



The University of the State of New York

The State Education Department

State Review Officer

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No. 19-131

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, by Gary S. Mayerson, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail M. Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request to have respondent (the district) fund home-based special education services to their son for the 2019-20 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 hearing record is sparse regarding the student's educational history, including information about the student's special education needs and prior educational placements; however, the hearing record reveals that the student has been attending the Ideal School (IDEAL) from the first grade until the eighth grade (2019-20 school year) (Tr. p. 130; see Parent Ex. D).¹ Additionally, the hearing record indicates that the student presents with developmental delays across all areas and has reportedly received diagnoses of spastic quadriplegia cerebral palsy,

¹ The Commissioner of Education has not approved IDEAL as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

microencephaly, oral motor and motor apraxia, and pervasive developmental disorder (PDD) not otherwise specified (Tr. pp. 61, 78, 92; Parent Exs. G; I; K; M; O; S; T).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2019, the parents asserted that the district failed to offer the student a free and appropriate public education (FAPE) for the 2019-20 school year (Parent Ex. A). Initially, the parents requested an interim order on pendency based on an unappealed IHO Decision dated March 20, 2019 consisting of: (1) tuition reimbursement for the student's attendance at IDEAL; (2) bus transportation to and from IDEAL; (3) two hours per week of 1:1 speech-language therapy at home; (3) three hours per week of 1:1 physical therapy (PT) at home; and, (4) three hours per week of 1:1 occupational therapy (OT) at home, all as part of a 12-month program (not including the month of August) (Parent Exs. A at p. 2; B at p. 14).

Initially, the parents argued that the district failed to convene a CSE meeting for the 2019-20 school year, failed to develop an educational program or recommend a placement for the student for that year and failed to meaningfully include the parents in the development of the student's IEP and placement selection process (*id.* at pp. 2-3). The parents further argued that they did not receive an IEP, school location letter, or prior written notice for the student's 2019-20 school year (*id.*). Next, the parents alleged that the district failed to timely develop critical assessment reports that should have been used as the basis of the student's present levels of performance (*id.* at p. 3). The parents also argued that the district failed to conduct a triennial evaluation, properly document the student's progress and conduct its own evaluations and assessments of the student (*id.*). Next, the parents argued that the CSE failed to discuss a classroom observation, "much less actually conduct one" (*id.*). In addition, the parents argued that the district failed to develop an IEP tailored to the student's individual needs (*id.*). The parents further argued that the district failed to develop any IEP goals or offer any "levels and frequencies" of related services despite the student's needs (*id.*). Next, the parents contended that the district failed to appropriately communicate with the student's teachers and related service providers as part of developing a program and placement (*id.*). The parents further contended that the district failed to consider the student's need for assistive technology (AT) or contemplate the student's least restrictive environment (LRE) (*id.*). Additionally, the parents contended that the district failed to recommend extended school year (ESY) and extended day services for the student, despite the fact that he required these services in order to acquire skills, prevent regression and continue to make progress (*id.* at p. 4). Next, the parents argued that the district failed to provide the student with appropriate vocational assessments and transition planning and services (*id.*). The parents also argued that the district failed to timely offer a placement recommendation or any special education transportation for the student (*id.*).

With respect to the student's unilateral placement, the parents argued that it was "reasonably calculated" to provide meaningful education benefits to the student (Parent Ex. A at p. 4). In addition, the parents argued that equitable considerations weighed in their favor because they provided appropriate notice to the CSE, cooperated in good faith and there were no equitable circumstances that would preclude or diminish relief (*id.*).

As relief, the parents requested the following: (1) tuition reimbursement for the student's attendance at IDEAL from September 2019-June 2020; (2) six hours per week of 1:1 speech-

language therapy; (3) up to ten hours per week of 1:1 PT; (4) five hours per week of 1:1 OT; (5) four hours per week of 1:1 special education itinerant teacher (SEIT) services at home; (6) transportation to and from school; and (6) up to four hours per month of parent counseling and training (Parent Ex. A at p. 5).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on July 24, 2019 and concluded the portion of the hearing related to pendency that day (Tr. pp. 1-7). In an interim decision dated July 24, 2019, the IHO noted that the district agreed with the parents that the student's pendency placement was established by an unappealed March 20, 2019 IHO decision that consisted of the following: (1) district funding of the student's attendance at IDEAL with transportation; (2) two hours per week of 1:1 speech-language therapy at home; (3) three hours per week of 1:1 PT at home; and, (4) three hours per week of 1:1 OT at home, all as part of an "11 month program, not including August" (IHO Ex. II at pp. 2-5). The IHO also directed all of the student's related services providers to submit monthly reports and that pendency would commence on June 28, 2019 (id. at p. 5).

On August 1, 2019, the impartial hearing proceeded on the merits and concluded on October 29, 2019, after four hearing dates (Tr. pp. 8-137). On the last day of proceedings, the district indicated that it would not present a case-in-chief, and conceded that it did not offer the student a FAPE for the 2019-20 school year (Tr. pp. 41, 136; see Tr. pp. 10-12, 23-24). In a final decision dated November 20, 2019, the IHO found that the district failed to offer the student a FAPE for the 2019-20 school year and that the IDEAL portion of the parents' unilateral placement provided an appropriate program for the student (IHO Decision at pp. 8, 13).² More specifically, the IHO found that the evidence presented by the parents was "credible" (id. at p. 8), including the documentary evidence admitted into the hearing record, and supported that IDEAL was an appropriate program for the student (id.).

