The University of the State of New York

The State Education Department
State Review Officer
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No. 20-050

Application of a STUDENT WITH A DISABILITY, by his parent, 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:
Arthur John Golder, III, Esq., attorney for petitioner

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Cynthia Sheps, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to increase the hourly rate paid to the providers of the student's home-based applied behavior analysis (ABA) services for the 2019-20 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and 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[a]). 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

Given the limited scope of the appeal and the largely uncontested facts pertaining to the student's need for special education services, a more complete recitation of the student's educational history in this case is not required. Briefly, however, the student—eligible for special education as a student with autism—has continuously attended the same State-approved nonpublic school, New York Children Learning Institute (NYCLI), since kindergarten (see Parent Ex. G at p. 1).[1] The evidence reflects that over the course of several dates from July through December

[1] The student's eligibility for special education programs and related services as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

2018, an IHO (IHO 1) conducted an impartial hearing concerning the parent's allegation that the district failed to offer the student a free appropriate public education (FAPE) for the 2018-19 school year based upon "numerous substantive and procedural grounds" (Parent Ex. B at p. 1). In a final decision addressing the merits of the parent's claims, dated May 8, 2019 (May 2019 decision), IHO 1 noted that, during the course of the impartial hearing, the student "was offered continued placement" in a 6:1+3 special class placement at the same State-approved nonpublic school "for a [12-]month, full-time ABA program" (id. at pp. 1, 14).[2] As a result, IHO 1 indicated that the parent withdrew "all claims except for" the district's alleged failure to "recommend 20 hours per week of [ABA] one-to-one instruction at home and in the community as part of the student's program"—which, according to IHO 1, the student had received via settlement agreements or previous pendency (stay-put) orders "for the last three years" (id. at pp. 1, 4).

Ultimately, IHO 1 concluded that the district failed to offer the student a FAPE for the 2018-19 school year (see Parent Ex. B at pp. 8-12). The IHO explained that a Board Certified Behavior Analyst-doctoral (BCBA-D) who consulted with NYCLI and worked with the student at both the school and in the home provided evidence that the student could not benefit from the school programming alone and, in contrast, the district's prior written notices only indicated that "the [s]tudent is receiving ABA programmatically at NYCLI and [the student's] goals are being addressed by the school at this time," with no other evidence to show why the student was likely to make progress with in-school services at NYCLI alone (Parent Ex. B at p. 10). Accordingly, IHO 1 found that the district failed to establish that NYCLI "alone could provide meaningful educational benefit to the student" and that the "weight of the record evidence show[ed] the student require[d] the 20 hours of home ABA services in order to make the slow progress he ha[d] shown and to minimize regression" (id. at p. 10). In addition, IHO 1 concluded that the 20 hours per week of individual, home-based ABA services was appropriate to meet the student's needs and that equitable considerations weighed in favor of the parent's requested relief (id. at pp. 12-13). Therefore, as relief, IHO 1 ordered the district to fund the "student's 20 hours per week of [ABA] one-to-one instruction at home and in the community for the 2018-2019 school year"—in addition to funding the student's placement at NYCLI—and to provide the student with special education transportation ("one-to-one support on an air-conditioned mini-bus, limited to 45 minutes maximum each way") (id. at pp. 13-14).

A. Due Process Complaint Notice

By due process complaint notice dated June 25, 2019, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (see Parent Ex. A at pp. 1-2, 9). Specifically, the parent asserted that the district failed to "produce an IEP by June 15, 2019," for the 12-month school year and failed to "recommend any program or placement" for the student (id. at p. 2).[3] In addition, the parent alleged, as relevant to this appeal, that the district failed to

[2] IHO 1 noted that the parties agreed that NYCLI was "appropriate" for the student and that the district "stipulated to its obligation to continue to fund it" (Parent Ex. B at p. 1). Prior to this agreement between the parties, the student had been attending NYCLI pursuant to an interim order on pendency, dated August 20, 2018, and issued by IHO 1 (id. at p. 4).

