



The University of the State of New York

The State Education Department

State Review Officer

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No. 17-032

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

Appearances:

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

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, Brian Davenport, 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 those parts of the decision of an impartial hearing officer (IHO) which directed respondent (the district) to provide partial direct funding for the costs of their son's prospective placement at the Manhattan Behavioral Center (MBC) and denied their request for prospective funding for home-based services. The appeal must be sustained in part.¹

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

¹ Part 279 of the practice regulations was amended in September 2016, which amendments are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although the relevant events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the district after January 1, 2017.

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 in this appeal received a diagnosis of an autism spectrum disorder when he was two years old and received services through the Early Intervention Program consisting of 20

hours per week of applied behavioral analysis (ABA) services, speech-language therapy, and occupational therapy (OT) (Parent Ex. C at pp. 1-2). During the 2015-16 school year, the student attended a full-day preschool program pursuant to an IEP developed by the Committee on Preschool Special Education (CPSE), and received related services including three 30-minute sessions per week of individual speech-language therapy and two 30-minute sessions per week of individual OT (Parent Ex. E at p. 2; see Tr. p. 67). In May 2016, the student started receiving 14 hours per week of home-based ABA instruction "[t]hrough the insurance" (Tr. pp. 77-79).²

During the 2016-17 school year, the student was enrolled in a 12-month preschool program in an 8:1+2 special class placement, and received related services consisting of three 30-minute weekly sessions of speech-language therapy and three 30-minute sessions per week of OT, as well as the services of a 1:1 paraprofessional (Parent Ex. C at p. 1).³ In a letter dated September 13, 2016, the parents requested that the district convene a "CSE" meeting (Parent Ex. B at p. 1). The parents informed the district that the student was undergoing an independent neuropsychological evaluation and they believed the student needed to attend a preschool where he would receive 1:1 instruction using a behavioral model (id.). The CPSE convened on January 6, 2017 in response to the parents' letter (Tr. pp. 72-73).⁴ The hearing record reflects the student's functioning is notable for significant challenges in the areas of cognitive skills, sensory regulation, behavior, safety awareness, social skills, language processing, communication, adaptive behavior, and fine motor skills (Parent Exs. C at pp. 1-2, 5-6; D at pp. 1-2; E at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated January 26, 2017, the parents requested an impartial hearing, asserting that the district failed to offer the student a free appropriate public education (FAPE) for the 2016-17 school year (Parent Ex. A). Specifically, the parents asserted that the January 2017 CPSE would not recommend a program consisting of both center- and home-based services due to district policy, and the CPSE would not "describe" ABA as an instructional methodology in the student's IEP, impeding their ability to participate in the CPSE meeting (id. at pp. 2-3). The parents also asserted that the recommended program outlined in the resultant January 2017 IEP was not consistent with "the weight of the information" available to the CPSE (id. at p. 3). As a remedy for the district's alleged failure to provide the student with a FAPE, the parents sought an order directing the district to provide the student with a program consisting of a center-based preschool placement using a 1:1 ABA instructional methodology, 10 hours per week of home-based ABA services provided by a special education itinerant teacher, and an increase in OT services to be provided in a sensory gym (id.).

² The parent testified the ABA program included one hour per week of "supervision from [a board certified behavioral analyst]" who provided training to the parents (Tr. p. 79).

³ During the 2016-17 school year, the student received two 45-minute sessions per week of OT which was privately funded by the parents, in addition to his school-based OT (Parent Ex. I at p. 1).

⁴ The January 6, 2017 IEP was not introduced into evidence at the impartial hearing.

B. Impartial Hearing Officer Decision

After a prehearing conference was held on March 3, 2017, an impartial hearing was held on March 16, 2017 (Tr. pp. 1-88). At the commencement of the impartial hearing, the district requested an adjournment of the impartial hearing due to a lack of witness availability (Tr. p. 12). The district representative at the impartial hearing also noted that the case was still being "investigated" for potential settlement, and that the district "did not disclose to the opposing side" (*id.*). The IHO denied the district's request, and entered a default judgment with regard to whether the district offered the student a FAPE for the 2016-17 school year (Tr. p. 13).