With respect to the student's home-based services, the IHO found that the student did not require home-based services to address his special education needs (IHO Decision at p. 14). The IHO noted that once a district failed to offer the student a FAPE, it was not liable for services the parents choose to privately obtain and that the parents are not entitled to funding if the services are excessive or unreasonable (id.). Furthermore, the IHO found that several issues existed with the student's current home program which replicated or duplicated IDEAL's goals and functions (id. at pp. 10, 13). The IHO noted that while the IDEAL staff and the home program staff all appeared to be aware of the dual program being provided, it did not make sense for "each program to coordinate without accounting for each program's therapy recommendations" (id. at p. 9). The IHO also noted that none of the student's therapists at IDEAL mentioned the student's need for any additional services outside of IDEAL or any additional summer services (id.). In addition, the

² The IHO's decision was not paginated (see generally IHO Decision). For ease of reference and, consistent with the method adopted by the parties, citations to the IHO decision will reflect pages numbered "1" through "18," omitting the cover page and the page identifying the names and titles of persons who appeared at the impartial hearing.

IHO found that IDEAL did not set forth any specific skill that they could not address at school which would result in the necessity of a home-based program (*id.* at p. 12). The IHO also noted that although the IDEAL staff and the home program staff contended that they were communicating with each other, there was overlap and duplication in the home program when the IDEAL program was already sufficiently addressing each area of the student's needs (*id.*). The IHO also found that although the parents may have believed that the additional home services were "desirable," it did not follow that the district must be made responsible for all of them (*id.* at p. 10). The IHO also found that without recent evaluative data, it was impossible to assemble an appropriate program for the student (*id.* at p. 13). In addition, the IHO found that the student's program was assembled by various parties each seeking to address the student's needs without any uniform plan which resulted in duplicative and potentially ineffective services being implemented (*id.*).

Turning to the parents' request for 12-month services at home, the IHO found that the evidence did not support a 12-month program for the student because there was no evidence of substantial regression in the hearing record (IHO Decision at p. 14). With respect to equities, the IHO found that no evidence was presented indicating that the parents frustrated the district's attempt to offer the student a FAPE, and thus the parents were entitled to tuition reimbursement at IDEAL for the student's 2019-20 school year (*id.* at p. 15). The IHO also found that the student was entitled to transportation to and from IDEAL (*id.*). In addition, the IHO found that the district did not provide any evidence of appropriate evaluations for the student, and therefore ordered the district to conduct evaluations so that the CSE could "develop an appropriate IEP and services" for the student (*id.* at p. 16).

As relief, the IHO ordered the district to: (1) fund the student's attendance at IDEAL for the 2019-20 school year; (2) evaluate the student in all areas of suspected disability within 60 days of the IHO decision; (3) reimburse the parents \$89,510 paid by the parents to IDEAL for the 2019-20 school year; (4) fund in total up to \$135,850 for the student's tuition for the 2019-20 school year; and (5) provide special education transportation to and from IDEAL (IHO Decision at p. 17).³

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in denying the parents' request for home-based services for the 2019-20 school year. Initially, the parents argue that the IHO correctly ruled that the district failed to offer the student a FAPE, IDEAL provided an appropriate program for the student and that equitable considerations weighed in their favor. With respect to home-based services, the parents argue that the IHO failed to consider the impact of an unappealed March 20, 2019 IHO decision which had already reduced the student's home-based services "from 23 hours to 8 hours per week" to "address concerns over 'maximizing,'" along with the district's failure to evaluate the student when denying their request for home-based services. The parents also argue that it was not necessary for IDEAL staff and the home-based staff to have assembled a single, all-encompassing program when there was evidence that the student needed at least some home-based

³ The IHO indicated that at a minimum the district should assess the student's needs as they related to academics, speech-language therapy, occupational therapy and physical therapy (IHO Decision at p. 17).

related services. The parents also argue that the severe deficits that the student's home-based providers were working on in the home were not identical to what the student was working on in school. In addition, the parents argue that the IHO "glossed over" the student's least restrictive environment (LRE) mandate because if the student received his home-based services in school, the student would miss a great deal of classroom time with his peers. Next, the parents argue that the IHO erred in finding that the student did not require any home-based services for the 12-month school year. The parents also argue that the IHO took an "unduly limited, restrictive and rushed approach" which did not include time to hear the testimony of any of the student's home-based service providers. As relief, the parents request reversal of the IHO's decision to the extent that the IHO eliminated the student's remaining home-based services and restoration of the student's home-based services at least to the levels set forth in the unappealed IHO decision dated March 20, 2019. In the alternative, the parents request remand back to the IHO to hear "additional evidence," including testimony from the student's home-based providers, and to consider the impact of the March 20, 2019 IHO decision and the district's failure to conduct evaluations assessing the student's needs.

In its answer, the district responds to the parents' allegations and requests that this office dismiss the parents' request for review and affirm the IHO's decision. Initially, the district argues that the parents' request for the restoration of the student's home-based services would be "excessive and unreasonable" because the IHO's award is sufficient to remedy the denial of a FAPE. The district also argues that the IHO properly found that there was no evidence of substantial regression which would result in the student's need for home-based services during the 12-month school year. Next, the district argues that a remand back to the IHO to hear testimony from the student's home-based services providers would not be appropriate because the IHO had affidavits from each of the home-based services providers and he reasonably determined that additional testimony was not necessary.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]).