[3] As support for the contention that the district was required to "produce an IEP by June 15, 2019," the parent cited to an order issued by Judge Nickerson in Jose P. v. Ambach, 553 IDELR 298, 79-cv-270 (E.D.N.Y. Jan. 5,

"provide the necessary home and community special education hours as part of [the student's] program" (id.). As relief, the parent requested a pendency order providing, in part, for the student's placement at [NYCLI], together with the home-based ABA services (id. at p. 8). The parent indicated that the unappealed, May 2019 decision formed the basis for the student's pendency placement (id.; see Parent Ex. B at pp. 12-14). The parent also sought an "order providing for placement at NYCLI, together with the home and community special education programming"; an order requiring the district to "provide the 20 hours per week of 1:1 ABA home program of special education"; special education transportation on an "air conditioned bus, a 1:1 bus paraprofessional, with limited time travel of no more than 45 minutes"; and the "issuance of [Related Services Authorizations] (RSAs) and authorizations for the related services that constitute[d] the 1:1 ABA home program of special education" (Parent Ex. A at pp. 2-3, 8).

B. Impartial Hearing

On July 10, 2019, the parties proceeded to an impartial hearing, and on that date, presented their respective positions pertaining to the student's pendency placement (see Tr. pp. 1-17; Parent Exs. A-C).[4] The parties agreed that the unappealed, May 2019 decision formed the basis for the

1982), as well as what appeared to be a district website (see Parent Ex. A at p. 2). However, when attempting to reach the website page with the internet address provided in the due process complaint notice, an error message appeared noting that the page could not be located (see Parent Ex. A at p. 2 [citing http://schools.nyc.gov/Academics/SpecialEducation/SEP/determination/ timelines.htm]). A "Nickerson letter" is a remedy for a systemic denial of a FAPE that resulted from a stipulation and consent order in a federal class action suit and provided that parents were permitted to enroll their children, at public expense, in appropriate State-approved nonpublic schools if they had requested special education services but had not received a placement recommendation within 60 days of referral for an evaluation (553 IDELR 298, 79-cv-270 [E.D.N.Y. Jan. 5, 1982] [emphasis added]). This remedy is available to parents and students who are class members in accordance with the terms of the consent order (see R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 192, n.5 [2d Cir. 2012]). The parent does not explain her reliance on the Jose P. case, the Nickerson letter procedure, or significantly, how or why this student should be considered to be a member of the class to whom these procedures may be applied (see Parent Ex. A at p. 2). Even assuming she was a member of the class, I have no authority to enforce the consent decree and the courts have indicated that allegations that the Jose P. consent decree has been violated should be raised in the Jose P. action (P.K. v. New York City Dep't of Educ., 819 F. Supp. 2d 90, 101 n.3 [E.D.N.Y. 2011], aff'd, appeal dismissed, 526 Fed. App'x 135 [2d Cir. May 21, 2013]; see W.T. & K.T. v. Bd. of Educ. of Sch. Dist. of New York City, 716 F. Supp. 2d 270, 290 n.15 [S.D.N.Y. 2010] [rejecting the parents' argument of an alleged violation of a consent order and noting that they should "seek relief from the court that entered that order"]). Moreover, the evidence in the hearing record demonstrates that the student was not without a placement recommendation for 60 days (see Tr. pp. 6-7). With that said, the IDEA requires a CSE to review and, if necessary, revise a student's IEP at least annually (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Additionally, the IDEA requires districts to have an IEP in effect at the beginning of each school year for every student with a disability in the district's jurisdiction (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]); 8 NYCRR 200.4[e][1][ii]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 194 [2d Cir. 2005]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

[4] The parent's June 2019 due process complaint notice was assigned to a different IHO for the impartial hearing—not to IHO 1, who conducted the impartial hearing concerning the parent's claims regarding the 2018-19 school year and who issued the May 2019 decision (compare IHO Decision at p. 1, with Parent Ex. B at p. 14). For clarity, references to the "IHO" in this decision will refer only to the IHO assigned to adjudicate the parent's