In a decision dated April 4, 2017, the IHO found that the requested MBC program was appropriate to meet the student's needs (IHO Decision at pp. 5-7).⁵ While the IHO found that placement at MBC would be appropriate for the student, the IHO found that the provision of additional home-based ABA services was unnecessary, as ABA instruction "permeate[d]" the MBC program, and the extent of the services requested was "excessive" (*id.* at p. 7). The IHO also found that the rates sought for the requested services were "inconsistent with prevailing reimbursement rates" for other nonpublic schools providing ABA instruction, and accordingly reduced the rate awarded for the services (*id.* at pp. 7-8).

Finally, the IHO found that there were no equitable factors that would militate against an award in favor of the parents (IHO Decision at pp. 9-10). As relief, the IHO ordered the district to make direct payments to MBC for 25.5 hours of 1:1 ABA instruction per week, two hours of BCBA supervision per week, three 45-minute sessions of speech-language therapy per week, and four 45-minute sessions of OT per week, each at specified hourly rates (*id.* at p. 10).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in reducing the rate at which the district was to directly fund the student's placement at MBC and in determining that the student did not require home-based services. Specifically, the parents assert that the IHO applied an incorrect legal standard, applying the standard used in determining if reimbursement is appropriate, while the parents were seeking prospective relief. The parents also argue that the IHO improperly determined *sua sponte* to reduce the requested rates and award funding at rates that were not based on any evidence in the hearing record.⁶ The parents also assert that the hearing record does not support the IHO's determination concerning the home-based services, and contend that the hearing record supports a finding that the student required both center- and home-based services. The parents request that the district be ordered to directly fund the student's placement at MBC, including both center- and home-based services, at the rates set forth in the hearing record.

⁵ MBC has not been approved by the Commissioner of Education as a school with which school districts may contract for the instruction of students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁶ The parents submit as additional evidence an affidavit from the MBC center supervisor (Req. for Rev. Ex. 1). The parents request that the exhibit be considered by an SRO as proof that MBC cannot provide services to the student at the rates awarded by the IHO.

In an answer, the district generally responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's determinations.⁷ The district also objects to the parents' request that an SRO consider additional evidence.

V. Discussion

A. Preliminary Matters

1. Additional Evidence

Before turning to the merits of the parents' appeal, several matters must be addressed. The district asserts that the SRO should not consider the additional evidence submitted with the parents' request for review. The additional evidence consists of an affidavit from the MBC center supervisor, and is introduced to demonstrate that MBC's rates are consistent with the prevailing rates charged by similar providers, and that MBC cannot provide those services at the rates awarded by the IHO (see Req. for Rev. Ex. 1). The district argues that the affidavit should not be considered because it is self-serving and was available at the time of the impartial hearing. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see 8 NYCRR 279.10; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). In this case, the parents were able to present evidence regarding the rates charged by MBC (Parent Exs. F; J), and the affidavit is not necessary in order to render a decision. Accordingly, the additional evidence submitted by the parents has not been considered on appeal.

2. Scope of the Impartial Hearing

The parents also appeal from that part of the IHO's decision which found that the rates charged by MBC were inconsistent with those charged by other nonpublic schools providing ABA services, asserting that the issue was raised sua sponte by the IHO. The decision of an IHO must be based solely upon the record of the proceeding before the IHO (8 NYCRR 200.5[j][5][v]). The hearing record shows that the district did not assert during the impartial hearing that the rates charged by MBC were not consistent with the rates charged by other schools offering similar services (see Tr. pp. 1-88; Parent Exs. A-J). Therefore, the IHO exceeded her jurisdiction by making a sua sponte determination regarding the rates charged by MCB. It is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process (see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]). Although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), or inquire as to whether the parties agree that an issue should be addressed, it is impermissible for the IHO to simply expand the scope of the issues raised without the express consent of the parties and then

⁷ The district does not appeal from the IHO's default judgment that it failed to offer the student a FAPE for the 2016-17 school year, and that portion of the IHO's decision has become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

base her determination on those issues (see Dep't of Educ. v. C.B., 2012 WL 220517, at *7-*8 [D. Haw. Jan. 24, 2012]). Further, even assuming the issue was properly before the IHO, the IHO cited to no evidence, and a review of the hearing record shows none, which could lead the IHO to make a determination that the rates charged by MBC were not consistent with the prevailing rates charged by other nonpublic schools providing ABA services, or to support a determination as to what the prevailing rates were (see IHO Decision at pp. 7-8, 10; see generally Tr. pp. 1-88; Parent Exs. A-J). Therefore, the IHO's determinations that the rates requested for MBC were not consistent with the prevailing rate, as well as her determination of what rates should be awarded, are annulled. Finally, the hearing record provides documentary evidence of MBC's rates for services at the time of the impartial hearing, which was not challenged by the district (Parent Ex. F).