The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. ___, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁴

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

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

VI. Discussion

A. Preliminary Matters

In this matter, the district does not cross-appeal the IHO's determinations that it failed to offer the student a FAPE for the 2019-20 school year, IDEAL is an appropriate program for the student and that equitable considerations favored the parents. The district also does not challenge the IHO's order directing it to fund or reimburse all costs associated with the student's attendance at IDEAL for the 2019-20 school year or his order that the district evaluate the student in all areas of suspected disability. As such, these determinations have become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the only issue in dispute is whether the IHO erred in denying the parents' request for home-based services for the student.

B. Reimbursement for Home-based Services

Turning to the crux of this case, the parents argue on appeal that the IHO erred in denying their request for home-based services for the student during the 2019-20 school year. In this matter, the IHO found that there was "overlap" and "duplication" in the student's home-based services in relation to the services the student was receiving at IDEAL. The IHO also rejected the parents' argument that the home-based services were needed to "generalize" the student's skills, as the IHO found that IDEAL was addressing each area of special education need and would not be

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

unable to work on skills that can be used in school as well as in the home. The parents argue that while there are home-based services that overlap with respect to working on particular needs of the student's, his home-based providers were working on severe deficits that were not identical to what the student was working on in school. As the IHO found that the district was not obligated to pay for "excess" services, the discussion of whether the IHO erred in denying the student home-based services is subject to an equitable considerations analysis; especially in this case, where the IHO found that although the IDEAL portion of the student's unilateral placement was appropriate and tuition for same should be reimbursed to the parent, the student did not require the additional home-based services for his educational program (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]).

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"]).

As the IHO correctly noted, 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.3d at 893 ; J.P. v County Sch. Bd., 447 F. Supp. 2d at 591).

Here, the unilateral placement for which the parents seek reimbursement is not merely the program provided by IDEAL, but also the home-based services that, together with the IDEAL program, constitute the totality of the placement at issue. In order to determine whether the IHO erred in denying the student's home-based services, a review of the hearing record is necessary in order to ascertain the student's needs. The district did not provide any documentary or testimonial evidence at the impartial hearing. In addition, although the student has been receiving special education services from an early age, neither party entered an IEP or education plan into evidence and the hearing record does not contain any recent evaluations of the student. As a result, the student's educational needs for the 2019-20 school year must be gleaned from the IDEAL 2018-19 final progress report and subsequent IDEAL school and home-based provider reports written during the 2019-20 school year. In addition to the IDEAL 2018-19 final progress report, the hearing record contains three physical therapy progress reports (dated summer 2019, August 2019 and October 2019), an October 2019 occupational therapy progress report, two speech and language progress reports from October 2019, and an October 2019 special education progress report (Parent Exs. G; I; K; M; O; R; S; U).

A review of the IDEAL 2018-19 final progress report indicates that the student was working on a modified curriculum and making progress across all academic areas (Parent Ex. U). According to the final progress report, the student attained academic grades ranging from B+ to A (id. at pp. 4-9). Specifically, in English, the report indicated that the student attained a grade of A, and was working on strengthening reading comprehension, grammar skills and written expression (id. at p. 4). The report noted that the student used "look back strategies" and highlighted key information in a text to help him answer scaffolded comprehension questions and complete short answer responses (id.). He applied learned spelling patterns to weekly spelling and vocabulary quizzes and demonstrated steady progress in his acquisition of learned vocabulary and application of learned spelling patterns (id.). Lastly, the final report for English indicated the student's teachers provided him with step-by-step instructions, models, sentence starters, and checklists to support the student with completing in-class assignments (id.). The report stated that the student had shown growth in his ability to stay on task, raise a quiet hand and modulate his volume in class (id.) In social studies, the IDEAL 2018-19 final progress report indicated that the student attained a grade of A and was an "enthusiastic participant in class discussions and supportive of his classmates' thoughts, opinions and ideas" (id. at p. 5). The report indicated that the student's stamina for completing assignments had improved as had his ability to complete assignments within the allotted class time (id.). The report further indicated that the student took responsibility for his work and acted on feedback (id.). The report described the student as "attentive, engaged, [and] on time" (id.). According to the final progress report, the student attained a grade of A in science and had made good progress in the second semester (id. at p. 6). The report indicated that the student took initiative and served as a model to peers (id.). In math, the student attained a grade of B+ and demonstrated growth and consistent progress (id. at p. 7). He actively participated in each lesson and became more independent in accurately completing his work (id.). With respect to math skills, the report indicated that the student could identify and add bills and coins to determine a total with intermittent support and used a multiplication chart to determine the product of two single-digit numbers (id.).

