The University of the State of New York

The State Education Department
State Review Officer
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No. 14-071

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

Appearances:
Mayerson & Associates, attorneys for petitioners, Maria C. McGinley, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, 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. 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 a nonpublic school (NPS) for the 2013-14 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student has received a diagnosis with a pervasive development disorder-not otherwise specified (PDD-NOS) (Parent Exs. C at p. 1, H at pp. 3, 7, 13, 17, X at p. 1, Z at p. 1, UUU at p. 2, VVV at p. 4).[1] The hearing record reflects that the student attended a half-day mainstream preschool program for the 2012-13 school year and received special education services pursuant to an IEP including special education itinerant teacher (SEIT) services for 25 hours per week, speech-language therapy three times a week for 45 minutes, Occupational Therapy (OT) three times a week for 30 minutes, and Physical Therapy (PT) twice weekly for 30 minutes (Parent Ex.

[1] Throughout the record, the student is alternately described as having received diagnoses of a PDD-NOS (Parent Exs. C at p. 1, H at pp. 3, 7, 13, 17, X at p. 1, Z at p. 1, UUU at p. 2, VVV at p. 4); an autism spectrum disorder (Parent Exs. H at pp. 3, 5, 7, UUU at p. 2); as having or being treated for autism (Parent Exs. J at p. 2, W at p. 1, VVV at p. 1); and as having apraxia (Parent Exs. H at p. 5, W at p. 1).

Z at p. 1).[2] The Committee on Preschool Special Education (CPSE) convened on March 20, 2013 to develop an IEP for July and August 2013 (Parent Ex. D). The CPSE recommended that the student receive 25 hours of SEIT services to be delivered at school and at home, four individual speech-language therapy sessions per week for 45 minutes each, three individual OT sessions per week for 30 minutes each, and two individual PT sessions per week for 30 minutes each (Parent Ex. D at p. 12). The CPSE provided a final notice of recommendation (FNR) summarizing the recommended services on March 20, 2013, to which the parents agreed (Parent Ex. E at p. 1).

The CSE convened on March 4, 2013 to develop an IEP for the academic 2013-14 school year (Parent Ex. C). The March 4, 2013 IEP developed by the CSE classified the student as intellectually disabled and recommended a 12:1+1 special class in a specialized school with the related services of three individual speech-language therapy sessions per week for 30 minutes each, three individual OT sessions per week for 30 minutes each, and two individual PT sessions per week for 30 minutes each (Parent Ex. C at p. 11).[3] When describing the student's management needs, the March 2013 IEP included a 1:1 paraprofessional, however this support was not included in the recommendations for special education programs and services section of the IEP (compare Parent Ex. C at p. 3 with Parent Ex. C at pp. 11-12).

On April 2, 2013, the parents executed an enrollment contract for the student's attendance at the NPS for the 2013-14 academic school year (Parent Ex. M).[4] By FNR dated May 24, 2013, the district summarized the special education programs and related services recommended by the March 2013 CSE and identified the particular public school site to which the district assigned the student to attend for the 2013-14 school year (Parent Ex. F).

By letter dated July 18, 2013, the parents notified the district that they believed the March 2013 IEP was inappropriate due to insufficient levels of 1:1 teaching, behavioral interventions and supports; insufficient "overall level of services"; and the lack of parent training and counseling on the IEP (Parent Ex. H at p. 1). The parents also indicated that the assigned school site was closed and they had visited a different school site as directed by the district (id.). The parents included copies of two evaluations and four progress reports from the student's home-based providers with the July 18, 2013 letter and requested another CSE meeting in order to review the updated evaluative information (id. at pp. 1-18).

By letter dated August 15, 2013, the parents again expressed their concerns regarding the March 2013 IEP and notified the district that the student would be unilaterally placed in the NPS for the 2013-14 academic school year and that they would seek tuition reimbursement as well as

[2] Although not entirely clear, there is some indication in the hearing record that in addition to the 15 hours per week of SEIT services the student received at his preschool program, he received "approximately 25 hours per week of an intensive and home-based ABA program" (Parent Ex. AA at p. 1).

[3] The student's eligibility for special education programs and services as a student with an intellectual disability is not in dispute in this proceeding (34 CFR 300.8 [c][6]; 8 NYCRR 200.1[zz][7]). The parents' due process complaint and amended due process complaint notices do challenge the student's classification as intellectually disabled; however a request to change the student's classification from intellectual disability to autism is not among the relief now demanded by the parents (compare Parent Ex. A at p. 6, and Parent Ex. B at p. 6, with Pet. at pp. 19-20).

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

reimbursement "and/or funding" for the student's home-based services and transportation (Parent Ex. I at pp. 1-2). By letter dated September 18, 2013, the parents advised the district that after several failed attempts and delays due to misinformation provided by the district, they were able to contact the assigned school and schedule a visit for September 12, 2013 (Parent Ex. K at p. 1). Following their visit, the parents enumerated eight grounds as the basis for rejecting the assigned school site and reiterated that the student would be attending the NPS and that they would seek reimbursement and/or funding for the student's tuition, home-based services, transportation, and related costs (id. at p. 3). The parents also noted in the September 18, 2013 letter that the district had not responded to their prior letters (id. at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated August 29, 2013, the parents requested an impartial hearing to determine the appropriateness of the recommendations of the CSE in the March 2013 IEP (Parent Ex. B). The parents allege in 120 separate claims that the district denied the student a FAPE. By amended due process complaint notice dated October 15, 2013, the parents clarified the proposed solution (Parent Ex. A). It is not necessary to reiterate all of the parents claims as the district has conceded that it failed to offer the student a FAPE and that the parents' unilateral placement of the student at the NPS was appropriate. Relevant to this appeal is the request for reimbursement and/or funding of the student's home-based services. According to the amended due process complaint, the student's home-based services consisted of (1) four speech-language therapy sessions per week for 45 minutes each using a language-based technique called Prompts for Restructuring Oral Muscular Phonetic Targets (PROMPT), (2) four OT sessions per week for 45 minutes each, (3) one PT session per week for 60 minutes, (4) up to 20 hours per week of home and community-based applied behavioral analysis (ABA) services, and (5) transportation (Parent Ex. A at p. 14; see also Parent Ex. UUU at p. 1).

B. Impartial Hearing Officer Decision

After a hearing related to pendency held October 10, 2013, by interim decision dated December 12, 2013, an IHO (IHO 1) granted the parents' request for 25 hours per week of Special Education Teacher Support Services/Applied Behavioral Analysis (SETSS/ABA), individual occupational therapy (OT) three times per week for 30 minutes each session, individual physical therapy (PT) two times per week for 30 minutes each session, and individual speech-language therapy four times per week for 45 minutes each session.[5] The district did not object to the parents' requested pendency placement (Interim IHO Decision at p. 2). The impartial hearing reconvened on January 16, 2014, wherein IHO 1 recused himself.

Another IHO (IHO 2) was appointed on January 29, 2014, who issued a pre-hearing order on February 10, 2014 advising the parties that State regulation allowed for "direct testimony by

[5] The IHO indicated in his interim decision that pendency was based upon the information provided by the parent and that the district did not object (Interim IHO Decision at p. 4). The record reflects that the student received Special Education Itinerant Teacher Services/ABA (SEIT/ABA), rather than SETSS/ABA (Parent Exs. D, E, H at pp. 5-6, 13-16, Z, TTT; compare Answer ¶ 18 fn 5 with ¶ 25). SETSS is not specifically identified in State regulations describing the continuum of services (see 8 NYCRR 200.6 [d], [f]). Since SEIT services are provided by a certified or licensed special education teacher (see 8 NYCRR 200.1 [yy]) and were included on the last agreed upon IEP developed by the CPSE, it appears the parents' primary concern is that the student receive 1:1 instruction using an ABA methodology from a qualified provider.

affidavit in lieu of in-hearing testimony" so long as the "witness giving such testimony shall be made available for cross-examination" (IHO Pre-Hearing Order at p. 1). Accordingly, IHO 2 directed that "each party should present the direct testimony by affidavit and then call the witness . . . for cross-examination" (id.). The order allowed for the presentation of "[a]dditional direct examination that [was] not repetitive or irrelevant," and further indicated that both parties had the opportunity to submit a list of witnesses to the IHO who "need[ed] to testify at hearing, the sum and substance of their testimony and the necessity for their direct testimony to be verbal instead of by affidavit" (id.).

On March 19, 2014, the impartial hearing proceeded on the merits and concluded on March 26, 2014, after two hearing dates (Tr. pp. 17-335). On the first day of the impartial hearing, the district conceded that it had not offered the student a FAPE (Tr. p. 19). In a decision dated April 17, 2014, IHO 2 found that the record did not support the appropriateness of the parents' unilateral placement (IHO Decision). The IHO stated that the record had "no information as to the student's prior levels of functioning" and contained no evidence that the student had made any progress (id. at p. 9). The IHO concluded that the student's program at the NPS did not target his needs and that the parents did not demonstrate that the student had made any meaningful progress (id.).

IHO 2 ordered the CSE "to conduct complete evaluations, provide [the] parents with copies of the evaluations and create a program to address the student's needs" (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The parents appeal, challenging IHO 2's finding that the parents' unilateral placement was not appropriate. With respect to IHO 2's decision, the parents argue that the IHO failed to carefully consider the evidence, applied incorrect legal standards and improperly shifted the burden of producing sufficient evaluative information to the parents. The parents assert that their unilateral placement of the student, which included the NPS and home-based services, was appropriate to address the student's needs and that the equitable considerations are in their favor. The parents also allege that the district has failed to comply with IHO 1's pendency determination. The parents request that the SRO direct the district to comply with the interim order on pendency and order compensatory education hours for services that were not provided. The parents also seek reimbursement for the cost of the student's tuition for the 2013-14 school year; reimbursement for the student's home-based program; and request that the district continue to provide transportation.

In an answer, the district responds to the parents' allegations with admissions and denials. The district does not dispute the appropriateness of the student's program at the NPS. The district challenges the student's home-based program claiming that home-based services are not necessary because they are duplicative of the student's NPS program and the focus of the home-based providers is to promote generalization of skills and to maximize the student's education.

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

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

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). Ordinarily, 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]).

As indicated above, the district has conceded that it did not offer the student a FAPE for the 2013-14 school year. With respect to the IHO denying reimbursement for the parents' unilateral placement, I agree with the parents that the IHO failed to consider the evidence in the hearing record. The parents' burden with regard to the unilateral placement is limited to establishing that it was appropriate to meet the student's special education needs, not that every individual component of the student's program was necessary for the student to receive educational benefits (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370; see Gagliardo, 489 F.3d at 112, 115; M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). "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). 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 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; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "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 only 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]; 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 the 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]).

Accordingly, in order to support a finding that the home and community-based services obtained by the parents were inappropriate for the student, the services either must have been contraindicated for the student under the particular circumstances or at least insufficiently designed to enable the student to receive educational benefits. The district does not challenge the appropriateness of the program provided at the student's NPS, but argues that if the student requires home-based services in addition to the NPS program in order to receive educational benefits, then the parents' unilateral placement must presumptively be inappropriate. In support of this argument during the hearing, the district asserted that the student's home-based services were for the purpose of generalizing skills. In this appeal, the district asserts an additional two reasons why they should not be required to fund the student's home-based services. However, I note that none of these assertions address the appropriateness of the services provided to the student. Therefore, I find that the parents' unilateral placement of the student, which when viewed under the totality of the circumstances and encompasses all of the programming and services obtained by the parents, is appropriate and addresses the student's special education needs. Accordingly, the district's contentions that the student's home-based services were solely for the purpose of generalizing skills; and as now argued in this appeal, also for the purposes of maximization of benefits and duplication of services, are more appropriately addressed within the context of equitable considerations. As the IHO did not make any findings with respect to the district's contentions in this regard, the parents' request for public funding for the student's home- and community-based services is more appropriately analyzed in the context of equitable considerations than with regard to whether the home and community-based services were appropriate to meet the student's needs (see L.B. v. Nebo Sch. Dist., 379 F.3d 966, 979 n.18 [10th Cir. 2004] [whether the student required the entirety of the after-school services obtained to succeed in the private placement is an appropriate equitable consideration]; Still v. DeBuono, 101 F.3d 888, 893 [2d Cir. 1996] ["The appropriate amount [of reimbursement] thus bears a relationship to the quantum of services that the state would have been required to furnish"] [emphasis added]; J.P. v County Sch. Bd., 447 F. Supp. 2d 553, 591 [E.D. Va. 2006], rev'd on other grounds 516 F.3d 254 [4th Cir. 2008] [the district "must reimburse the parents for the reasonable costs of educating [the student] at the [private school] and any related services and accommodations that would have been covered under the IDEA had [the district] provided [the student] with an appropriate education"] [emphasis added]).

B. Equitable Considerations

As noted above, the district does not challenge the appropriateness of the NPS in the sense that it is insufficiently beneficial for the student, but disputes the student's need for additional home

and community-based services above and beyond those provided through the NPS. The arguments put forth by the district with regard to generalization of skills, maximization of educational benefit and duplication of services 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 and community-based services.

Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 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"]). The IDEA 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, fail to provide timely notice of the unilateral placement and their intention to seek reimbursement or funding, 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][1]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 13-198).

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]; see Jennifer D. v New York City Dept. of Educ., 550 F. Supp. 2d 420, 436 [S.D.N.Y. 2008]). As stated by the Supreme Court, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). As one circuit court 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), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced" (C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011]; Still v. DeBuono, 101 F.3dat 893 ; J.P. v County Sch. Bd., 447 F. Supp. 2d at 591).

In this case, the parents assert that the student requires home and community-based services to generalize the skills learned at school, to benefit from his education and to make meaningful progress. Several courts have held that the IDEA does not require school districts as a matter of course to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

The Educational Coordinator for the NPS testified in her affidavit that the student received intensive 1:1 teaching and instruction during five of the six hours that he is in school (Parent Ex. RRR at p. 3). For the sixth hour of the school day, the student was in a 2:1 student to staff ratio for instructional lunch and leisure skills (id.). With the exception of his individual therapy sessions, the student remains in his classroom for the school day in a student to staff ratio of 6:1+5 (id.). The NPS Educational Coordinator also testified that the student requires 1:1 instruction in order to acquire new skills and to remain available for learning (id. at p. 5). She further testified that the student must be retaught skills that he has mastered in one setting when he moves to another "because he does not independently transfer acquired skills across settings or individuals" (id.). She described the student as exhibiting delays across all areas of development and requiring significant and intensive intervention at school and at home in order to make meaningful progress (id. at p. 8). The NPS Educational Coordinator also recommended the continuation of the student's home and community-based services because the student requires consistency across domains and because he is not able to generalize skills across his home and community environments (id. at p. 14). The NPS Educational Coordinator also testified in her affidavit that the student has been making meaningful progress, has shown improvement in achieving his goals and objectives and has made significant improvement in his overall limitations (id. at p. 13).

One of the student's community-based SEIT/ABA providers testified in her affidavit that the student demonstrates significant delays within all areas of development and has only made gains with teaching that is done in a highly structured 1:1 setting with continuous reinforcement and repetition (Parent Ex. TTT at p. 3). She testified that the student received approximately 18 hours of 1:1 ABA after school from a variety of providers including herself (id. at p. 3). She further testified that this level of intervention was required in order for the student to make meaningful progress (id.).

The Speech-Language Pathology Supervisor for the student's NPS testified in her affidavit that the student receives three 30-minute individual speech-language therapy sessions and one 30-minute group speech-language therapy session per week, which is delivered in a 1:1 setting for this student (Parent Ex. QQQ at p. 3). She testified at the hearing that the student receives some PROMPT therapy at school, but the NPS providers use multiple techniques and methodologies (Tr. pp. 77-80). The NPS Speech-Language Pathology Supervisor also testified in her affidavit and during the hearing that the student required "after-school services" because he has "trouble generalizing his skills across different environments," and the combination of the home and school program enabled him to work on his generalization skills (Tr. pp. 82-83; Parent Ex. QQQ at p. 7). In addition, she testified that the level of speech-language therapy the student received during the school day was sufficient and appropriate for him to receive educational benefit, explaining that

removing the student for additional therapy sessions would reduce his participation in his core classroom activities and limit his exposure to peers (Tr. pp. 33, 36, 80, 102). She also testified that the student needed home-based speech-language therapy to address his needs (Tr. p. 105).

The community-based speech-language pathologist testified at the hearing that the student receives four individual speech-language therapy sessions per week for 45 minutes each using the PROMPT technique (Tr. pp. 43-44, 73).

The student's occupational therapist at the NPS testified in her affidavit that the student "greatly benefit[ted]" from additional OT outside of school "as he has a lot of difficulty generalizing his skills across different environments and people" (Parent Ex. SSS at pp. 3, 9). At school, the student receives two individual OT sessions per week for 30 minutes each, one 30-minute "group" OT session per week (delivered with 1:1 support for this student), and one 30-minute OT lunch consultation (Parent Ex. SSS at p. 2). She further testified that the student was making slow, steady progress at the NPS and received the appropriate amount of OT services at school for his individualized needs and also indicated that removing the student for additional therapy sessions would hinder his academics and his ability to socialize with his peers (id. at p. 3). She also testified in her affidavit and during the hearing that the student had severe sensory needs and required a home-based program that included OT in order for him to continue to make meaningful progress (Tr. pp. 143-44; Parent Ex. SSS at p. 9). Although unclear in the record, the student was receiving at least four hours per week of home- and community-based OT (Parent Ex. XXX at p. 2; but see Parent Ex. H at p. 17).

With regard to evidence favoring the parent's view, the hearing record demonstrates that there is a coordination of efforts between the student's home and community-based providers and the student's teachers and providers at the NPS. Each of the student's providers testified to the need for a home-based component in order for the student to derive benefit from his education. While the providers did testify that the home and community-based services addressed generalization of skills that the student learned at school, they also testified to this student's severe delays and significant needs that required this level of intensive intervention. The NPS Educational Coordinator also testified that multiple "studies have demonstrated that early and intensive behavior intervention is a highly effective form of treatment for children with autism" (Parent Ex. RRR at p. 13). She further stated that "[g]iven the student's young age, the provision of these services are critical to his progress towards goals individually tailored to address his skill deficits" (id.). While the hearing record also demonstrates that the student has made progress in his school program, all of the providers attributed the student's success to the combined school and home-based programming.

For the 2013-14 school year, the student was entering his kindergarten year and transitioning from a preschool program that had historically included a typical preschool day component and an intensive home-based component. The record in this case demonstrates that the student is achieving benefit from the totality of the services obtained by the parents. However, there is evidence in the record regarding the student's progress that the student made in the prior school year while receiving significantly fewer hours of home and community-based services and attending a general education preschool program with SEIT services (Parent Exs. D, H at pp. 5, 7, 9-11, 13, 16).

School districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 379 [2d Cir.2003]; Walczak, 142 F.3d at 132). Reimbursement does not require maximization of the student's potential, although the parents can of course choose to provide extra services on their own (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). While I can understand that the parents may believe these services were desirable for their son, it does not follow that the district must be made responsible for all of them. The IDEA ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). I therefore conclude that equity does not require the district to reimburse the parents for home and community-based services for the purpose of the generalization of skills, in addition to the school day services at the NPS (see Luke P., 540 F.3d at 1152-53; L.B. v. Nebo Sch. Dist., 379 F.3d at 979 n.18).

Accordingly, I find that the hearing record does not support a conclusion that the student required all of the home and community-based services the parents obtained for him as part of his unilateral placement. Therefore, the relief awarded should reflect that the parents acquired sufficient appropriate services when all of the services are viewed in totality, but that the district is only required to pay for expenses to address the student's needs that it would have borne in the first instance had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; C.B., 635 F.3d at 1160). Notwithstanding the foregoing, the district has already been required to entirely fund the home-based component of the student's last agreed upon IEP developed by the CPSE pursuant to pendency and it is unnecessary to set forth factual findings weighing the equitable considerations and explaining the extent to which the parents are entitled to public funding of these services since the district must pay for them by operation of law in any event.

VII. Conclusion

I find that the IHO erred in determining that the parents did not meet their burden of establishing that their unilateral placement of the student was appropriate. I further find that the equitable considerations do not support an award of full reimbursement and/or funding of the parents' unilateral placement. As all of the reimbursement relief sought by the parents has been realized by virtue of pendency, it is not necessary for me to determine a specific amount by which to reduce or eliminate an award.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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

IT IS FURTHER ORDERED that the impartial hearing officer's decision, dated April 17, 2014, is reversed to the extent it found that the parents did not establish the appropriateness of their unilateral placement for their son; and

IT IS FURTHER ORDERED that the district shall pay directly to the nonpublic school, pursuant to the student's pendency entitlement, the student's tuition costs for the 2013-14 academic school year, to the extent that such tuition costs have not already been paid by the parent; and

IT IS FURTHER ORDERED that, to the extent that the parent has paid any portion of the student's tuition costs at the nonpublic school for the 2013-14 school year, the district shall reimburse the parent for such costs upon the submission of proof of payment to the district.

Dated: **Albany, New York**
September 19, 2014

JUSTYN P. BATES
STATE REVIEW OFFICER