 22).

A review of the Keswell December 2019 speech and language progress report also shows that the student demonstrated progress toward his communication objectives. Between July 2019 and December 2019, the student mastered (receptive) short-term objectives related to understanding the sequence words first and last, "when" and "where" questions, inferences about when, and the additive term "and" (Parent Ex. I at pp. 1, 2). The student also mastered (expressive) short-term objectives related to responding to "who" questions (id. at p. 3). The speech and language progress report also shows that the student made significant progress (70% mastered according to objective criteria) toward short-term objectives related to demonstrating the understanding of three new prepositions, sequencing at least three pictures for at least five events, and producing at least three-word phrases using AAC (id. at pp. 1, 3). According to the December 2019 progress report the student also made good progress (50% mastered according to objective criteria) toward short-term objectives related to expanding his expressive vocabulary to include at least three new adjectives and using language to engage in communication interactions, both using AAC (id. at pp. 3, 4). The progress report indicated that there were numerous short-term speech and language objectives developed for the student that had not been targeted as of December (id. at pp. 1-4).

In addition to the education plan and speech and language progress reports, the January 2020 OT progress report indicated that the student demonstrated progress toward some of his OT goals. The report stated that the student's grasp on a writing utensil had significantly improved but noted that he continued to require verbal prompts to complete a coloring task due to decreased visual attention and motivation (Parent Ex. J at p. 2). The progress report also indicated that the student demonstrated improved accuracy with copying a circle and cross when give verbal and gestural cues and continued to make progress with writing his name within a two-inch boundary (id. at p. 3). In addition, the student demonstrated decreased frustration with cutting tasks (id.). According to the OT progress report, the student continued to make significant improvement in his gross motor skills (id.). The student had increased his endurance for walking on the treadmill from four to five minutes to seven minutes (id.). The student's visual attention had increased, and he looked more at the target and was less distracted when participating in a throwing task (id. at p. 4). The OT progress report indicated that the student was able to stand on one foot for up to three seconds whereas the prior year he required physical support to stand on one foot (id.). Lastly, the OT progress report indicated that the student had made great progress toward his self-care goals over the past year (id. at p. 5). He was able to don his socks independently and certain shoes with decreased assistance (id.). The student had required physical cues to complete the skills the previous year (id.).

The student's mother testified that the student had made meaningful progress (Tr. pp. 33, 39). She reported that the student was able to communicate using his iPad using Proloquo2go which was something he was not able to do before (Tr. p. 33). He was able to express himself better including expressing his emotions and what he was thinking (Tr. pp. 33, 39). The student's mother further reported that the student could write his name and count coins and, also that he could identify community helpers which he was unable to do in the past (Tr. pp. 33, 40, 46). The student's mother testified that the student had been unable to put anything in his mouth and now he was brushing his teeth after every meal and able to go to the dentist (Tr. pp. 33-34). According

to the student's mother, the student was afraid of dogs but with the support of Keswell could now stand still when a dog passed by (Tr. p. 40). She reported that the student was making steady progress, as well as he could, given the pandemic (Tr. p. 52).

In addition to the student's mother, the associate director of Keswell testified that with ABA and 1:1 instruction the student had demonstrated consistent progress (Tr. p. 65). She testified that the student made progress with regard to his behavior reduction plan (Tr. p. 69, 72). In addition, she opined that the student had made meaningful progress in his program at Keswell (Tr. p. 88).

The associate director explained that the December 2019 education plan progress report tracked the student's progress from July until December (Tr. pp. 98-99). She testified that no quantitative assessment data was provided in the report and the report did not indicate the student's baseline performance on the goals and objectives at the start of the school year (Tr. p. 98). She confirmed that there were objectives or subparts of objectives for which no information on progress was reported (Tr. pp. 101-02). The associate director explained that the lack of information meant that staff had not gotten to those goals as of December 2019 (Tr. p. 102). She further explained that the integrated education plan served as a master plan for the student's instruction and as skills were mastered staffed added the next skill to be worked on (Tr. pp. 103-04). She opined that it was realistic that all of the objectives on the student's education plan could be covered during the school year (Tr. pp. 104-05). She did not agree that because some objectives were not addressed that the student was not making sufficient progress, rather she explained that the rate of instruction varied from goal to goal and depended on the level of supports the student required and the time frame for systematically fading the supports (Tr. pp. 104-05). The associate director reported that staff graphed data weekly and the graph tracked the student's progress toward meeting a goal (Tr. p. 107).

Overall, the evidence in the hearing record, including objective evidence provided by Keswell, shows that the student made progress during the 2019-20 school year and supports a finding that Keswell was an appropriate placement for the student.

C. Equitable Considerations

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"]).

In the present matter, the district has not raised any equitable considerations that would warrant a reduction or denial of the parents' requested tuition reimbursement. Further, the evidence in the hearing record shows that the parents communicated with the district regarding the need for a CSE meeting to develop an IEP for the student for the 2019-20 school year (see Parent Ex. E), and when none was held, gave the district timely notice of their intent to unilaterally place the student at Keswell (see Parent Ex. C). Accordingly, I find that equitable considerations weigh in favor of the parents' requested relief.

VII. Conclusion

Based on the foregoing, the IHO erred in finding that the district was required to fund the student's attendance at Keswell pursuant to its pendency obligations and in dismissing the parents' claims as moot. As for the merits, the IHO's determination that the district failed to offer the student a FAPE for the 2019-20 school year is final and binding, and the evidence in the hearing record supports a finding that the unilateral placement of the student at Keswell was appropriate and that equitable consideration supports the parents' request for tuition reimbursement for the costs of the student's attendance at Keswell for the 2019-20 school year.

THE APPEAL IS SUSTAINED.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 5, 2020 is modified by reversing that portion determining that Keswell was the student's pendency placement and dismissing the matter as moot; and

IT IS FURTHER ORDERED that, upon proof of payment, the district shall reimburse the parents for the costs of the student's tuition at Keswell for the 2019-20 school year.

Dated: **Albany, New York**
January 20, 2021

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SARAH L. HARRINGTON
STATE REVIEW OFFICER