student's pendency placement (see Tr. pp. 5-6, 13-14; Parent Ex. B at pp. 13-14). At that time, the parent's attorney noted that the "transportation piece and the school placement [were] occurring, despite there being no formal provision for that" between the parties (Tr. pp. 6-7). However, according to the parent's attorney, the student's "related services of one-to-one ABA" was "not happening," and the district had taken no action to "provide or pay for those services" (Tr. p. 7). The parent's attorney explained that the "services [were] provided by private related services providers who [were] not willing to work on the case unless their payment [was] secured, either by some indication from the [district] that they w[ould] be paid or paperwork that indicate[d] that, such as a related services authorization [RSA], which [was] a usual mechanism by which such private related service providers [were] paid" (Tr. p. 7). In addition, the parent's attorney argued that, due to the district's position of historically failing to automatically implement undisputed pendency placements absent an order, the student "had a gap in services of over a week in terms of the related services, the one-to-one 20 hours per week of ABA home program" (Tr. pp. 7-10). As such, the parent's attorney stated the "intention on the record to pursue a remedy of compensatory education for the lost services," notwithstanding the difficulty in scheduling such make-up services when there was "no availability in the [student's] schedule, and there [was] little availability in the related service providers' schedules" (Tr. pp. 10-11). As a final point, the parent's attorney indicated that "[w]e may seek . . . to amend the due process complaint notice to state some kind of remedy for this gap in services" (Tr. pp. 11-12).[5]

In an interim order, dated July 10, 2019, the IHO memorialized the parties' agreement reached at the impartial hearing and ordered the following as the student's pendency placement: the student "shall immediately continue to attend [NYCLI], a New York State approved non-public school and receive all of the services he [was] entitled to under the [unappealed, May 2019 decision], the cost of which shall be paid by the [district] upon its receipt of reasonably satisfactory proof of services having been render[ed], retroactive to the date the [p]arent filed her instant [due process complaint notice" (Interim IHO Decision at pp. 3-4).[6] In addition, the IHO ordered the district to provide the student with "compensatory services in the amount of and in the nature of, those services the student did not receive since June 25, 2019 to the present, the cost of which shall be paid by the [district], upon its receipt of reasonably satisfactory proof of the student's entitlement and denial of those services, and reasonably satisfactory proof of those compensatory services having been rendered" (id. at pp. 4-6).

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claims in the June 2019 due process complaint notice concerning the 2019-20 school year.

[5] The hearing record does not include an amended due process complaint notice, evidence upon which to conclude that the parent—or the parent's attorney—followed through with the stated intention to seek compensatory educational services for this alleged "gap in services," or that the parties otherwise agreed to expand the scope of the relief already requested in the due process complaint notice dated June 25, 2019 to include compensatory educational services (see generally Tr. pp. 1-51; Parent Exs. A-W; Dist. Exs. 1-4).

[6] Neither the IHO's interim decision nor his final decision is paginated. For ease of reference, citations to the decisions will refer to the consecutive pages, with the cover pages as page "1," respectively (see IHO Decision pp 1-21; Interim IHO Decision at pp. 1-7).

C. Events Post-Dating the Due Process Complaint Notice

On or about July 24, 2019, a CSE convened to conduct the student's annual review and to develop an IEP for the 2019-20 school year (see Dist. Ex. 1 at pp. 1, 13-14, 17; see generally Dist. Exs. 3-4). Finding that the student remained eligible for special education as a student with autism, the July 2019 CSE recommended a 12-month school year program in a 6:1+3 special class placement at a State-approved nonpublic school, together with one 60-minute session per month of individual parent counseling and training, as well as special education transportation services (air conditioned vehicle, limited travel time not more than 60 minutes, and an "Attendant/Matron" with a "[r]oute with fewer students") (see Dist. Ex. 1 at pp. 1, 13-14, 17). According to the July 2019 CSE meeting minutes, the parent requested that the student continue to receive 20 hours per week of individual, home-based ABA services—and moreover, requested that the student's IEP include such recommendation (see Dist. Ex. 3 at p. 2).[7] When the July 2019 CSE rejected the parent's request to include the home-based ABA services in the student's IEP, the parent expressed that she "need[ed] the extra help" (id.). Thereafter, the parent's attorney "stated that they agree[d] with [the] placement, but disagree[d] with not rec[ommending] 20 [hours] of ABA at home" (id.). The July 2019 CSE noted in the IEP—within the section denoting "Other Options Considered"—that the CSE considered, but rejected, a 6:1+1 special class placement in a specialized school, a "Residential" State-approved nonpublic school, and "ABA Home Services" as "not appropriate at this time" (Dist. Ex. 1 at p. 19). The CSE indicated within the same section of the IEP that the student was "receiving ABA programmatically at NYCLI and [the student's] goals [were] being addressed by the school at this time" (id.).