In addition to information from the student's teachers, the IDEAL 2018-19 final progress report contained information provided by the student's related service providers (Parent Ex. U at pp. 11-17). With regard to occupational therapy, the report indicated that the student received two 45-minute sessions of therapy per week and identified the goals the student was working on, all of which were noted to be "in progress" (*id.* at p. 11-12). According to the final progress report, the student was working on: writing four sentences using appropriate finger spacing between words, as well as appropriate capitalization, punctuation, and good legibility; writing his full name and numbers 0-9 using appropriate capitalization, spacing, sizing, and good legibility; improving his visual motor skills by keyboarding at a rate of 10 words per minute; transitioning smoothly between near-point stimuli without losing focus in order to accurately copy and type four sentences from the paper next to him; demonstrating independence with clothing management during his bathroom routine; completing pericare with minimal assistance; and buttoning and unbuttoning 1" buttons (*id.*). With the exception of the initial handwriting goal, the final progress report recommended that the student continue to work on each of these goals during the next school year (*id.*). The occupational therapist reported that the student's handwriting program had shifted towards using assistive technology "as a functional alternative to handwriting while completing academic work" and noted that a keyboarding goal had been added to the student's OT program (*id.* at p. 11). The occupational therapist noted that the student's tolerance for typing had increased throughout the year and the student continued to work on increasing his speed and stamina for typing (*id.*). The occupational therapist further noted that the student's ability to complete self-help skills was progressing with regard to dressing, bathroom routines, and washing hands; however, he continued to need assistance such as verbal cueing and physical assistance depending on the task (*id.* at p. 12). Finally, the occupational therapist recommended that the student continue to receive OT at the same frequency and format for the next school year (*id.*).

With regard to speech-language therapy, the IDEAL 2018-19 final progress report indicated that the student was receiving therapy twice per week for 45 minutes per session (Parent Ex. U at pp. 13-15). According to the final report, the student was working on the following goals, all of which were noted to be "in progress": following two to three step directions during verbal and written tasks; responding to more complex "wh" and "how" questions; generating a short written paragraph using correct grammar and punctuation; adding two to three details to his written work; taking three to four conversational turns and adding new information to maintain conversation with peers and adults; using strategies to increase intelligibility when speaking to peers; and increasing his awareness of volume of speech (*id.*). The speech language therapist indicated that the student made progress in his receptive, expressive and pragmatic language skills, articulation, and in increasing awareness of the volume of his speech (*id.*). With respect to receptive language, the speech-language therapist reported that the student continued to follow one to two step directions and had shown progress in his ability to identify key words in oral and written directions (*id.* at p. 13). With respect to expressive language, the student practiced his written language skills and made gains in the correct use of grammar and punctuation, stamina during independent work, and feelings toward his work (*id.*). In terms of pragmatic language, the speech-language therapist reported that the student continued to initiate and maintain conversations with peers and adults and had shown progress in his ability to gain someone's attention appropriately (*id.* at p. 14). The student needed reminders to use different topics and vary his language each time he interacted with the same person (*id.*). The IDEAL 2018-19 final report indicated that the student did not receive direct therapy for articulation, but that the speech-language therapist provided the student with specific verbal reminders in order for the student to

improve his speech intelligibility (*id.*). The speech-language therapist recommended continuation of speech and language therapy twice per week but also recommended that the sessions be changed to a group setting in order to provide the student with more opportunities to work on pragmatic language skills (*id.* at p. 15).

Turning to physical therapy, the IDEAL 2018-19 final progress report indicated the student was receiving two 45-minute sessions per week of physical therapy and that the following goals were "in progress": ascending and descending stairs using a step-over-step pattern, independently propelling his wheelchair; standing with two feet on a balancing mat with minimal upper body sway; ascending and descending a four-inch step in preparation of navigating a sidewalk curb; and stepping over a one-inch hurdle (Parent Ex. U at pp. 16-17). The final report indicated that the student had achieved the following: walking a 60 foot hallway with sufficient toe clearance and hip flexion for a stable gait without the use of an assistive device, with contact guard assistance and picking up five bean bags off of the floor and placing them into a bucket on an elevated surface (*id.*). The physical therapist reported that the student worked hard on strengthening to improve walking form and endurance (*id.* at p. 16). He was able to ascend and descend stairs with minimal assistance for weight shifting, but required slightly more assistance when descending because of his difficulty grading his movement; the student would occasionally shift his weight too far forward and could become unsafe without assistance (*id.*). According to the physical therapist, the student's walk had "improved immensely"; however, a wheelchair goal was added to the student's PT program due his recent acquisition of a manual wheelchair (*id.*). The physical therapist explained that since beginning to practice self-propulsion the student's understanding of how to control the wheelchair had improved and he was independent at pushing himself; however, he required moderate verbal cueing to continue pushing and became fatigued after approximately one block (*id.*). The physical therapist stated that the student worked on balancing without his walker in order to decrease his reliance on it, and to increase his overall safety during transitions (*id.* at p. 17). The student required minimal assistance navigating a curb when outside or a similarly elevated surface indoors, and he worked hard to increase hip strength in order to allow weight shift on one side and hip flexion on the other side to be done more smoothly (*id.*). The physical therapist recommended that the student continue to receive individual PT for two 45-minute sessions per week in order to improve his strength, balance, endurance and coordination skills (*id.*).

The IDEAL 2018-19 final progress report indicated that the student was a member of an advisory group in which he worked hard to build mature relationships with classmates and peers (Parent Ex. U at p. 2). The report further indicated that with teacher support, the student could ask peers questions about their day and lives, bonding over shared interests such as music; however, he benefitted from reminders to ask students if they would like to sing with him before beginning to sing as an attempt to engage with peers (*id.*). The report described that with visual and verbal reminders, the student made progress maintaining an appropriate volume of speech when transitioning in the hallways and entering classrooms and that he showed growth in recognizing when it was appropriate to stop for longer conversations (*id.*). Additionally, the student made "tremendous growth" in identifying when he needed assistance and continued to work on asking for help with specific tasks (*id.*). Finally, the report indicated that the student had been working on identifying peers' feelings, and when and how it was appropriate to offer support (*id.*).

The IDEAL 2018-19 final progress report included detailed information about the modifications and accommodations provided to the student, which included: an associate (1:1) teacher throughout the day for academic classes and all transitions; modifications; reduced writing requirements for assignments; reduced complexity of texts and highlighting of key points; small group instruction; additional time to complete assignments; untimed assessments; preferential seating; checks for comprehension and understanding; cues to maintain focus or attention to task; extra wait time to formulate oral and written responses; preview, review, and repetition of information; use of dictionary and word banks; verbal prompting and visual aids; directions read aloud when needed; step-by-step directions; lap-sized whiteboard for transcribing sentences and words to be typed; teacher scribe for extended written responses; allowed dictation of answers; chunking of information; use of audio books; enlarged text; guided comprehension questions; sentence starters for written responses; support for planning and producing extensive written responses; graphic organizers; use of oral discussion to demonstrate comprehension; multiple-choice options for open-ended comprehension questions; prompting to expand on responses to inferential questions; fidget to sustain attention; cues to establish eye contact; cues to maintain conversation for multiple turns; support to promote and expand conversations and engage in play with peers; verbal cues and prompts to keep responses relevant to the topic; support for recording homework assignments; monitor for balance; activities adapted to allow for participation from a seated position/wheelchair; rest breaks as needed; adapted choreography; and games rules and regulations modified to promote confidence and success (Parent Ex. U at p. 10).

Progress reports completed by the student's home-based service providers during the 2019-20 school year provided additional insight into the student's needs. The student's home-based physical therapy services were provided by several different therapists. In a progress report dated August 21, 2019, the first physical therapist indicated that the student received five hours of therapy per week to address his gross motor delays (Parent Ex. K at p. 1; see Parent Ex. L at p. 1). The physical therapist reported that the student was not an independent ambulator, had poor postural alignment, and had low muscle tone and weakness in his trunk, and high muscle tone in his arms and legs (Parent Ex. K at p. 1). Additionally, the physical therapist reported that the student needed assistance to change position and was not able to sit for long due to tight hamstrings and posterior pelvic tilt; however, he was able to improve his trunk postural alignment when sitting crisscross (Parent Ex. K at p. 1). The student required maximum assistance to transition from the floor to standing and was unable to stand and maintain the position as he was "in constant movement" due to body asymmetry which affected his balance (id.). According to the physical therapist, the student could walk short distances independently but used an asymmetric walking pattern and often reached to hold onto walls, furniture or people and would fall when he lost focus (id.). The physical therapist opined that the student demonstrated the most difficulty standing and walking due to increased flexor tone in his lower extremities and poor postural alignment and that he demonstrated increased laxity in his core muscles denoting lack of midline control (id. at pp. 1-2). She noted that the student's walking skills were not functional or efficient (id. at p. 2).

A second physical therapy progress report was completed by a physical therapist who worked with the student during July and August 2019, twice per week for 60-minute sessions (Parent Ex. O). The second physical therapist reported that the student required minimal to moderate assistance to transition from sitting to standing, but was able to transition independently from a chair to standing with verbal cueing to slow down, concentrate, and position himself appropriately (id. at p. 2). The physical therapist further reported that the student showed an

inconsistent loss of balance when attempting to transition from the floor or a chair to standing, and he had demonstrated a "fair ability" to ambulate step to step when ascending and descending stairs with bilateral upper extremity support on the handrails and very close supervision (*id.*). The summer 2019 physical therapist also indicated that the student demonstrated decreased protective reactions while standing when minimal to moderate outside forces were applied (*id.*). Furthermore, the physical therapist reported that the student had muscle weakness throughout his extremities and his core, and tight heel cords, hamstrings, hip flexors and hip adductors; however, his range of motion remained functional (*id.*). The physical therapist stated that the student needed to: maintain his range of motion throughout bilateral upper and lower extremities; improve his lower extremity strength and endurance; increase standing tolerance to improve his ability to ambulate without assistance; improve core strength to improve his overall extremity control, sitting/standing balance, and his ability to maintain an upright posture (*id.*).

In the October 2019 progress report, a third physical therapist reported that she provided the student with PT at home five times per week for 60 minutes per session (Parent Ex. G at p. 1). According to the third physical therapist, the homebased PT focused on improving the student's strength, balance and spatial awareness so that he could effectively and safely interact with his environment; improving the student's motor planning, to enhance organization and "encourage fluid movements with his gross motor skills"; and improving the student's body awareness so he could successfully maneuver and interact with his classmates in a safe manner (*id.*). The third physical therapist indicated that the student could maintain side sitting and long sitting independently; however, continued to demonstrate significant gross motor delays, detailing that he had core weakness and spasticity; required assistance to transition into standing; had difficulty maintaining ring sitting due to hamstring tightness; was unable to stand alone due to his unsteadiness and required supervision to stand; and could walk on level surfaces with close supervision, but required guidance to maneuver around obstacles and a contact guard when descending or ascending stairs (*id.* at pp. 1-2). The physical therapist reported that the student still used crawling as his primary means of mobility (*id.* at p. 2). Additionally, the physical therapist reported that the student was very engaged with therapy activities and loved participating in gross motor skills activities, and she opined that physical therapy was crucial to continue improving the student's balance, gait and safety (*id.* at pp. 1-2).

Next with regard to OT, the October 2019 occupational therapy progress report indicated that the student received occupational therapy at home five times per week for 60 minutes per session, the focus of which was to improve the student's "functional independence in all self-care activities," focus and attention, and fine motor tasks including handwriting, typing and "other skills necessary for successful school functioning" (Parent Ex. I at p. 1). The occupational therapist reported that therapy had also focused on improving the student's executive functioning skills in order to help him independently follow routines at home and manage his homework and organize materials for school (*id.* at p. 1). Additionally, the occupational therapist reported that due to core weaknesses the student continued to have poor postural control, especially when required to complete motor tasks with his hands, and that when sitting in a regular chair the student often slouched and hyperextended his head and neck resulting in lack of fine motor control and poor visual focus on table top work (*id.*). The occupational therapist indicated that the student was becoming more independent in self-care (toileting, hand washing, bathing, tooth brushing, dressing and feeding); however, he required close supervision and/or minimal assistance in all areas for safety and cleanliness (*id.* at pp. 1-2). Finally, the occupational therapist reported that the student

was highly distractible; had difficulty following more than one-step directions; needed frequent cueing to stay on task; had difficulty maintaining good posture for fine motor tasks; had limited range of motion in his arms and hands which interfered with fine motor tasks; and had difficulty visually tracking across midline (id. at p. 2). The occupational therapist recommended that the student continue with OT to enable him to become independent in all routine activities and successful in school activities (id.).

Similar to PT, the student's home-based speech-language therapy was provided by more than one therapist. The speech-language pathologist who completed the October 2019 speech-language progress report indicated that she had been providing the student with therapy once a week for 60 minutes beginning in July 2019 (Parent Ex. M at p. 1).⁵ However, the speech-language pathologist noted that the student also received speech and language services six times per week for 60 minutes from a different provider (id. at p. 1). The speech-language pathologist reported that therapy addressed the student's expressive, receptive, oral motor, articulation, and pragmatic/social thinking language delays (id.). The speech-language pathologist described the student's oral muscle tone as weak and reported that the student had notable difficulty with jaw stability, labial/facial rounding/ control, posture, and breath support, as well as weakness during lingual retraction for the phonemes s,/z in conversational speech (id.). Additionally, she described the student's vocal quality as "fair to poor" while speaking with unfamiliar listeners, noted that his speech was breathy and labored, and indicated that he demonstrated vocal abuse characterized by strain and poor breath support in conversational speech,; she opined that the student's poor breath support directly affected his speech intelligibility (id.). The speech-language pathologist indicated that the student presented with weaknesses in receptive and expressive language, specifically noting the student's difficulties with following complex or conditional directions and generating grammatically and syntactically appropriate sentences (id. at p. 2). The speech-language pathologist also noted that the student exhibited moderately impaired descriptive language; disorganization of his thoughts and ideas, and difficulty retelling, organizing and writing details in stories (id.). With regard to pragmatic and social thinking skills, the speech-language pathologist reported that the student had difficulty with social skills and would often omit pertinent information for the listener (id.). Additionally, the speech-language pathologist reported that while the student had made some progress generating comments related to the conversational topic, he occasionally had difficulty self-monitoring his productions to determine relevancy to the topic and struggled to introduce novel topics into conversations (id.). The speech-language pathologist reported that the student exhibited significantly below average expressive/receptive language, oral motor, articulation, and pragmatic language skills (id.). Finally, the speech-language pathologist strongly recommended that the student continue to receive language, oral motor articulation, and pragmatic language skills therapy six times per week to address his disorders (id.). She specifically stated that therapy was medically necessary for the student to improve speech, language, oral motor and pragmatic language skills for successful communications and that his medical conditions had not shown improvement or self-corrections; therefore it was anticipated that he would continue to need therapy for six months or longer and that prognosis was good with intervention (id. at p. 3).

⁵ The speech-language pathologist indicated that she had been providing the student with speech-language therapy during the summer since July 2010 (Parent Ex. M at p. 1).

A second speech-language therapy progress report, dated October 22, 2019, indicated that the treating therapist had been working with the student since April 2019 (Parent Ex. S at p. 1). The speech-language pathologist indicated that she provided the student with speech-language services five times per week for 60 minute sessions focusing on increasing the student's motor speech competencies to improve speech production and intelligibility; and targeting the student's cognitive linguistic deficits involving attention, topic maintenance and expansion, and turn taking via receptive and expressive language tasks (*id.* at pp. 1-2). The speech-language pathologist noted that at times she supported the student's ability to complete homework that involved receptive and expressive language and reading comprehension abilities (*id.* at p. 1). The SLP described the student as having a global motor impairment with relative strengths in his receptive language and the ability to retain novel information, as well as his interpersonal interactions (*id.* at p. 2). The speech-language pathologist indicated therapy sessions also focused on improving the student's feeding and swallowing skills (Parent Ex. S). She described the student as personable, often using humor to navigate challenges and noted that he responded well to tangible and verbal reinforcements (*id.* at p. 2).

The October 21, 2019 special education progress report, written by the student's home-based special education teacher, indicated that teacher began working with the student in September 2019 (Parent Ex. R at p. 1). The special education teacher (teacher) reported that the "main overall goal" of home therapy was to help the student become more independent in his home environment and noted that during the sessions they worked on completing homework not finished during the week, as well as developing age appropriate social language skills (*id.*). The teacher commented on the student's performance as it related to goals that targeted his willingness to let the teacher know what homework he needed help with, ability to share past events using a strong voice and clear words, reading comprehension skills and reading stamina, independence at home, and pragmatic language skills (*id.* at pp. 1-3). The teacher reported that the student was working on becoming more aware and responsible with his schoolwork but that he needed a lot of support from her to complete assignments including: having literature reread to him, and at times help understanding what he read (*id.* at p. 1). She further reported that when it came to writing responses the student would dictate his responses to her, and she would help him correct his grammar (*id.*). When working on sharing past events, the student required prompts to slow down, use a strong voice, and to swallow, which helped with intelligibility (*id.* at p. 2). According to the teacher, the student also required reminders to respond using complete sentences and to add detail to his responses and answers both in conversations and on homework assignments (*id.* at p. 20). The teacher reported that reading out loud was physically challenging for the student and it required a lot of focus and energy because the student had difficulty orchestrating breathing and reading out loud (*id.* at p. 2). The teacher indicated that the student could decode most words but often did not know the meaning of words, and he had difficulty understanding figures of speech and sarcasm, and phrases or sentences with "double meaning" (*id.*). Another goal identified in the October 2019 special education progress report targeted the student's ability to become more independent at home, and indicated that he was working on increasing his awareness of his needs and wants, having his backpack in his room and ready to work on his homework or to know where it was, and letting the teacher know when he needed a break from a certain position or a stretch (*id.* at pp. 2-3). The teacher reported that the student needed verbal cues to ask for what he needed (*id.* at p. 3). With regard to pragmatic language, the teacher indicated that the student was very social and loved talking and interacting with people; however, he could become very excited and speak too loudly, mumble his words, talk about socially immature things or all of the

aforementioned (*id.*). The teacher reported that the student required constant reminders to turn towards and make eye contact with his conversational partner, and to keep his hands and body within his own personal space (*id.*). Finally, the teacher opined that the student was making steady progress due to the treatment plan he had in place (*id.*).

With regard to the program that would be provided to the student by IDEAL during the 2019-20 school year, here again the hearing record is limited; however, the director of the Dylan program (Dylan) at IDEAL provided testimony about the school and the Dylan program generally. She also provided limited testimony about the specially designed instruction provided to the student. The director of the Dylan program described IDEAL as an inclusive learning environment in which neurotypical students and students with special needs work together in the classroom (Tr. p. 45). The school employs differentiated instruction and is highly individualized (Tr. pp. 49-51; Parent Ex. F at pp. 1-3). According to the director, the student was enrolled in the Dylan program which was for students who have been identified as needing one-to-one support throughout the day (Tr. p. 46). The director explained that the Dylan program might look different for different individuals in that some students needed the program for safety reasons, some for academic reasons, and some for both (Tr. p. 46). She noted that while other students attending IDEAL who had IEPs received the services of "special educators, speech, OT and PT" Dylan students may have additional therapy sessions and the support of a one-to-one associate teacher to help them access the school's inclusive community (Tr. p. 47). The director explained that the student's one-to-one associate teacher goes with him and supports him in all of his classes, redirects his attention to help him with stamina and "working through", creates a visual schedule for the student and may do some review or preview or implementation of differentiating materials (Tr. pp. 83-84). Students in the Dylan program received a maximum of 270 minutes of related services per week (Tr. p. 52; Parent Ex. F at p. 3). The director specified that at school the student received two 45-minute sessions per week each of occupational therapy, physical therapy and speech language therapy, and that the student's therapy was balanced between the different disciplines because he required therapy in each of them (Tr. pp. 52-53). The director indicated that the student was foreign language exempt, and because the student had academic challenges, his therapies were scheduled during a Spanish block and study halls so he would not miss any academic classes (Tr. p. 53-54). The director testified that the students have "advisory" at the beginning and end of the day which helps them to organize their schoolwork and homework and to work on executive functions (Tr. pp. 55-56). With regard to the student's mobility, the director testified that when navigating the hallway, the student used a walker fairly independently with monitoring (Tr. p. 61). According to the director, the student left his walker outside when going in and out of the classroom and his associate teacher helped him move his seat, sit in his seat and use the restroom (Tr. pp. 61-62). The student generally traveled between floors using an elevator (Tr. p. 62). Based on the student's reduced need for support, the director reported that the student had made significant progress ascending and descending stairs, as well as walking through the hallway without a walker in controlled situations (Tr. pp. 62). The director opined that the student needed additional services that he received at home due to the nature and severity of his disability; specifying that he needed "very specific instruction in terms of navigating environments" that the school does not have access to streets, community and transportation (Tr. pp. 67-68). The director testified that all of the student's physical and occupational therapists were working towards helping him becoming more independent with regard to adjusting his clothing, completing toileting routines and transitioning between his walker and his wheelchair (Tr. pp. 70-71). The director further opined that having these services in and out of school help the student be more available to learning, and that he was

learning skills that could be applied to both academics and "to his transitions and navigating the setting" (Tr. p. 72).

The determination as to whether a parent has demonstrated that the totality of a unilateral placement is reimbursable is inevitably made more difficult where, as here, the district has conceded FAPE and failed to produce any evidence demonstrating the student's needs. One court in this jurisdiction has addressed whether a unilateral placement was appropriate under circumstances in which the student's needs remained unclear (A.D. v. Bd. of Educ. of City Sch. Dist. of New York, 690 F. Supp. 2d 193, 206 [S.D.N.Y. 2010]). In A.D., the Court discussed how New York has placed the burden of production and persuasion on parents to establish that the unilateral placement was appropriate (690 F. Supp. 2d at 206). However, if there is a lack of required evaluative information and the IEP is deficient as a result, the Court held that, when analyzing whether the unilateral placement addresses the student's needs, the district, rather than the parent, is held accountable for any lack of information regarding the student's needs because the IDEA places the responsibility for evaluation procedures on the district in the first instance (id. at p. 207; see Application of the Bd. of Educ., Appeal No. 08-056).

As applicable here, the progress reports in the hearing record from both IDEAL and the home service providers present an incomplete and limited view of the student's needs going into the 2019-20 school year. While the reports offer some level of detail, as discussed above, with respect to what IDEAL and the home services providers were working on with the student in terms of skills and subject matter at the time of the reports, a lack of comprehensive evaluative information concerning all areas of the student's disability renders the hearing record one of gaps and silences with respect to the student's educational history and present levels of performance. Rather, a fact finder or reviewer is compelled in some sense to "reverse engineer" the student's needs from the provider's observations of the student's progress rather than measuring the student's progress against a known baseline of the student's strengths, deficits and challenges. Indeed, the IHO acknowledged that "no evaluations have been completed to set forth a complete picture of the [s]tudent need and appropriate services" and "without recent evaluative data it is impossible to assemble an appropriate program for the student" (IHO Decision at p. 13). Accordingly, to affirm the IHO's finding that the district was not required to fund any aspect or amount of the home-based services provided to the student as part of his unilateral placement—where the district conceded that it failed to offer the student a FAPE for the 2019-20 school year and elected to not submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs—would, in effect, unfairly fault the parent for a deficiency in the record for which the district should be held responsible (see 34 CFR 300.305[c]; 8 NYCRR 200.4[b][5][iii]; A.D., 690 F. Supp. 2d at 208; Application of a Student with a Disability, Appeal No. 18-049; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027).

Based on the foregoing, although the hearing record provides descriptions of the student's performance during his home-based related service sessions and the related services he received at IDEAL, it does not contain evaluative information—standardized assessments of the student's

skills, therapy session notes, or objective measures of progress—that would allow for a better understanding of the student's abilities in relation to established standards, and the degree of the student's deficits. As a result, there is not enough evidence in the hearing record upon which to base an increase or decrease in the student's home-based services. Therefore, under the unique set of circumstances of this case and based on the lack of objective evaluative information in the hearing record, I am modifying the IHO's determination to allow the student to continue to receive the same frequency and duration of home-based services, funded by the district, that he has been receiving for the 2019-20 school year.⁶ This comports with the relief sought by the parents on this appeal, namely the restoration of the student's home-based services at least to the levels set forth in the unappealed IHO decision dated March 20, 2019. Once the CSE conducts its evaluations of the student as ordered by the IHO, the CSE will have a better understanding of whether the student's needs support the provision of home-based services and an IEP reflecting that information can be developed.

With respect to the parents' argument that this matter should be remanded to the IHO so that the IHO can hear testimony from the student's home-based related service providers, it is noted that the IHO had affidavits from each of the home-based services providers and, in any event, the issue still remains that there is a lack of information in the hearing record regarding the services the student received at IDEAL. Moreover, absent any evaluative information such as standardized assessments of the student's skills, therapy session notes, or objective measures of progress, the testimony of the student's home-based providers, much like their affidavits, would not be sufficient to establish the student's needs for purposes of determining whether home-based services were an appropriate part of the student's program.

VII. Conclusion

In light of the foregoing, I find that the IHO erred in denying the parents' request for home-based services to be funded by the district for the 2019-20 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 20, 2019, is modified by reversing that portion which denied the parents' request for home-based services; and

IT IS FURTHER ORDERED that the district shall fund the parent's request for home-based services for the 2019-20 school year, in accord with the amount and duration of such services previously ordered in the unappealed March 20, 2019 IHO decision, that consisted of the following: (1) district funding of the student attendance at IDEAL with transportation to and from

⁶ I note that the unappealed March 20, 2019 IHO Decision provided a basis for the award of the eight hours of home-based services per week by finding that, upon consideration, although "there was insufficient credible evidence that th[e] student should receive 23 hours of therapy 52 weeks a year," that the testimony at hearing was sufficient to conclude at least that the student "require[d] a certain number of hours of related therapy in the home, based on his disability."

school; (2) two hours per week of 1:1 speech-language therapy at home; (3) three hours per week of 1:1 PT at home; and, (4) three hours per week of 1:1 OT at home, all as part of a 12-month program (not including the month of August).

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

CAROL H. HAUGE
STATE REVIEW OFFICER