The University of the State of New York

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

No. 12-048

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorneys for petitioner, Lisa R. Khandhar, Esq., of counsel

Thivierge & Rothberg, P.C., attorneys for respondents, Christina D. Thivierge, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondents' (the parents') son and ordered it to fund the costs of the student's home-based program for the 2011-12 school year. The 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 school district representatives (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]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of autism and epilepsy, and exhibits global developmental delays and behaviors that interfere with learning (Dist. Exs. 1 at p. 20; 3; 5; 7; 8 at p. 2; 9). Since kindergarten, the student has attended a State-approved nonpublic school and received home-based services using an applied behavior analysis (ABA) instructional method (home-based ABA), speech-language therapy, and occupational therapy (OT) (Tr. pp. 77, 742-44). The student's eligibility for special education and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On June 13, 2011, the CSE convened to conduct the student's annual review and to develop his IEP for the 2011-12 school year (Dist. Ex. 1). For the 2011-12 school year, the CSE

recommended that the student continue his 12-month placement at the nonpublic school in a 6:1+2 special class and receive 1:1 crisis paraprofessional services and in-school individual speech-language therapy and OT (Tr. p. 77; Dist. Ex. 1 at pp. 1, 20). The CSE also recommended that the student receive individual speech-language therapy and OT outside of school at district expense (Tr. pp. 711-13; Dist. Ex. 1 at p. 20).

By letter to the CSE dated June 20, 2011, the parents conditionally accepted the CSE's recommendation to enroll the student in the program at the nonpublic school, but contended that the district "failed to additionally recommend" a home-based program for the student consisting of 1:1 ABA services, provider team meetings, and parent counseling and training (Parent Ex. J at p. 1).[1] Accordingly, the parents notified the district of their intent to unilaterally continue the student's home-based ABA program and seek funding from the district (id.).

During the 2011-12 school year, the student attended the nonpublic school in a classroom composed of seven students, one head teacher, two teaching assistants and the student's 1:1 paraprofessional, and received home-based ABA services including 16 hours per week of 1:1 ABA instruction, one hour per month of team meetings for his ABA providers, and two hours per month of parent counseling and training (Tr. pp. 398, 401-02, 523, 527-29; IHO Ex. II at p. 3). The hearing record shows that the nonpublic school used ABA-related teaching methods including 1:1 discrete trials and token economy systems (Tr. pp. 233, 401-03). The nonpublic school used a behavioral intervention plan with the student to reduce or eliminate "escape" and aggressive behaviors (Tr. pp. 412-13; Dist. Ex. 1 at pp. 5, 18).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2011, the parents asserted that the district had failed to offer the student a free appropriate public education (FAPE) (Parent Ex. A). The parents contended that the district predetermined its recommendations for the student in that the CSE would not recommend that the student receive home-based ABA services, despite the student's need for such services to make progress (id. at pp. 3-5). The parents asserted that despite their request at the CSE meeting for such services to be included on the IEP, the district informed them that it would not consider home-based services (id. at p. 5). The parents argued that the district also failed to recommend parent counseling and training on the IEP, despite their need for such services (id. at p. 4). The parents asserted that the district had failed to provide them with a finalized version of the student's IEP for the 2011-12 school year and sought to exclude them from the process of developing the student's IEP (id. at pp. 3-4). The parents further contended that the IEP incorrectly stated the communication device used by the student and failed to include any goals regarding the use of the device (id. at p. 6).[2] As relief, the parents sought direct funding for

[1] A prior IHO decision dated February 8, 2010, awarded the student 16 hours of 1:1 home-based ABA instruction per week, one hour of team meetings per month, and two hours of parent counseling and training per month for the 2009-10 school year (Parent Ex. B at p. 18). This decision was apparently not appealed by the district (Tr. pp. 4-5, 8-10).

[2] The due process complaint notice contained a variety of other claims regarding the development of the student's IEP; because these claims were dismissed by the IHO and the parents do not appeal their dismissal, they are not discussed here. However, the parents correctly noted in the due process complaint notice that the district failed to use the form mandated by State regulation for use in developing IEPs (Parent Ex. A at p. 3; 8 NYCRR 200.4[d][2]). I remind the district that "IEPs developed for the 2011-12 school year, and thereafter, shall be on a

the student's home-based ABA program, and reimbursement for any costs they incurred prior to the district funding the program (id.).