B. Home Based Services

Having found that the IHO erred in reducing the rate at which the district should prospectively fund the student's placement at MBC, the only issue remaining for review is the IHO's determination that the requested home-based services were "excessive" and not necessary for the student to receive educational benefit. The parents assert that the student required instruction in a combined center-based and home-based program to receive educational benefit and make progress. As set forth below, a review of the hearing record reveals that while the home-based ABA services at issue may have provided the student with additional benefit, particularly with respect to the generalization of skills, such services were not required for the student to receive educational benefit.

As noted above, the proposed programming at MBC consisted of two components, center-based services and home-based services (see Parent Exs. F; J). The IHO ordered the district to provide funding for the center-based component, consisting of 25.5 hours of 1:1 ABA instruction per week, two hours of BCBA supervision per week, three 45-minute sessions of speech-language therapy per week, and four 45-minute sessions of OT per week (IHO Decision at p. 10). The district and parents did not appeal from this portion of the IHO's order, and it has therefore become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).⁸

1. Applicable Standards

As an initial matter, the parents assert in a footnote that the IHO applied an improper legal standard to their request for direct prospective funding of the student's placement at MBC. While arguments raised only in a footnote will generally not be considered to be adequately raised for review (see R.R. v. Scarsdale Union Free Sch. Dist., 366 Fed. App'x 239, 241-42 [2d Cir. Feb. 18, 2010]; see, e.g., United States v. Quinones, 317 F.3d 86, 90 [2d Cir. 2003], quoting United States v. Restrepo, 986 F.2d 1462, 1463 [2d Cir. 1993]; see also 8 NYCRR 279.8[c][2]), in this instance further discussion is warranted. The IHO applied the standard applicable to cases in which parents have unilaterally placed their child and sought tuition reimbursement, and the parents assert in their memorandum of law that, once the IHO found that the student was denied a FAPE, the district

⁸ As this portion of the IHO's decision is not appealed from, it is not necessary to determine whether MBC's center-based services constitute an appropriate remedy for the denial of a FAPE in this instance (see 8 NYCRR 279.8[c][2], [4]).

bore the burden of disproving the appropriateness of the parents' requested relief. However, while the IHO may have erred in applying the standard applicable to tuition reimbursement cases, the authority of an IHO to order the district to prospectively place the student in a non-approved, nonpublic placement at district expense is severely limited, even when the district has failed to offer the student a FAPE. In certain limited circumstances, courts have held that an award directing a district to prospectively pay for the costs of a student's placement in an appropriate but non-approved nonpublic school may be proper (see Connors v. Mills, 34 F. Supp. 2d 795, 802, 805-06 [N.D.N.Y. 1998]). In Connors, the court stated, in dicta, that "once the Burlington prerequisites relative to a non-approved private school are met, and a parent shows that his or her financial circumstances eliminate the opportunity for unilateral placement in the non-approved school, the public school must pay the cost of private placement immediately" (id. at 805-06). However, the court held that the prospective funding at issue constituted the only available remedy that could have provided the student with an appropriate education, as "both the school and the parent agree[d] that the child's unique needs require[d] placement in a private non-approved school and that there [we]re no approved schools that would be appropriate" (id. at 799, 804). At least one court has noted this distinction, noting that Connors stands for the proposition that a district may be required "to pay tuition directly to [the] private school unilaterally chosen by [the] parent, when the parent and district agreed that the district could not provide a FAPE" (Z.H. v. New York City Dept. of Educ., 107 F. Supp. 3d 369, 376-78 [S.D.N.Y. 2015]). Here, the parent did not place the student at MBC and seek direct payment for the costs of the student's placement; rather, MBC expressly conditioned its willingness to accept the student for instruction on the issuance of an order for public funding. However, the Second Circuit has generally held that although direct payment for the costs of a unilateral placement providing appropriate services to a student with a disability is within the scope of remedies permitted by the IDEA (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453-54 [2d Cir. 2014]), a district cannot be directed to effectuate a placement in a non-approved nonpublic school (see Antkowiak v. Ambach, 838 F.2d 635, 640-41 [2d Cir. 1988]; Z.H., 107 F. Supp. 3d at 376 [noting the distinction between a district being required to directly fund a unilateral placement, and being required to effectuate the placement itself]).