D. Impartial Hearing and Impartial Hearing Officer Decision

The impartial hearing resumed on August 2, 2019, and was completed after two total days of proceedings (see Tr. pp. 18-51). On that date, the district entered four documents into the hearing record as evidence but declined to present any witnesses for testimonial evidence (see Tr. pp. 20, 22-23, 44; see generally Dist. Exs. 1-4). The IHO advised the district representative that, in his opinion, "trying to make a case solely on documents" was a "tough thing to do" and then explained the rationale underlying that opinion (Tr. pp. 22-24).

When given the opportunity to make an opening statement, the parent's attorney referred to the information in the due process complaint notice and highlighted evidence in an effort to "narrow the issues in the case particularly concerning the [student's] school placement" (Tr. pp. 25-26). Notably, the parent's attorney pointed to the July 2019 IEP and—while questioning whether it was a "final IEP"—indicated that, if the district stipulated that the student could continue to attend NYCLI consistent with the recommendation in the IEP, then the "issue" in the due process complaint notice alleging that the district failed to recommend a placement for the student could be "eliminate[d]" (Tr. pp. 25-27). The district representative at the impartial hearing confirmed that NYCLI satisfied the recommendation for a State-approved, nonpublic school placement in the July 2019 IEP (see Tr. pp. 32-35). Thus, according to the parent's attorney, the remaining issues to be resolved at the impartial hearing included the "one-to-one ABA program of related services and the special education transportation requested in the due process complaint" notice (Tr. p. 27).

[7] The parent's attorney attended the July 2019 CSE meeting with the parent (see Dist. Ex. 3 at p. 1).

The parent's attorney then described the evidence supporting the parent's contention that the student required both the State-approved nonpublic school and the individual, home-based ABA services to receive a FAPE, focusing primarily on information contained within a signed statement from a the "program [s]upervisor" for the student's home/community ABA program (program supervisor) entered into the hearing record as evidence (in lieu of that witness's direct examination at the impartial hearing) (see Tr. pp. 27-31; see generally Parent Ex. U).[8, 9] When the IHO asked the district representative if he wished to cross-examine the program supervisor, the district representative declined that opportunity (see Tr. pp. 47-48). The parent's attorney agreed to rest the parent's case after entering her documentary evidence into the hearing record (see Tr. pp. 38, 47-48; see generally Parent Exs. D-U). At the conclusion of the impartial hearing, the parties agreed to simultaneously file closing briefs with the IHO (see Tr. p. 49).[10]

In a decision dated February 9, 2020, the IHO initially described the background and procedural history of the case (see IHO Decision at pp. 3-6, 19). According to the IHO, the "only issue to be determined at the hearing [was] the [p]arent's request for (20) hours per week of home[-based] 1:1 ABA" (id. at p. 6). Next, the IHO briefly described the district's case, noting specifically that the district did not present any evidence through witnesses but submitted four documents into evidence; the IHO further noted that the district "did not object to the [p]arent's documentary submissions and did not cross examine the [p]arent's witness" (id. at p. 6). The IHO also described the parent's case as consisting of two witnesses who both "testified on direct testimony via affidavit" without cross-examination by the district, as well as the submission of 22 documents into evidence (id.).

[8] According to the statement, the program supervisor was a psychologist who was a BCBA-D (Parent Ex. U at pp. 1-2) and I note it was the same BCBA-D identified in the May 2019 IHO decision (Parent Ex. B at p. 10). The signed statement did not constitute an affidavit, as it was not sworn before a notary public, and therefore would not qualify as direct testimony by affidavit in lieu of in-hearing testimony (8 NYCRR 200.5[j][3][xii][f]); however, this deficiency was not raised during the impartial hearing and the district has not objected to the evidence. Accordingly, the evidence shall be weighed notwithstanding this deficiency. Parent's counsel is reminded to ensure that if he chooses to present testimonial evidence through written statements from witnesses in lieu of in-person testimony—and the IHO permits the same—those statements must be in the form of an affidavit in order to comply with State regulation.

[9] The parent's attorney anticipated proffering the parent as a witness; however, the IHO surmised that the parent's testimony was "going to be very redundant," and thus, after further discussion, the parent decided she would not testify at the impartial hearing (Tr. pp. 30-32; 40-42).

[10] The parent submitted a post-hearing brief to the IHO on August 30, 2019; however, the district did not submit a post-hearing brief (see IHO Decision at pp. 3, 21; see generally Parent Ex. W). While not mentioned by the IHO in the decision, the parent noted within the post-hearing brief that she was simultaneously submitting a motion seeking the consideration of additional documentary evidence that consisted of a signed statement from one of the student's ABA providers, dated August 29, 2019, in support of her argument to "raise the compensation rate of the teachers in the ABA home and community program from the current rate of $125 per hour to the going rate of $225 per hour" (see IHO Decision at pp. 3, 21; Parent Exs. V at pp. 1-2; W at p. 4). With regard to equitable considerations, the parent argued, in part, that the cost of the home-based ABA services obtained by the parent were "reasonable," and moreover, the "home program requested herein [was] the same as that currently being provided under this IHO's previous pendency order, and paid for by the [district] at its current rates, such that there [was] no issues as to cost" (Parent Ex. W at pp. 27-29).

Turning to the merits of the case, the IHO—after setting forth legal standards applicable to tuition reimbursement matters—concluded that, in light of its "burden of production and persuasion at an impartial hearing," the district's failure to present any testimonial evidence, and its failure to "rebut the presumption in the law that the [p]arent ha[d] cooperated with the agency" resulted in a "concession that the agency did not offer the student a FAPE" (IHO Decision at pp. 6-10). In addition, the IHO indicated that "[i]t would be fundamentally unfair to allow either party to rely solely on the submission of documents in meeting its burden under the law, where those documents [were] rife with double, triple and even unidentified hearsay sources, that c[ould not] be cross examined" even if the "compliance with technical rules of evidence [was] not required in administrative hearings" (id. at pp. 10-11). The IHO further noted that the district did not "present a case-in-chief, did not object to the [p]arent's documentary submissions and did not cross examine the [p]arent's witnesses" (id. at p. 11). In addition, the IHO found that the "credibility of the documentary and testamentary evidence was not controverted" by the district, and the evidence was "relevant and material to the issues to be determined" (id.). Consequently, the IHO concluded that the parent's "documentary evidence" was "credible and persuasive in favor of the [p]arent" (id.).

Having determined that the district failed to offer the student a FAPE for the 2019-20 school year, the IHO turned to the parent's burden of proof and what relief, if any, was warranted (see IHO Decision at p. 11). After summarizing the district's burden with respect to any award of compensatory educational services, the IHO then explained the parent's burden of proof with respect to the requested relief: namely, whether the district must reimburse or fund the "private educational services" for the student (id. at pp. 11-15). Finding that the parent did not seek compensatory educational services as relief in this matter and that the district's failure to offer the student a FAPE for the 2019-20 school year did not constitute a "gross violation of the IDEA," the IHO turned to whether the parent's requested relief was appropriate (id. at pp. 13-15). Here, the IHO indicated that the "credibility of the [p]arent['s] documentary and testamentary evidence was completely uncontroverted by the [district]," and moreover, the evidence "clearly establishe[d] the student's need for the home program in addition to the NYCLI school program in order to learn and make adequate progress" (id. at p. 16).

Nevertheless, the IHO was not persuaded by the parent's arguments supporting her request to "raise the compensation rate of the student's at home ABA teachers from the current rate of $125 per hour to the going rate of $225 per hour because the teachers have had no pay rise since the program began in 2015" (IHO Decision at p. 16). According to the IHO, the parent asserted that the "difference [between the current rate of pay and the going rate of pay was] threatening the viability of the home and community program, making it difficult to retain, replace or recruit new teachers" (id.).[11] The IHO noted that the district had been "paying for the student's at home ABA teacher" pursuant to the interim order on pendency in this case and that the hearing record did not contain any evidence to "establish that the [p]arents ha[d] incurred any financial obligation to pay the difference between the enhanced rate and the rate the [district] normally pa[id] for such services" (id. at p. 17). Moreover, the IHO found that the hearing record failed to contain any

[11] Next, the IHO addressed special education teacher support services (SETSS) and the absence of any regulatory definition of these services (see IHO Decision at pp. 16-17). However, neither party raised the issue of SETSS in this case (see generally Tr. pp. 1-51; Parent Exs. A-W; Dist. Exs. 1-4).

evidence of a "specific arrangement or a contract or an actual agreement the [p]arent ha[d] made with the home ABA provider, to pay the provider if the impartial hearing process did not result in an award of the enhanced rate" (id.). Therefore, according to the IHO, it was "unclear at this juncture" whether the parent—even if she prevailed on her claims—would be entitled to receive "any relief . . . absent evidence that the provider was owed additional compensation based on an agreement with the [p]arent or the [district]" (id.). Given the district's failure to provide the student with "special education programs and services on an equitable basis," the IHO ordered the district, in part, to "continue [its] responsibility to continue paying the student's at home ABA provider at the established 'pendency' rate of $125 per hour" for the entirety of the 2019-20 school year (id. at pp. 17-19).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by denying her request to increase the home-based ABA providers' rate of pay from $125.00 per hour to $225.00 per hour. The parent contends that, while not explicitly set forth in the decision, the IHO misapplied the principles of standing and improperly relied on the absence of evidence in the hearing record establishing that the parent was financially obligated to pay the increased rate of $225.00 per hour as a basis upon which to deny the parent's request to increase the providers' rate of pay. As such, the parent seeks an order increasing the home-based ABA providers' rate of pay from $125.00 per hour to $225.00 per hour.

In an answer, the district responds to the parent's allegations and seeks to uphold the IHO's decision in its entirety.[12]

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 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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v.

[12] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational

> instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).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

Given that the parties do not dispute the IHO's findings that the district failed to offer the student a FAPE for the 2019-20 school year and that the 20 hours per week of individual, home-based ABA services were required to offer the student a FAPE, the only remaining dispute is the hourly rate to be paid for the ABA providers. For the following reasons, I find that—consistent with the IHO's decision—the hearing record lacks sufficient evidence to support the parent's request to increase the hourly rate of pay for the student's home-based ABA providers during the 2019-20 school year from $125.00 per hour to $225.00 per hour.

First, the evidence in the hearing record shows that the due process complaint notice did not specify a particular rate for the parent's reimbursement or direct funding request for the individual, home-based ABA services, other than noting that the parent could not pay for these services (see Parent Ex. A at pp. 7-8). More significantly, the due process complaint notice did not include any request for reimbursement or direct funding for the individual, home-based ABA services obtained for the student during the 2019-20 school year, but rather, sought the issuance

of RSAs to secure the necessary funding from the district (id. at p. 8).[13] For example, on the first day of the impartial hearing, the parent's attorney explained the need to secure an interim order on pendency, noting that the student had missed a "over a week" of the home-based ABA services as a result of the district's failure to implement pendency placements; in addition, the parent's attorney stated the "private related services providers" unwillingness to provide the home-based ABA services absent some "indication" from the district that they would be "paid" or would issue RSAs (Tr. pp. 6-12).

Notwithstanding the manner in which the parent framed this matter, this is clearly a unilateral placement case under the Burlington/Carter framework because the parent is seeking funding for non-approved, home-based services, and, on appeal, the parties appear to be in agreement that this is a Burlington/Carter case. However, there is no evidence that the parent paid any out of pocket costs for the ABA services at either $125.00 per hour or at a higher rate now requested—namely, $225.00 per hour—during the 2019-20 school year (see generally Tr. pp. 1-51; Parent Exs. A-W; Dist. Exs. 1-4).

It should be reiterated here that the caselaw supports reimbursement and direct payment remedies in a unilateral placement case (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]), even where the unilateral aspect only represents a portion of the student's programming (see Application of a Student with a Disability, Appeal No. 18-144), and that the parent carries a burden of production and persuasion related to the private, unilateral services obtained (Educ. Law § 4404[1][c]). If the amount to be paid for services unilaterally acquired by the parent are disputed by the parties, a parent's burden in this regard should include evidence that he or she has either paid for the services or is financially liable to pay for the unilateral services. Here, as there is no proof in the hearing record that the parent was legally obligated to pay the independent ABA providers a specific amount for the home-based ABA services during the 2019-20 school year, I decline to order relief in the form of a direct payment remedy for a parentally-obtained unilaterally placement.

Moreover, the district was obligated to fund the ABA services delivered to the student by the independent ABA providers pursuant to its pendency obligation. In fact, it is unclear why the

[13] Although the IHO did not order the district in this instance to issue RSAs to the parent as relief, this school district's use of RSAs or other types of vouchers as a mechanism to provide educational services to disabled students has recently come under scrutiny, as it manifests what may be considered as the systemic dysfunction regarding the provision of special education services and the procedural safeguards that were supposed to protect the student. Thus, while not directly applicable to this matter, it bears repeating that the Commissioner of Education has made it abundantly clear and has "repeatedly held that a board of education lacks authority to provide instructional services through an independent contractor" (Appeal of Sweeney, 44 Ed Dept Rep 176, Decision No. 15,139; Appeal of Woodarek, 46 Ed Dept Rep 1, Decision No. 15,422) and this application of State law requiring that core instruction provided by a school district must be performed either by teachers who are employees of the district or pursuant to a contract for special education services that a district is specifically authorized by law to enter into has been upheld in the courts (see Bd. of Co-op. Educ. Servs. for Second Supervisory Dist. of Erie, Chautauqua & Cattaraugus Ctys. v. Univ. of State Educ. Dep't, 40 A.D.3d 1349, 1350 [3rd Dep't 2007] [noting that the relevant provisions of the Education Law did not provide for instruction by employees of for-profit corporations such as Kelly Services Inc.]; see also Averback v. Bd. of Educ. of New Paltz Cent. Sch. Dist., New Paltz, 147 A.D.2d 152, 154 [3rd Dep't 1989] ["Explaining that "[a]bsent a 'plain and clear' prohibition in statute or decisional law, boards of education are empowered to agree to terms of employment" of a teacher] [emphasis added]).

rate dispute remains now that the 2019-20 school year has elapsed, as it would seem that the district was obligated to fund the services delivered at whatever rate the agency charged (that rate being a matter between the district and the provider) (see Application of a Student with a Disability, Appeal No. 20-023).[14] In fact, the parent indicated in the closing brief to the IHO that the student had been receiving the individual, home-based ABA services pursuant to the IHO's interim order on pendency, which had been "paid for by the [district] at its current rates, such that there [was] no issues as to cost" (Parent Ex. W at pp. 25-27).

Next, the evidence in the hearing record demonstrates that the parent first requested reimbursement or direct funding of the student's individual, home-based ABA services in the closing brief to the IHO and did not otherwise raise any issue concerning the ABA providers' hourly rate for either the ABA services as part of the pendency placement or as part of the parent's unilateral placement (consisting of the school-based and home-based programs) (see Parent Ex. W at p. 4; see generally Tr. pp. 1-51; Parent Exs. A-U; Dist. Exs. 1-4).[15] In support of the request to increase the ABA providers' hourly rate, the parent provided the IHO with a signed statement—from a "Licensed Behavior Analyst [LBA] and 1:1 ABA provider" who had worked with the student in the home-based ABA program "since December 2015"—dated August 29, 2019, which the IHO entered into evidence without explanation (see Parent Exs. V at pp. 1-2; W at p. 2).[16, 17] In the statement submitted to the IHO, the LBA indicated that the "ABA therapists on [the student's] case ha[d] not received any rate increase since December 2015" (Parent Ex. V at p. 1). In addition, the LBA indicated that on "other ABA cases for [the district], [she was] paid $225 per hour" and attached a redacted invoice on another district ABA case she worked on as proof of the "going rate" for ABA services (id. at pp. 1-2). According to the LBA, the "continued low pay rate

[14] According to the district's answer, the district has been funding the ABA services pursuant to pendency at the $125 rate invoiced by the providers (Answer at p. 2 n.2).

[15] At least one court has found that a parent's request for compensatory educational services as relief—raised for the first time in the closing brief to the IHO—was untimely, as the parent failed to request this form of relief in the due process complaint notice (see M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *1, *12-*14 [S.D.N.Y. Dec. 16, 2011]).

[16] The IHO noted in the decision that the district elected not to cross-examine the LBA who signed the statement—but that is inaccurate, as the parent did not proffer the August 20, 2019 statement until after the impartial hearing had concluded its hearing dates, and thus, the district did not have the opportunity to decide whether to cross-examine the LBA (compare IHO Decision at p. 6, with Parent Ex. V at p. 2). Further, as with the statement of the program supervisor, the signed statement from the LBA was not an affidavit, as it was not sworn before a notary public, and therefore would not qualify as direct testimony by affidavit in lieu of in-hearing testimony (8 NYCRR 200.5[j][3][xii][f]).

[17] In New York, ABA, the practice of ABA, and the licensure of professionals who may permissibly hold themselves out as a "licensed behavior analyst" (LBA) or a "certified behavior analyst assistant" (BCBA) have been defined governed by State statute (Educ. Law §§ 8801-8803). For example, "'ABA' means the design, implementation, and evaluation of environmental modifications, using behavioral stimuli and consequences, to produce socially significant improvement in human behavior, including the use of direct observation, measurement, and functional analysis of the relationship between environment and behavior" (Educ. Law § 8801). However, the practice of ABA is not limited to a "licensed behavior analyst" or "certified behavior analyst assistant," as State law provides a very broad exception allowing certified teachers and teaching assistants to continue providing ABA to students in the educational environment, an educational practice that long predates the State's statutory oversight of ABA (Educ. Law § 8807[2]-[3]).

ma[de] therapists reluctant to stay on [the student's] case, and ma[de] it nearly impossible to find new teachers when new teachers [were] needed" (id. at p. 2). The LBA further opined that the low rate of pay "will endanger the viability of the home and community program of ABA related services" (id.). This affidavit, offered at some point after the hearing, is the strongest statement in favor of the $225 per hour rate, but it reads like someone who would like a retroactive pay raise.

As far as the information that was available during the evidentiary phase of the impartial hearing, according to a signed statement entered into evidence during the second day of impartial hearing, the program supervisor indicated that the student's home-based ABA program was provided to the student by herself, as well as "four other therapists" (listing five therapists)—each of whom worked a "number of hours each week on various days in order to fill out the 20 hour per week mandate" (Parent Ex. U at p. 9; see Tr. pp. 47-48). This program supervisor—who had been working in the student's home-based program since March 2015 as a therapist and supervisor and who had been the student's classroom teacher at NYCLI for at least two school years beginning in October 2015—indicated that the "roster of therapists ha[d] changed from time to time" and that "[m]any of the therapists ha[d] also worked at NYCLI," the student's State-approved nonpublic school (id. at pp. 1, 9). Notably, the program supervisor did not state her own hourly rate or the hourly rate paid for the additional ABA therapists, nor did she indicate any difficulty retaining or replacing ABA therapists due to the hourly rate (see generally Parent Ex. U). Although she acknowledged that the was not currently working in the student's classroom, she also did not indicate how much she had been paid at NYCLI to work with the student (id.). This evidence is inadequate to support parent's challenge to the IHO's determination in this case.

Finally, when, as here, the hearing record contains inadequate proof that the parent is legally obligated to make up the difference between the payments that the district has made pursuant to pendency and there is no evidence that the parent has paid any excess out of pocket, equitable relief in this circumstance does not require the district to either reimburse or directly pay additional funds—or to increase the ABA providers' hourly rate to $225.00—that the parent now seeks because the providers have not received a pay increase since December 2015. Simply stated, the parent bore the burden of proof to establish the hourly rate for the home-based ABA providers, and a review of the available evidence reflects that the parent failed to meet that burden. Contrary to the parent's arguments on appeal, this is not a case that turns on whether the parent has standing to seek the requested relied; rather, this is a case of inadequate proof and, equitably, it would be unfair for the district to bear additional costs that the evidence in the hearing record fails to establish that the parent, herself, would otherwise bear. Notably, one of the first cases in this State on the topic, indicated that "[w]here there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).[18] Consequently,

[18] Courts have differed with the determinations of administrative hearing officers, especially on issues involving the terms of a contract, a point with which the courts have made abundantly clear that no deference is owed such

the parent's argument that the IHO erred in his weighing of the facts and denying the parents' request to increase the rate paid for the home-based ABA providers from $125.00 per hour to $225.00 per hour is not supported by the evidence and must be dismissed.

VII. Conclusion

Having determined that the evidence in the hearing record does not require reversal of the IHO's denial of the parent's request for an order increasing the hourly rate paid for the home-based ABA providers services for the 2018-19 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 11, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER

determinations (see, e.g. E.M. 758 F.3d at 45; A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *7 [S.D.N.Y. Sept. 23, 2013]).