B. Impartial Hearing Officer Decision

An impartial hearing was convened on July 26, 2011 for purposes of determining the student's educational placement during the pendency of the proceedings (Tr. pp. 1-20).[3] The impartial hearing was reconvened to address the merits of the parents' claims and continued on four additional hearing dates (Tr. pp. 21-769).[4]

In a decision dated January 27, 2012, the IHO awarded the parents the entirety of the relief they had requested (IHO Decision at p. 23). She found that the district had refused to consider recommending that the student receive home-based ABA services, despite the parents' explicit request that the CSE do so (id. at p. 12). The IHO held that such a refusal constituted a denial of the parents' right to participate in the development of the student's IEP (id. at pp. 12-13). Furthermore, the IHO found that, even if the parents had not requested that the CSE consider recommending the student receive home-based ABA services, the CSE should have done so because of the student's longtime receipt of such services (id. at p. 13). The IHO further found that the hearing record, considered as a whole, did not support the district's contention that the student would receive educational benefits without the home-based ABA services (id. at pp. 13-16).[5] Specifically, the IHO found "credible and persuasive" the testimony of the supervisor of the student's home-based ABA program (the supervisor) with regard to the student's need for the home-based ABA, while giving little weight to the testimony of the district's witnesses who testified that the district program was appropriate to meet the student's needs (id.).

With regard to the home-based ABA services obtained by the parents, the IHO found that the services were calculated to provide the student with educational benefits (IHO Decision at pp. 20-22). Furthermore, she determined that the number of hours of ABA services requested by the parents was not excessive or overly restrictive, as the student had been receiving that amount of

---

form prescribed by the Commissioner" (8 NYCRR 200.4[d][2]) and that "the State's IEP form may not be modified to otherwise change its appearance or content" ("Model Forms: Student Information Summary and Individualized Education Program (IEP)," Office of Special Educ. Mem. [Jan. 2010], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/memo-Jan10.htm; see also "Questions and Answers on Individualized Education Program (IEP) Development, The State's Model IEP Form and Related Documents: Miscellaneous Questions," Question 2, Office of Special Educ. [April 2011], available at http://www.p12.nysed.gov/specialed/formsnotices/IEP/training/answers-misc.htm).

[3] In an interim decision dated August 5, 2011, the IHO found that the student's pendency (stay put) placement included home-based ABA consisting of 16 hours per week of 1:1 instruction using ABA methodology; one hour of team meeting per month; and two hours per month of parent counseling and training (IHO Interim Decision at p. 2).

[4] The IHO properly documented each extension she granted in the hearing record (IHO Ex. V; see 8 NYCRR 200.5[j][5]).

[5] With regard to additional claims raised in the due process complaint notice, the IHO found that none of the claims constituted a denial of FAPE under the circumstances of this case (IHO Decision at pp. 16-20).

services and benefitting from them and he required "intense supervision and instruction" (id. at p. 22). The IHO also found the team meeting and parent counseling and training to be necessary for the student (id.). Finally, the IHO found that there were no equitable considerations which warranted a diminution in the relief requested by the parents (id. at p. 23).

IV. Appeal for State-Level Review

The district appeals and contends that the IHO's findings with regard to the appropriateness of the recommended placement and the home-based ABA should be overturned. The district asserts that the IHO erred in finding the testimony of one of its witnesses deserving of little weight, despite her qualifications. The district further asserts that the IHO erred in finding that it impeded the parents' participation in the development of the June 2011 IEP. The district also contends that the IHO erred in awarding the parents reimbursement for the student's home-based ABA because the services obtained by the parents were duplicative of those provided at the nonpublic school, the services were intended to maximize the student's progress, and the home-based services were overly restrictive. The district challenges the award of funding for parent counseling and training on the basis that the nonpublic school offered such services and the parents failed to take advantage of them.[6]

The parents answer, denying many of the district's allegations, and requesting that the IHO's decision be affirmed. The parents assert that the district refused to consider the parents' input, the June 2011 IEP would not enable the student to make progress, and the home-based services were appropriate to meet the student's needs and necessary for him to make progress. The parents further assert that the award of parent counseling and training was appropriate because the IEP did not specify that the nonpublic school would provide such services. Finally, the parents assert that the hearing record supports the IHO's credibility determinations.[7, 8]

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

[6] Although the district asserts that the parents are not entitled to reimbursement for the home-based ABA services because the student was making progress at the nonpublic school, at no point does the district assert that the student could make sufficient progress at the nonpublic school without the home-based ABA services such that the program recommended by the June 2011 IEP offered the student a FAPE.