In this case, the IHO erred in applying the standards applicable to unilateral placements; however, because the district has not appealed the portions of the IHO's decision that found that the center-based portion of the MBC program was appropriate to meet the student's needs and ordered the district to partially fund the cost of the student's attendance at MBC, those portions of the IHO's determination have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

However, with respect to that aspect of the parents' appeal which seeks to reverse the IHO's denial of their request for prospective funding for MBC home-based services, a district cannot be required to fund services beyond those necessary for the student to receive educational benefits (L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). As discussed further below, the hearing record does not support a finding that the student required home-based ABA services to receive educational benefits. In particular, with respect to home-based services, 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 needs related to generalizing skills to settings outside of the school environment, particularly in cases where it is determined that services oriented toward skill generalization are not necessary to enable the student to receive educational benefits (see F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11

[S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81; C.G. v. New York City Dep't of Educ., 752 F. Supp. 2d 355, 360 [S.D.N.Y. 2010]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir. 1991]). While the Second Circuit has not specifically ruled on the issue of a district's obligations, or lack thereof, under the IDEA to provide for the generalization of skills as part of an educational program, it recently held that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K., 674 Fed. App'x at 101).

2. Need for Home-Based Services

While the student's deficits and needs are not at issue, a brief description of the student is required to facilitate a discussion about the asserted need for home-based services. The hearing record shows that the student demonstrates needs in the areas of cognitive skills, sensory regulation, activities of daily living (ADLs), language processing, communication, behavior including aggression, safety awareness, social skills, and fine motor skills (Parent Exs. C-E; D).

In an August 2016 private behavioral evaluation, the evaluating BCBA's assessed the student's behavior and functioning using a functional assessment interview with the parents serving as informants, which indicated the student's behaviors included verbal disruption, disruptive behavior, off-task behavior, inattention, and aggression (Parent Ex. E at pp. 1-4). The report indicated the student also engaged in repetitive behaviors during the evaluation, including running back and forth and rewinding sections of videos as well as hitting others, throwing items, crying in response to changes in routines, non-compliance, and chewing on clothing (id. at p. 1).

The parents also obtained a private neuropsychological evaluation of the student, conducted during September and October 2016, which included administration of the Adaptive Behavior Assessment System-Third Edition (ABAS-3), the Gilliam Autism Rating Scale, Third Edition (GARS-3), and the Wechsler Preschool and Primary Scale of Intelligence-Fourth Edition (WPPSI-4), as well as a parent interview, behavioral observations, and school observations (Parent Ex. C at pp. 1, 6). The neuropsychologist noted in her report that the student lacked the requisite skills needed to engage in formal standardized testing, therefore, few subtests were completed and most data was collected from clinical/school observations and objective measures of parent report (id. at pp. 2-3, 5). The neuropsychologist reported the student presented with significant deficits across all areas of functioning, including cognitive skills, language, reciprocity, self-regulation, sensory processing, social skills, safety awareness (i.e., elopement), and maladaptive behavior including self-stimulatory behaviors (id. at pp. 4-5). The BASC-3 results indicated the student presented with scores in the clinically significant range in the areas of ADLs, functional communication, attention problems, withdrawal, social skills, depression, adaptive skills, and behavioral symptoms (id. at pp. 4, 9). The student's scores were in the at-risk range in the areas of externalizing problems, internalizing problems, hyperactivity, and atypicality (id.). Results of the

ABAS-3 indicated the student's adaptive behaviors were "well below" age-expected levels in the areas of communication, community use, functional preacademic skills, home living, health and safety, leisure, self-care, self-direction, social skills, and motor skills (id. at pp. 5, 10).

In a December 2016 narrative report, the student's home-based BCBA provider conducted a classroom observation and documented the student's behavior and functioning within his preschool classroom (Parent Ex. D at p. 1; see Tr. pp. 34-35). The narrative report indicated that students were seated between two tables except for the student, who sat alone at a third table (Parent Ex. D at p. 1). The student played quietly with a playhouse while the staff read stories to the other students and then his 1:1 paraprofessional entered the room and joined the student at the table (id.). The student followed the instructions of the paraprofessional but required gestural prompts (id.). The narrative report indicated the student cleaned up his toys with minimal prompts, cleaned the table independently, and joined his peers for a snack (id.). The student made vocalizations during a circle-time song, and at times covered his ears and rocked back and forth, but followed the paraprofessional's directive to participate in the hand movements portion of the song and followed a prompt to stop rocking (id. at pp. 1-2). When the students were given pictures of themselves to place on the wall, the student slapped his paraprofessional and was prompted to stop, and vocalized loudly when he had difficulty placing his picture on the wall (id. at p. 2). In her analysis and summary, the BCBA noted the student sat for short durations and followed some classroom routines but was often separated from other students (id.). The student appeared to require additional prompting and attention compared to his classmates, and did not show physical aggression towards peers, but did exhibit one instance of aggressive behavior toward his paraprofessional (id.). The student was observed to respond well to his paraprofessional's instructions and prompts but his interaction with peers was minimal, which the BCBA reported may have been due to being seated away from his peers (id.).

A March 2017 recommendation letter completed by the student's private occupational therapist described in detail the student's sensory, communication, and behavioral needs (Parent Ex. I). The report indicated the student was nonverbal but able to repeat some words, although his words were unclear (id. at p. 1). According to the report, the student demonstrated severe deficits in sensory processing, registration, and modulation (id.). The report indicated the student's sensory deficits brought about very low frustration tolerance, poor transitioning and auditory processing skills, poor attention to task including difficulty following directions, decreased fine motor coordination, decreased bilateral coordination, and poor overall engagement in functional activities including dressing, prewriting, and play skills (id.). Due to his low frustration tolerance, the student engaged in violent tantrums when he did not have his own way (id.). The student engaged in sensory seeking behaviors including running away, banging into objects, crashing into walls, and looking at himself in mirrors/glass reflections for visual input, and the report indicated that he lacked safety awareness (id.). The evaluating occupational therapist noted the student's attention was poor and he was unable to participate in a standardized assessment (id.). Results of an administration of the Sensory Profile Caregiver Questionnaire indicated the student exhibited severe dysfunction in most areas tested (id. at pp. 1-3). The results indicated the student demonstrated behaviors which fell two standard deviations below the mean in areas related to sensory seeking, emotional reactivity, low endurance/tone, oral sensory sensitivity, inattention/distractibility, "registration," auditory processing, visual processing, vestibular processing, touch processing, oral sensory processing, sensory processing related to endurance/tone, modulation of movement affecting activity level, modulation of sensory input

affecting emotional responses, emotional/social responses, behavioral outcomes of sensory processing, and thresholds for responses (*id.*). The results also indicated the student demonstrated behaviors which fell one standard deviation below the mean in areas related to fine motor skills/perceptual, multisensory processing, modulation related to body position and movement, and modulation of visual input affecting emotional responses and activity level (*id.* at p. 2).⁹ The report indicated the student responded very well to sensory-based OT and required strong sensory input to engage in functional activities (*id.* at p. 3).

Turning to the issue on appeal, in addition to the 25.5 hours of center-based, 1:1 ABA instruction awarded by the IHO, the MBC home-based services the parents seek include 10 hours of 1:1 ABA instruction and one hour of BCBA supervisory services. A review of the hearing record supports the IHO's determination that the parents were not entitled to prospective funding of these home-based services provided by MBC.

The September/October 2016 neuropsychological evaluator specifically recommended that the student receive school- and home-based ABA instruction, and the December 2016 narrative report indicated that home-based ABA promoted the student's progress and recommended its continuation, as well as initiation of 1:1 ABA services at school (Parent Exs. C at pp. 6-7; D at p. 2).¹⁰

According to the September/October 2016 neuropsychological evaluation report, the student's then-current prekindergarten program consisted of a 12-month school year program in an 8:1+2 special class placement, together with related services of three 30-minute sessions of individual speech-language therapy per week, three 30-minute sessions of individual OT per week, and the support of a full time 1:1 paraprofessional, and did not indicate that the student received instruction using ABA at school (Parent Ex. C at pp. 1-2). The evaluator reported that the student's parents had obtained the services of a private ABA provider who worked with the student "outside of school" (*id.* at p. 2). The student's father testified that the student began receiving home-based ABA services in May 2016, and was receiving 14 hours per week of home-based ABA services at the time of the impartial hearing (Tr. pp. 78-79).¹¹ The parent further testified the student made progress only because of the home-based ABA services the student received (Tr. p. 78).