[7] To the extent that the parents assert additional reasons the IHO could have found that the district denied the student a FAPE, the parents specifically disavow any intent to cross-appeal from the IHO's decision; therefore, the IHO's determinations on those issues have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[8] I have not considered the district's reply, as the parents' answer contains no procedural defenses arising on appeal and the parents did not submit any additional documentary evidence, and as such, the pleading exceeds the scope of the reply permitted by State regulations (8 NYCRR 279.6).

students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is 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]; A.H. v. Dep't of Educ., 2010 WL 3242234, at *2 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

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 v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). 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 P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). 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 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; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i];

Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 CFR 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111 [2d Cir. 2007]; Cerra, 427 F.3d at 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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 M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. CSE Process—Parental Participation

The district argues that while the IHO found the CSE's failure to recommend that the student receive home-based ABA services impeded the parents' right to participate in the development of the student's IEP, the district was not required to include on the IEP all the services requested by the parents and the hearing record is "not clear" whether the parents requested such services at the CSE meeting.

The evidence shows that the student's mother testified that she "attempted to bring up the [home-based ABA] but the team immediately explained that they were not allowed to have any discussion about that matter" (Tr. p. 754). Furthermore, when she provided the CSE with a report prepared by the supervisor, district staff informed her that the recommendations contained therein "were not going to be incorporated into the IEP . . . because they weren't able to discuss or include anything regarding ABA in the IEP" (id.). Both the student's classroom teacher at the nonpublic school for the 2010-11 school year and the district's representative at the June 2011 CSE meeting testified that they did not recall a request by the student's mother that the CSE consider home-based ABA services (Tr. pp. 86, 156-57, 242-43, 356-57). The IEP indicates that the CSE considered a residential nonpublic school to be an overly restrictive environment for the student, but does not indicate that any consideration was given to recommending that the student receive

any home-based services (Dist. Ex. 1 at p. 16). The IHO found the mother's testimony on this issue to be credible (IHO Decision at p. 12), and the hearing record provides no evidence, either testimonial or documentary, that the IHO should have concluded otherwise; therefore, it is appropriate to give deference to this determination (see Carlisle Area Sch. v. Scott P., 62 F. 3d 520, 524 [3d Cir. 1995]; Bd. of Educ. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 11-145; Application of the Dep't of Educ., Appeal No. 11-130; Application of a Student with a Disability, Appeal No.11-103; Application of a Student with a Disability, Appeal No. 11-074; Application of a Student with a Disability, Appeal No. 11-064).

The IDEA entitles parents to participate in the substantive formulation of their child's educational program, and requires the CSE to consider any "concerns" of parents for "enhancing the education of their child" when it formulates the IEP (20 U.S.C. § 1414[d][3][A][ii]; 34 CFR 300.324[a][1][ii]; 8 NYCRR 200.4[d][2]; Winkelman, 550 U.S. at 524, 530-32). The district is also required to maintain an open mind during the CSE meeting with regard to possible changes to the student's IEP (J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 648-49 [S.D.N.Y. 2011]). Based on the parent's unrebutted testimony, I find that under the circumstances of this case, the district conducted the June 2011 CSE meeting in a manner that significantly impeded parental participation due to its unwillingness to consider the parents' concerns (Winkelman, 550 U.S. 516, 524; Application of the Bd. of Educ., Appeal No. 07-087; see T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; Application of the Dep't of Educ., Appeal No. 11-031). The district's failure in this instance to consider or adequately respond to and address the parents' concerns that they raised during the formation of the IEP constituted a procedural infirmity which "significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student" (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Application of a Student with a Disability, Appeal No. 08-035; see Matrejek, 471 F. Supp. 2d at 426-27), thereby denying the student a FAPE.[9]

B. Home-Based ABA Services

Although the district asserts three reasons why the district should not be required to fund the student's home-based ABA services, only one addresses the appropriateness of the services obtained for the student, namely that the program is overly restrictive. Accordingly, the district's arguments regarding maximization of benefits and duplicativeness are addressed below with regard to the propriety of the relief granted by the IHO.

[9] I also note, as did the parents, that there is no evidence in the hearing record that the district complied with the procedures requiring that prior written notice be given to the parents, which would have required the district to describe why it changed the services and/or refused the parents' request to provide home-based services together with a description of each evaluation, procedure, assessment, record or report that was used as a basis for the refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a][5][ii]). Prior written notice should be sent within a "reasonable time" and under the circumstances of this case it would have been reasonable to send it before the date of initiation of the proposed IEP. The district's response to the due process complaint notice, which is required in those cases when prior written notice is not required, was filed over three months after the complaint and the response fails to show that the district considered the parents' request or the rationale for the district's refusal of home-based services (Dist. Ex. 10; see 34 CFR 300.508[e]).

A private placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the placement must provide an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112 [quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 (2d Cir. 2006)]; see Rowley, 458 U.S. at 207). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

With regard to the district's argument that the home-based ABA services are overly restrictive, I note that although the analysis regarding a student's LRE is applicable to unilateral placements, the purpose of an LRE analysis is to assess the extent to which a student will have access to nondisabled peers or whether the student can be educated in the school that he or she would otherwise attend if not disabled (34 CFR 300.116[c]; 8 NYCRR 200.4[d][4][ii][b]; Newington, 546 F.3d at 112, 120-21). In this case the district's arguments regarding LRE appear to be misguided insofar as neither party is suggesting that the student be removed from his nonpublic school day program and placed in a highly restrictive setting such as a residential placement (see, e.g., Walczak, 142 F.3d at 132 [explaining that "(i)t would violate IDEA's preference for the least restrictive educational setting to move a child from a day program where she is making progress to a residential facility simply because the latter is thought to offer superior opportunities"]; S.H. v. New York City Dep't of Educ., 2011 WL 609885, at *9 [S.D.N.Y. Feb. 18, 2011]). The district contends that the student's home-based ABA is overly restrictive because the student could make progress in the nonpublic school's special education program, he already receives a restrictive level of programming by virtue of placement in the nonpublic school, and provision of the home-based services limits the time in which he can engage in age-appropriate leisure activities. However, the district does not allege facts relevant to an LRE analysis such as arguing that the student could have been placed in a general education classroom or that the student should have been educated to a greater extent with nondisabled students and in this case, the hearing record does not contain evidence showing that either party contemplated that the student should have any opportunities for interaction with his nondisabled peers. Therefore an LRE analysis regarding the extent to which the student should have access to nondisabled peers in his home environment is unnecessary in the context of this case. In any event, for the reasons stated below, the hearing record supports the IHO's finding that the home-based ABA services were not overly restrictive for the student.

The student's special education teacher at the nonpublic school during the 2011-12 school year testified that the student required 1:1 instruction at all times and exhibited academic and behavioral progress within that program (Tr. pp. 398, 400-02, 409-12, 418-19, 424-25, 445-46, 457-58). The supervisor testified that the student required highly structured, systematic, direct instruction to acquire all new skills (Tr. pp. 512, 522-24, 527-28, 565-68). She stated that the student also needed a high number of repetitions to master new skills; repetition that the home-based ABA services provide (Tr. pp. 569-70; Parent Ex. I at p. 3). Because the student continued to require numerous repetitions and direct instruction, and did not exhibit the ability to learn new skills incidentally, the supervisor recommended continuing the home-based ABA services (Tr. pp. 568, 620; Parent Ex. I at p. 3). The student's home-based ABA services were provided on a 1:1 basis, and based on the data collected, the student exhibited progress within the program (Tr. pp. 559-62, 566-67; see Tr. p. 527). The hearing record shows that the student's instructional needs were met in a 1:1 learning environment, which in conjunction with his school-based placement that offered the opportunity for peer interaction, did not result in an overly restrictive special education program (see Tr. pp. 445-46).

The student's special education teacher at the nonpublic school during the 2011-12 school year testified that the student demonstrated the ability to appropriately play by himself independently for one to two minutes (Tr. pp. 430-31). According to the supervisor, who was aware of the student's play and leisure skills or lack thereof within the home setting, when left unsupervised the student engaged in high levels of stereotypic behaviors such as facial grimacing, hand squeezing, and inappropriate vocalizations (Tr. pp. 546-49; Parent Ex. I at p. 3). She testified that it was important to directly teach the student leisure skills such as how to play with puzzles and look at books to keep him appropriately engaged in activities (Tr. pp. 548-50). In unstructured situations such as at the park, the student resorted to engaging in "what's comfortable for him," namely, stereotypic behaviors (Tr. p. 550). The supervisor testified that the home-based ABA services focused on replacing the student's stereotypic behaviors with behaviors that were appropriate (id.).

As the hearing record shows that the student did not exhibit appropriate leisure or play skills in unstructured settings and needed to be taught those skills, I find unpersuasive the district's argument that the 16 hours per week of home-based ABA services inappropriately intruded on the student's available "downtime." I note that the district's witness who opined that the home-based ABA services would not leave the student time for developmentally appropriate activities did not know what his preferred activities were, nor had she ever observed him receiving home-based ABA services (Tr. pp. 87, 89-90, 127, 157). Courts have explained that "[w]hile failure of a parent to put a student in the LRE is not a bar to tuition reimbursement, it is a factor which may be considered" in determining whether reimbursement is warranted due to the IDEA's requirements for mainstreaming (Pinn v. Harrison Cent. Sch. Dist., 473 F. Supp. 2d 477, 482 [S.D.N.Y. 2007] [internal citation omitted]; see Schreiber v. East Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 549 [S.D.N.Y. 2010]). In view of the foregoing evidence, I find that the parents established that the provision home-based ABA services in addition to the day placement recommended by the district was not so restrictive that it warrants denial of reimbursement under the circumstances of this case (see Frank G., 459 F.3d at 364).

C. Equitable Considerations and Relief

As noted above, the district does not challenge the IHO's determination that equitable considerations supported the parents' request for relief; however, at the same time, the arguments put forth by the district with regard to maximization and duplicativeness more closely resemble assertions that the parents are not entitled to the entire amount of relief requested, rather than challenges to the appropriateness of the home-based ABA services. As such, the district's arguments that the home-based ABA was duplicative of the instruction provided at the nonpublic school, that the home-based ABA was designed solely to maximize the student's progress, and that the parents were not entitled to home-based parent counseling and training are addressed below.

1. Duplicativeness

The district asserts that the IHO erred in awarding home-based ABA services because they are duplicative of the instruction also provided by the nonpublic school. As described more in detail below, although both the nonpublic school and the home-based ABA services address similar areas of need for the student including communication, behavior, academics, community of reinforcers, and self-help skills, I find that there are differences between the instruction provided in the two settings and, as stated previously, the student requires repetition in order to acquire new skills.

The student's special education teacher at the nonpublic school during the 2011-12 school year testified that ABA instructional techniques are an effective methodology to use with the student, and that he had exhibited academic and behavioral progress with that method (Tr. pp. 401-02). She stated that she ensured that the student's IEP annual goals were being addressed via ABA programs (Tr. pp. 405-07). The hearing record reflects that while at school, the student worked on goals designed to improve his ability to sequence objects, pictures, and letters; answer "wh" questions; distinguish same and different size, color, and shape; exchange money during simulated purchases; follow multistep directions; count to 25; write personal information; spell sight words; and improve behavior (Tr. pp. 422-25, 433-36; see Dist. Ex. 1 at pp. 7-8, 11).

According to the supervisor, the student benefitted from instruction using ABA methods and he had exhibited progress in his home-based ABA program (Tr. pp. 532; Parent Ex. I at p. 3). The hearing record shows that the providers of the home-based ABA services focused on improving the student's ability to use his augmentative/alternative communication (AAC) device to label objects using adjectives, label pronouns, and respond to social questions; discriminate "who" versus "what" questions; tell time on a digital clock; write uppercase letters; respond to questions based on short stories; spell sight words; make letter-sound associations; follow three-step directions; sequence numbers 1-20; and compute simple math problems up to 10 using a calculator (Tr. pp. 531-44, 556; Parent Ex. I at pp. 1-2). The home-based ABA services also addressed expanding the student's "community of reinforcers" by learning to discriminate sounds in a listening lotto game, and learning to take turns and wait appropriately during other school-age games (Tr. pp. 550-52; Parent Ex. I at p. 3). To improve the student's self-help skills, the home-based ABA program provided instruction in activities such as sorting laundry, folding clothes, setting the table, and finding items in a grocery flyer; as well as desensitizing the student to situations such as getting haircuts and tolerating dentist and doctor appointments (Tr. pp. 552-55, 557-58; Parent Ex. I at p. 3). Additionally, the home-based ABA service providers worked with

the student to address problem behaviors (Tr. pp. 544-50). The supervisor also suggested strategies to the nonpublic school for addressing the student's problem behaviors that were subsequently implemented at the school (Tr. pp. 352, 387-88).

The hearing record reflects that none of the district's witnesses, including those from the nonpublic school, had ever observed the student's home-based ABA program, or expressed knowledge of what specific skills it addressed (Tr. pp. 126-27, 353-54, 460-61, 497). The supervisor observed the student at the nonpublic school during both the 2010-11 and 2011-12 school years and testified that although some of the academic skills addressed were similar between the two settings, the home-based ABA services addressed "quite a few" areas of need not addressed at the nonpublic school (Tr. pp. 567-68, 574-75, 596-97, 623-24, 703-04). For example, while the student worked to improve math skills in both the school and the home setting, the specific math skill targeted was different between the two environments (Tr. pp. 703-04). I also note differences between the type of communication device used at home and school (Tr. pp. 421, 524-26; Dist. Ex. 1 at p. 6; Parent Ex. I at p. 1), and the type of self-help skills and degree to which self-help skills were emphasized in the school and home settings (Tr. pp. 424, 552-55, 621; Dist. Ex. 1 at p. 9; Parent Ex. I at p. 3). Additionally, the student's special education teacher at the nonpublic school during the 2010-11 school year testified that the supervisor reviewed with nonpublic school staff programs she was working on with the student in order to ensure that the instruction was not identical to what was provided at home (Tr. pp. 392-94). While I agree that the supervisor testified that there was some overlap of the skills addressed at school and home, the hearing record supports a finding that the home-based ABA services are not duplicative of the school-based services to such an extent that they are unnecessary or excessive.[10]

2. Maximization

The district argues that reimbursement for the home-based ABA services is not an appropriate remedy because the home-based ABA services are designed to maximize the student's abilities, and asserts that there is no evidence in the hearing record that the student would regress without the home-based services he receives. The district is correct that parents may not take advantage of the deficiencies in an offered placement to obtain maximization of their child's potential at public expense (see Application of the Dep't of Educ., Appeal No. 11-164; Application of the Dep't of Educ., Appeal No. 11-031). To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). As the Ninth Circuit recently explained, "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs)" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; see Richardson Indep. Sch. Dist. v. Michael Z., 580 F.3d 286, 301 [5th Cir. 2009] [explaining that "a finding that a particular private placement is appropriate under IDEA does not mean that all treatments received there are per se [reimbursable];

[10] As further described below, I find that the relevant factor in determining whether services are duplicative is not whether the nonpublic school and home-based services address similar areas of need, but whether the nonpublic school services sufficiently meet the student's needs in an area of deficit such that the student is likely to progress, thereby rendering the home-based services unnecessary or excessive (see Application of the Dep't of Educ., Appeal No. 11-119).

rather, reimbursement is permitted only for treatments that are related services as defined by the IDEA"]).

The hearing record contains an e-mail from the program coordinator of the nonpublic school to the district indicating that "home-based ABA services are definitely an essential piece to the education of this child" (Parent Ex. F; see Tr. p. 478). The program coordinator further indicated that staff at the nonpublic school had worked closely with the home-based ABA providers and found that the student had exhibited "great progress while the home-school team [was] in effect" (Parent Ex. F). During the impartial hearing, the program coordinator stated that she responded to the district's e-mail question about home-based ABA services by stating they were "essential," in order to be supportive of the parents (Tr. pp. 482-84, 502). However, the program coordinator also testified that she wrote the e-mail after conferring with the student's special education teacher at the nonpublic school during the 2010-11 school year, who informed her that he was only familiar with the student while the student had been receiving the home-based ABA services (Tr. pp. 495-96, 503). The student's special education teacher at the nonpublic school during the 2010-11 school year testified that the student could make progress at school, but acknowledged that during the time he worked with the student, the student also received home-based ABA services (Tr. pp. 354-55). He further stated that it was "possible" that the student would not exhibit progress in school without also receiving the home-based ABA services (Tr. p. 251). The student's special education teacher at the nonpublic school during the 2011-12 school year testified that she could not express an opinion about the student's ability to make progress without the home-based ABA services (Tr. pp. 462-63).

I agree with the IHO's finding that the preceding testimony does not support a determination that the nonpublic school staff was familiar enough with the student's home-based ABA services to opine that such services were not necessary in order for the student to make progress in the school environment (Tr. pp. 126-27, 353-54, 460-61, 497; IHO Decision at pp. 13-15). Similarly, although the district representative testified that the IEP was adequate to meet the student's needs, she had no particular knowledge of the student or his home-based program (Tr. pp. 86-87, 126-27, 209), and I find the IHO's weighing of the testimony presented to be reasonable, especially, where as here, it has been determined that the CSE refused to even consider home-based services as an option. The supervisor further testified that discontinuation of the home-based ABA services would have negative effects on the student at both school and home because he would not be receiving the repetition and reinforcement that he required to make progress (Tr. pp. 679-80, 688-89). She further stated that because of the student's deficits, he must work on skills in both settings and without the home-based ABA services, he would not progress in either environment and would regress (Tr. pp. 680-81). Under the circumstances of this case, I find that the hearing record supports a finding that the student's home-based ABA services did not constitute maximization, but rather an appropriate supplement that supported the student's school-based special education program.

With regard to the district's specific request that I reduce the awarded reimbursement on the basis that the student had previously received fewer hours of home-based ABA and made progress, I note that the prior February 2010 IHO decision ordering 16 hours of ABA services per week explicitly found that the increase was "necessitated by the student's significant deficits" (Parent Ex. B at pp. 16-17), and the district has provided no alternative argument as to what would constitute a currently appropriate amount of home-based ABA services (see IHO Decision at p.

22). Furthermore, as the district refused to consider the possibility of providing the student with home-based ABA services, and points to no evidence in the hearing record supporting a specific amount of home-based services other than that awarded, I do not find the possibility that the student may be able to progress with slightly fewer hours of home-based ABA to weigh so heavily in the district's favor as to warrant reducing the relief that the IHO granted to the parents.

3. Privately-Obtained Parent Counseling and Training

The district contends that the IHO should not have awarded the parents monthly training by the supervisor because the nonpublic school provided these services and the parents had not taken advantage of them. Parent counseling and training is defined in State regulation as "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]), and State regulations require that IEPs developed for students with autism make provision for such services, "for the purpose of enabling parents to perform appropriate follow-up intervention activities at home" (8 NYCRR 200.13[d]; see 8 NYCRR 200.4[d][2][v][b][5]).

The district representative at the June 2011 CSE meeting testified that the IEP did not specify that the parents would receive counseling and training because of her "understanding" that the nonpublic school offered parent counseling and training "as a matter of course" (Tr. p. 81), although she herself was unaware of what the training consisted (Tr. p. 156). The current program coordinator for the nonpublic school testified that parent training was provided through monthly workshops on a variety of topics and that parents could speak to the program coordinator regarding particular problem behaviors, in which case she would "meet with the parents . . . and then try to give them some information on . . . behaviors themselves, . . . and then hope that they can apply that in the home" (Tr. pp. 478-81). The program coordinator also testified that she was not aware of the parents having taken advantage of the monthly workshops held at the nonpublic school (Tr. pp. 484-85). The student's mother testified that the training provided by the supervisor consisted of strategies for the parents to incorporate aspects of ABA into their interactions with the student (Tr. p. 746). The student's private speech-language pathologist also testified that the supervisor provided her with strategies to address the student's interfering behaviors (Tr. pp. 718-19). Under the circumstances of this case, in which the district failed to provide for parent counseling and training on the student's IEP in the first instance and thereafter, the district's representative was unaware of what parent counseling and training consisted of at the nonpublic school, I decline to limit or deny relief granted by the IHO with respect to the privately-obtained parent counseling and training.[11]

[11] The district also requests that I reverse the IHO's decision awarding the parents reimbursement for monthly team meetings with the ABA providers; as the district fails to indicate any reasons why it challenges the IHO's decision on this issue, I decline to reverse the IHO's award (8 NYCRR 279.4[a] ["The petition for review shall clearly indicate the reasons for challenging the impartial hearing officer's decision, identifying the findings, conclusions and orders to which exceptions are taken"]).

VII. Conclusion

For the reasons stated above, I find that the district impeded the parents' right to participate at the June 2011 CSE meeting by refusing to discuss or consider recommending that the student receive home-based ABA services and thereby denied the student a FAPE. I further find that the home-based ABA services obtained by the parents were not so restrictive as to be inappropriate. As no equitable considerations weigh against the parents' claim for relief, I decline to reverse the IHO's decision to direct the district to fund the student's home-based ABA program.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
April 05, 2012

JUSTYN P. BATES
STATE REVIEW OFFICER