The hearing record shows that based upon the neuropsychological evaluation, the private neuropsychologist stated that the student was not making progress in his then-current placement and recommended that, in addition to receiving ABA instruction at school, it was "critical" that the student receive a minimum of 10 hours per week of 1:1 home-based ABA that included direct instruction, family training, and educational programming coordination to "aid in generalization

⁹ The student's scores reflected a typical performance in the areas of sensory sensitivity and sedentary (*id.* at p. 2).

¹⁰ The August 2016 behavioral evaluation recommended the student receive ABA therapy to address needs related to "communication, self-care routines, academic skills, social skills, and self-regulation" (Parent Ex. E at p. 3). The evaluating BCBA's did not specify that the student required ABA services beyond the school day, nor did they make any recommendation as to how many hours per week the student should receive ABA instruction (*id.*).

¹¹ The parent testified that the home-based ABA services were funded through insurance (Tr. pp. 77-79).

and coordination of his educational plan" (Parent Ex. C at pp. 3, 6-7). The neuropsychologist also stated that "a minimum of 10 hours" per week of home-based ABA instruction was "imperative" to assist the student in "making appropriate progress" and minimizing regression (id. at pp. 6-7).¹² However, it is relevant that at the time of this recommendation, the student was not receiving any ABA instruction during the school day, such that it is difficult to determine if the evaluator would have found that the student would continue to require home-based ABA services had he been receiving school-based ABA services at the level (25.5 hours per week) awarded by the IHO (see id. at pp. 1-2).

Additionally, as quoted above, the neuropsychologist's recommendation for home-based ABA services focused on the student's need for generalization of skills and coordination of the student's educational program in the areas of self-regulation, functional communication, social, and ADL skills (Parent Ex. C at pp. 6-7). To the extent the student's communication, behavioral, and social needs as identified in the neuropsychological evaluation report were such that home-based ABA services would benefit the student, the evidence in the hearing record does not indicate these skills could not be addressed during the school day, for which the student was awarded 25.5 hours per week of 1:1 ABA services.

In a December 2016 narrative report, a BCBA indicated that, based on the classroom observation of the student, and his response to the home-based ABA sessions, it was strongly recommended the student receive 1:1 ABA instruction on a continuous basis at school (Parent Ex. D at p. 2). The BCBA also indicated the student's pace of progress in the home setting while receiving ABA therapy had been "significant in the areas of expressive and receptive language, compliance with instructions and imitation skills," and was "a clear indication of the progress he could make" with the provision of school- and home-based ABA services (id.). However, as stated previously, at the time of the observation the student was not receiving any school-based ABA instruction, and the BCBA did not provide a rationale as to why the student would continue to require home-based services, in addition to receiving 25.5 hours of 1:1 ABA instruction in a center-based environment, to receive educational benefit (id.).

In letters dated March 15, 2017, entitled "To Whom It May Concern," the MBC center supervisor indicated that MBC was able to provide a program which met the student's educational and therapeutic needs (Parent Exs. F; J). The letters indicated that, upon receiving an order for funding, MBC would provide services including 25.5 hours of ABA instruction and 10 hours per week of home-based ABA therapy (Parent Exs. F; J). The MBC clinical supervisor testified that home-based ABA would "generalize the skills that [the student was] learning in the school setting to the home and community-based settings," allowing him to perform the skills "more successfully and more independently" (Tr. pp. 57-58; see Tr. pp. 49, 60-61). The MBC clinical supervisor testified that the in-school ABA instruction would address the student's needs in the areas of verbal behavior, social skills, self-management, leisure skills, independent play skills, and academic skills (Tr. pp. 42-43). Regarding the recommendation for 10 hours of home-based ABA instruction, the

¹² In conjunction with the home-based ABA services, the neuropsychological evaluation report indicated the student required a 12-month school-based program in a full time special class placement with staff trained in ABA (Parent Ex. C at p. 6). The neuropsychologist indicated the student required 1:1 direct instruction which emphasized functional communication and behavioral interventions to redirect inappropriate behaviors and promote socially appropriate behaviors and reciprocal interaction with peers (id.).

MBC clinical supervisor testified that the student required assistance with sensory needs across the entire day, and the functional living skills needed "to be successful in his home and community environments," such as independent leisure skills, safe play skills, self-management skills, the ability to appropriately interact with family members, and appropriate community-based skills; skills that would also be addressed during the school day (compare Tr. pp. 42-43, with Tr. pp. 40, 47-48). For example, the MBC clinical supervisor testified that the student's ABA provider would support the student through the provision of systematic reinforcement of leisure skills exhibited in the home setting which he learned during the school day, reflecting that the purpose of the home-based ABA services was to permit generalization of skills across environments (see Tr. pp. 57-58).

In further support of the student's need for the provision of home-based ABA services, the MBC clinical supervisor testified that a trained ABA provider was needed to provide home-based instruction to the student to ensure constant data analysis, implementation of research-based practices, systems of reinforcement, and systematic fading of prompts (Tr. pp. 48-49). In addition, the MBC clinical supervisor testified that a BCBA supervisor would provide oversight and coordination among providers for both the home- and school-based ABA programs as well as parent training and collaboration with the parents regarding the student's instruction (Tr. pp. 49, 60-61). However, the hearing record fails to clearly explain why the student required these additional services beyond the school day, other than for the generalization of skills (see Tr. pp. 47-50, 57-58).

The hearing record also shows that the reasons stated for the one hour per week of home-based BCBA supervision was to provide parent training, parent communication, and to evaluate the need for a home-based FBA or BIP (Tr. p. 52). However, the MBC clinical supervisor testified that parent training is provided on an individual basis at MBC, as part of the ABA program (Tr. pp. 61-63). The MBC clinical supervisor also testified that MBC has a social worker on staff to provide additional parent training and support, and that there are also parent support groups available (id.). Therefore, in this case, the hearing record shows that the parents would have received parent counseling and training through the school-based MBC ABA program, and the overarching reason provided by the MBC clinical supervisor for the request to have the district fund home-based ABA instruction was for generalization of skills addressed within the school-based program to the home and community settings (Tr. pp. 40, 47-50, 57-58; see also Tr. p. 24).

VI. Conclusion

Based on the foregoing, the IHO properly found that the home-based services sought by the parents were not necessary for the student to receive educational benefits and were thus not required to be funded by the district (L.K., 674 Fed. App'x at 101). Although the MBC clinical supervisor suggested that the student would experience "more success and more meaningful progress" if he received home-based services in addition to a school-based ABA program (Tr. p. 57), school districts are not required to "maximize" the potential of students with disabilities (Bd. of Educ. v. Rowley, 458 U.S. 176, 189-90 [1982]; Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 132 [2d Cir. 1998]). While it is possible that the student would make more progress if he were to receive home-based ABA services in addition to the awarded placement at MBC, "equitable considerations are relevant in fashioning relief" under the IDEA and "the relief is to be 'appropriate' in light of the purpose of the Act" (Sch. Comm. of Burlington v. Dep't of Educ., 471

U.S. 359, 369, 374 [1985]). Although the evidence in the hearing record appears to reveal a consensus among the professionals who evaluated the student that he should receive home-based ABA services, a closer review of the recommendations establishes that the primary purpose of the recommended home-based services would be to provide the student with generalization of skills addressed during the school-based portion of his program. As discussed above, school districts are not required to recommend programs that will ensure a student's generalization of skills across environments (F.L., 2016 WL 3211969, at *11; L.K., 2016 WL 899321, at *8-*10; P.S., 2014 WL 3673603, at *13-*14; M.L., 2014 WL 1301957, at *11; R.B., 2013 WL 5438605, at *15; K.L., 2012 WL 4017822, at *14). Accordingly, because the hearing record does not support a finding that home-based ABA services are necessary to enable the student to receive educational benefits, rather than to generalize skills, the record does not establish that this is one of the rare cases in which the district should be ordered prospectively to fund the requested home-based services to be provided by the nonpublic school (see Antkowiak, 838 F.2d at 640-41; Z.H., 107 F. Supp. 3d at 376).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated April 4, 2017, is modified, by reversing that part which ordered the district to provide direct funding for the student's placement at MBC at specified rates; and

IT IS FURTHER ORDERED that the district shall fund the student's placement at MBC at the rates indicated in the impartial hearing record.

Dated: Albany, New York
June 21, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER