The University of the State of New York

The State Education Department
State Review Officer
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No. 20-125

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

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by John Poppe, Esq.

Paul, Weiss, Rifkind, Wharton, & Garrison, LLP, attorneys for respondent, by Josephine Young, Esq., and Golda Lai, 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 district) appeals from a decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to fund the costs of the home-based services for the student 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 student has reportedly received a diagnosis of autism spectrum disorder (Dist. Ex. 5 at p. 1; Parent Ex. H at p. 1).[1, 2] She was described as having limited verbal language such that she used TouchChat on a dynamic display speech generating device to supplement her speech, which consisted of one to two-word utterances that could be difficult to understand (Dist. Ex. 5 at pp. 1, 3). The student had limited social skills, showed minimal interest in novel toys but would play with them functionally, and engaged in parallel play with peers, interacting with them by laughing (id. at p. 1). The student at times exhibited protest behaviors including yelling, crying, pushing items away, and grabbing or scratching others but was easily redirected back to task after a few minutes (id. at pp. 1-2). She independently followed her visual schedule and the classroom routine (id. at pp. 1, 3). Academically, when the student was in fifth grade chronologically, she demonstrated skills at the first-grade level in reading and mathematics (id. at p. 2). She demonstrated strong gross motor skills and was progressing in her fine motor skills, showing an ability to write independently and copy from the board (id.). With regard to adaptive skills the student independently dressed and fed herself and used the bathroom but required prompts to wash her hands thoroughly (id.).

For the 2015-16 and 2016-17 school years (second and third grade chronologically speaking), the student received 10 hours of home-based ABA services through a private agency, Kids of New York Applied Behavior Analysis, PLLC (previously known as Bridge Kids of New York) (hereinafter "Kids of New York") (Parent Ex. I at p. 1).[3, 4] In August 2017, the parent requested an impartial hearing alleging that the district failed to offer the student a FAPE for the 2016-17 and 2017-18 school years and seeking an order requiring the CSE to convene and add

[1] The hearing record contains exhibits that are duplicative in content but different in layout of the pages (compare Parent Exs. E; F, with Dist. Exs. 1; 4). For purposes of this decision, district exhibits were cited where both a parent and district exhibit were identical or similar.

[2] The hearing record does not include a primary source for this diagnosis.

[3] According to the parent's June 7, 2019 due process complaint notice, the student's "2015-16 IEPs indicated [i]n the management needs that [the student] should receive 10 hours a week of 'at home SETSS services' which [the student's] parents understood as ABA services" and further indicated that in October 2015 the district issued a "Form P-4" authorizing the parent to obtain the home-based ABA services from a private agency at district expense (Parent Ex. A at p. 4; see Parent Ex. B at p. 2). The parent stated in the due process complaint notice that the initial authorization was for a year starting from the student's September 18, 2015 IEP and going to September 18, 2016, which was then extended to September 19, 2017 (Parent Ex. A at p. 4). The parent indicated that she located an independent ABA service provider (Kids of New York) who signed and returned the P-4 letter to the district and started providing home-based ABA services to the student in November 2015 (id.). The parent also indicated that Kids of New York completed a progress report in August 2016 that indicated the student had progressed in all developmental domains and exhibited significantly less interfering behavior but continued to engage in interfering behavior to avoid non-preferred activities and less often engaged in physical aggression toward her therapist in the form of scratching (id.). This progress report is not included in the hearing record.

[4] The student's March 3, 2016 IEP reflected under the management needs section that the student would receive 10 hours per week of at-home SETSS services (Parent Ex. B at p. 2).

home-based ABA services to the student's IEP, as well as compensatory education services for missed sessions of home-based ABA (Parent Ex. D at p. 4).

In or around October 2017, the student began receiving 10 hours per week of ABA services through another private agency, Gotham Children (Parent Ex. G at p. 1).[5]

On January 26, 2018, an impartial hearing officer issued a decision in the matter related to the student's 2016-17 and 2017-18 school years (Parent Ex. D at pp. 11-16). The IHO in that matter ordered the district to fund the cost of 15 hours per week of home-based ABA at a rate not to exceed $125, as well as home parent counseling and training, but denied the parent's request for compensatory education to make up for a lapse in services (id. at p. 15).

On May 25, 2018, the district conducted a bilingual (Mandarin-English) psychoeducational evaluation of the student to assess her then-current intellectual, academic, and social/emotional functioning in order to determine the services that were necessary to address her individual learning needs (Parent Ex. H at pp. 1, 2). At the time of the evaluation the student was attending an 8:1+2 special education class and receiving speech-language therapy, occupational therapy (OT), and ABA services (id.). The student's performance on the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) resulted in scores in the extremely low range for verbal comprehension, visual spatial skills, fluid reasoning, working memory, and processing speed (id. at pp. 1-2, 4-5). In addition, her performance on the Wechsler Individual Achievement Test-Third Edition (WIAT-III) yielded scores in the deficient range for listening and reading comprehension, word reading, essay composition, spelling, numerical operations, and math problem solving (id. at pp. 2, 5). In terms of adaptive behavior, the student's performance on the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3) yielded scores that were in the low range of functioning for communication, socialization, and daily living skills (id. at p. 5).

In an educational progress report dated January 22, 2019, the student's special education classroom teacher at her State-approved nonpublic school (AHRC-Blue Feather) summarized the student's progress related to academics, social/emotional skills, behavior, fine motor skills, gross motor skills and adaptive skills (Dist. Ex. 5 at pp. 1- 3). The report reflected that the student had made progress in all areas of development, particularly in behavior, literacy, math, and independence (id. at p. 3). The student's teacher further indicated that with the consistency and intensity of a 12-month program the student was able to maintain acquired skills and progress through the curriculum (id.).

On February 12, 2019, the CSE convened to develop the student's program for the 2019-20 school year (Dist. Ex. 1 at pp. 1, 13). The resultant IEP reflected a recommendation that the

[5] An impartial hearing officer's decision dated January 26, 2018 reflected that Kids of New York did not have a therapist available to cover all 10 hours the student required so they assisted the parent in finding a different agency to provide the services, ultimately Gotham Children, which charged $250 per hour for ABA services (Parent Ex. D at p. 9). A February 1, 2020 progress report and treatment plan update from Gotham Children indicated that the student began receiving services from Gotham Children in October 2017 (Parent Ex. G at p. 1). Testimony by this provider from Gotham Children indicated that she began providing ABA services to the student at home beginning mid-September 2018 (Tr. pp. 83-84). She further testified that there was a break in home services from Gotham Children between mid-September 2019 to the beginning of December 2019, at which time the agency was told to stop services due to certain legal issues (Tr. pp. 90-91).

student be placed in a 12-month 8:1+2 special class day program in a State-approved nonpublic school (id. at p. 10). The IEP also reflected a recommendation for related services including two 30-minute sessions per week of individual OT, one 30-minute session per week of individual speech-language therapy, and two 30-minute sessions per week of group speech-language therapy, as well as four 60-minute sessions per year of parent counseling and training (id.). The February 2019 IEP also reflected the provision of a static display speech generating device as needed in school and at home (id.). In addition, the IEP documented the parent's preference that the student continue to receive 10 hours of home-based ABA services and one hour of supervision; however, the CSE determined that the student's needs were being met in the school setting (id. at p. 14).

In a prior written notice dated February 13, 2019, the district notified the parent of the recommendations made by the CSE at the February 12, 2019 CSE meeting, noting that the decision was based on a February 12, 2019 teacher report (Dist. Ex. 4 at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice, dated June 7, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (see Parent Ex. A). The parent alleged that the student's 2019-2020 IEP did not recommend "[a]t-[h]ome ABA [s]ervices" (id. at p. 7).[6] According to the parent, the CSE failed to provide her with an opportunity to provide meaningful input into the development of the student's IEP and failed to constitute a proper IEP team, in that the CSE convened without the participation of the student's ABA services provider, Gotham Children (id.). The parent also alleged that the CSE ignored the recommendation of Gotham Children that continuing home-based ABA services was necessary in order to address the student's cognitive and behavioral needs (id.). As relief, the parent requested that the CSE be required to reconvene to add "at least ten-to-fifteen hours per week of at-home ABA services" to the student's IEP (id. at p. 8). The parent also requested pendency consisting of 10 hours per week of home-based ABA services from Gotham Children at the rate of $250 per hour (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on August 22, 2019 and concluded on May 29, 2020 after six days of proceedings (see Tr. pp. 1-179).[7] In an interim decision on pendency, dated December 4, 2019, the IHO determined that the program and placement set forth in the March 2016 IEP constituted the student's pendency (stay-put placement), including 10 hours per week of home-based ABA services from Gotham Children (IHO Ex. I at pp. 3-4).[8]

[6] The parent also referred to the ABA services she sought as "at home SETSS services," and the parent also alleged that the IEP lacked goals for the missing home-based ABA services (Parent Ex. A at p. 7). According to the hearing record, "SETSS" stands for special education teacher support services (see Tr. p. 78).

[7] After the first hearing date on August 22, 2019 (see Tr. pp. 1-5), a different IHO was assigned in November 2019 and presided over the rest of the impartial hearing (Tr. p. 8; IHO Decision at p. 2; see Tr. pp. 6-179).

[8] After some discussion at the impartial hearing regarding the rate that the district would be required to pay for the home-based ABA services during the pendency of the proceedings—including reference to the January 2018

In a final decision dated June 17, 2020, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year and ordered the district to fund the costs of 10 hours per week of home-based ABA services for the student by Gotham Children, LLC, at the rate of $250 per hour and, if provided, one hour per week of supervision and one hour per week of parent training by Gotham Children, LLC, for the 2019-20 school year (IHO Decision at pp. 7-9). The IHO also ordered the district to reconvene the CSE to amend the student's IEP for the 2019-20 school year to include the home-based ABA services, supervision, and parent training (id. at pp. 8-9).

IV. Appeal for State-Level Review

The district appeals from the IHO's final decision. The district's alleges that the IHO erred in determining that the district failed to offer the student a FAPE by recommending a program and placement that did not include home-based ABA services. According the district, the evidence showed that the student was progressing in the 8:1+2 special class at Blue Feather and that the home-based ABA services were merely for the purpose of generalization of skills, which the district argues is more than required to furnish a FAPE to the student. Additionally, the district challenges aspects of the relief ordered by the IHO, including the IHO's orders that the district fund supervision and parent training from the home-based providers, fund the cost of home-based ABA services at the rate of $250 per hour, and reconvene the CSE to amend the student's IEP for the 2019-20 school year.

In an answer, the parent agrees that the district would have offered a FAPE if the student was able to achieve the educational goals set forth in her IEP for the 2019-2020 school year; however, the parent disagrees with the district insofar as she believes the evidence shows that that the at-home ABA services were necessary for the student to achieve such goals and that the IHO correctly held that the student required 10 hours of home-based services to achieve the goals.[9] The parent also argues that the hourly rate charged by Gotham Children is not excessive, is in alignment with other privately contracted rates, and that requiring the student to change providers would be harmful due to the disruption in service.

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.

IHO decision in the prior matter which set the rate at $125, a stipulation of settlement entered into by the parties as a result of an appeal of the January 2018 decision which set the rate at $250, and the March 2016 IEP which was silent as to rate—the IHO indicated that the interim decision would not specify a rate (Tr. pp. 10, 13-16; Parent Exs. C at p. 2; D at p. 15; IHO Ex. I at p. 2).

[9] In a reply the district points out a failure of the parent to properly verify the answer, which defect the parent promptly cured.

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]).[10]

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. Home-Based Services

I will turn first to the district's allegation that the IHO erred in finding that the student needed home-based services to receive a FAPE. In this case, both parties seem to agree that if the student is likely to make progress toward IEP goals in the school environment that the district would not be required to provide additional ABA services outside of the school day in the home setting. This is in alignment with several courts which have held that the IDEA does not require

[10] 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).

school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other environments outside of the school environment, particularly in cases in which it is determined that the student is otherwise likely to make progress in the classroom (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

While agreeing in large part on the conceptual framework, the parties disagree with whether the student actually requires the home-based ABA services in order for the student to make progress in the school environment. While home-based services for the purpose of generalization are most likely beneficial to a student (a point with which the district does not argue), that is not alone a basis for providing them going forward, even in this case where the student has been getting home-based ABA services, including from a previous impartial hearing officer decision from January 2018, because the determination must be made each year based upon a review of the student's past progress and current needs (Walczak, 142 F.3d at 131–32 [noting that the IDEA does require a program to maximize potential or "everything that might be thought desirable by loving parents" [quotation and other citations omitted]; see also Doe v. Bd. of Educ. of Tullahoma City Schs., 9 F.3d 455, 460 [6th Cir. 1993]). By the same token, it would be equally improper for a school district to remove home-based services from a student's IEP solely on the basis that a prior due process determination was no longer binding because such a justification lacks any consideration of such student's recent progress or need for home-based services to support learning in the school environment.

In this case, as noted above, the February 2019 IEP documented the parent's preference that the student continue to receive 10 hours of home-based ABA services and one hour of supervision that was currently being implemented by the district through the "implementation unit" as the result of the IHO decision in the prior matter (Dist. Ex. 1 at p. 14). The IEP noted that the student's ABA provider report "seem[ed] to address the same things that [were] addressed in the class" and that the "school and team felt [the student's] needs were being met in her current setting" and that she was "receiving FAPE" (id.).[11] Minutes of the February 2019 CSE meeting also documented the parent's preference for the 10 hours of home ABA to continue (Dist. Ex. 3 at p. 3). The parent's concerns regarding the student's behavior and difficulty paying attention were reflected in the meeting minutes (id.). The student's classroom teacher also reported the student's problems with attention but further reported the student had made good progress during the school year, responded to redirection to pay attention, verbal prompts, and a token system that was used some of the time, as well as reinforcement in the form of being allowed to dance and use the iPad (id.). According to the meeting minutes, the student's classroom teacher reported that the student was motivated, interacted with peers, and was taking more initiative to interact with people in

[11] The ABA provider report relied upon by the February 2019 CSE relied was not included in the hearing record.

person (id.). The meeting minutes indicated that the student was receiving a free and appropriate education however, further indicated that the parent would "implement" her due process right to an impartial hearing (id.).

The district school psychologist acknowledged that, at the time of the February 2019 CSE meeting, she did not consider whether the improvement that the student was demonstrating in school was attributable in part to the student's home-based services (Tr. p. 72). The school psychologist testified that the CSE team felt that the student was receiving a "fair and appropriate education" "during the school hours" (Tr. pp. 60-61, 70-71). She further testified that home-based services were not the responsibility of the district, that the district was responsible for providing an appropriate education for children "at school" (Tr. pp. 61-62), and that at the time of the CSE meeting the recommendation made by the CSE was reasonably calculated to provide an appropriate educational program to the student (Tr. p. 61). The school psychologist testified that the CSE felt that if the parent wanted to generalize the student's progress at home, it should be addressed by the parent outside of school (see Tr. pp. 60, 71). The school psychologist testified that at the time of the CSE meeting the committee was aware that the child was receiving ABA services at home but that it was as a result of a decision from a previous impartial hearing (Tr. p. 71). She testified that the CSE "felt that [the student's] main gain was from participation in school services at school" (Tr. p. 72). However, her opinion, which was largely subjective, is not convincing when she also conceded that she failed to consider whether the home-based services were responsible for the student's progress that she was seeing in school the school environment.

While the district psychologist opined that the student did not need home-based ABA services as she believed the student was doing fine and would likely continue to do so without the home-based ABA services, the student's home-based ABA provider testified to the contrary. Testimony by the Board Certified Behavior Analyst-doctoral (BCBA-D) from Gotham Children, who provided both direct and supervisory home-based ABA services to the student beginning in mid-September 2018 and had first-hand knowledge of the student's progress, testified that, in addition to purposes of generalization, the student required home-based ABA services in order to maintain and retain skills (Tr. pp. 84-90, 108).[12] The BCBA-D's testimony indicated the student had a very difficult time maintaining skills that had been taught without forgetting them and that she utilized data on the student's performance to determine if a certain skill needed to be retaught (Tr. pp. 85-86).[13] Although the BCBA-D did not attend the February 2019 CSE meeting, she had

[12] The student's home-based ABA services were provided by the BCBA-D and two other BCBA providers (Tr. pp. 84, 96; Parent Ex. G at p. 1). The BCBA-D testified that she had been providing both supervisory and direct implementation of the student's home-based ABA services (Tr. p. 84). She testified that this encompassed performing all the assessments, completing the written reports, doing observations to determine the student's strengths and weaknesses in order to determine a set of programs that the home-based ABA providers would target with the student, and ensuring that the other two ABA providers on the team were also implementing the programs correctly (id.). She testified that, in addition, she also ran the programs with the student once or twice per week in order to see the student's progress firsthand (id.).

[13] The BCBA-D also pointed to a specific instance of the student exhibiting regression during a break in home-based ABA services as an indicator of the student's continuing need for such services (see Tr. pp. 92-94). It is not entirely clear if the regression took place across settings. Specifically, the evidence in the hearing record does not demonstrate whether the student showed regression in skills at school during the same time frame that she reportedly demonstrated regression at home. Further, as it appears the specific instance of the student's regression

worked with the student leading up to the meeting, and as noted above, the CSE purportedly had before it a ABA provider report, although the district failed to offer that report into evidence at the impartial hearing (see Tr. p. 84; Dist. Ex. 1 at p. 14).[14]

The IHO specifically determined that the testimony from the BCBA-D was "credible and compelling" and demonstrated the student's' need for the home-based ABA services (IHO Decision at p. 8). Generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the BCBA-D. In addition, testimony by the parent indicated that the student's home-based ABA services improved the student's behavior, attention, and eye contact and that these improvements helped her with her school work (Tr. pp. 120-21).

One of the primary reasons to provide home-based services is that a student is unlikely to receive educational benefit from his or her schooling or is likely to experience regression in the school setting in the absence of home-based services. However, the district did not provide convincing evidence that objectively shows how much progress the student was making in the school environment or other data that would tend to clarify whether the student was likely to make progress in the school environment even in the absence of the home-based services. For example, the hearing record does not include the student's IEP for the 2018-19 school year, which would provide a baseline from which to judge her progress toward meeting her IEP goals, as well as a description of the student to help identify the areas of need that carried over from year to year.[15]

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occurred after the February 2019 CSE meeting (see Tr. pp. 90-91), it cannot be relied upon to invalidate the February 2019 IEP (C.L.K. v. Arlington Sch. Dist., 2013 WL 6818376, at *13 [S.D.N.Y. Dec. 23, 2013] [stating that in addition to districts not being permitted to rehabilitate a defective IEP through retrospective testimony, "[t]he converse is also true; a substantively appropriate IEP may not be rendered inadequate through testimony and exhibits that were not before the CSE about subsequent events and evaluations that seek to alter the information available to the CSE"]; see J.M. v New York City Dep't of Educ., 2013 WL 5951436, at *18-*19 [S.D.N.Y. Nov. 7, 2013] [holding that a progress report created subsequent to the CSE meeting may not be used to challenge the appropriateness of the IEP]).

[14] Testimony by the BCBA-D indicated that she had attempted to reach out to the student's teacher at school in the past via email and twice via letter in the student's communication notebook in order to introduce herself, tell her about the programs they would be working on at home, and inquire as to anything the BCBA-D might practice at home or vice versa, however she had not received a response (Tr. p. 100).

[15] A student's progress under a prior IEP is to varying degrees a relevant area of inquiry for purposes of determining whether a subsequent IEP is appropriate (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66 [2d Cir. Jun. 24, 2013]; Adrianne D. v. Lakeland Cent. Sch. Dist., 686 F. Supp. 2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, at *14-*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," Office of Special Educ., at p. 13 [Dec. 2010], available at http://www.p12.nysed.gov/specialed/publications/

In addition, there is no testimony by the student's special education teacher or related services providers from the school environment (i.e., from Blue Feather) that would provide their opinion and shed some light on the matter.[16]

In addition, the hearing record includes only one educational progress report on the student dated January 22, 2019, that was created by the student's special education teacher at Blue Feather (Tr. pp. 53-54; Dist. Ex. 5 at pp. 1, 3).[17] A review of this report reveals that it does not include sufficient information about student's progress in her school program to allow any conclusions to be drawn about how necessary the home-based services were to support the student's school program (see Dist. Ex. 5). The January 2019 educational progress report reflects that several methods of assessment were used in determining the student's strengths and needs and to report on her progress, including teacher observation, parent interview, and "permanent product" and that the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) was conducted once prior to the report (id. at p. 1). However, the report does not reflect when the VB-MAPP was conducted, nor does it include the results of the administration of this assessment (see generally id. at pp. 1-3). Notably, the progress report stated that the student's program goals were targeted in individualized and group teaching sessions and reflected in her program data and graphs; however, the data and graphs were not included in the progress report or in the hearing record (id. at p. 1). In addition, the student's then-current functioning with regard to her social/emotional development, fine and gross motor skills, activities of daily living, behavior, and academics was reported with minimal reference to objective measures, and a blanket statement opined that the student had made progress in all areas of development (id. at pp. 1-3).[18] However, the report included no details on the student's previous abilities in order to support the statement that the student had progressed and nothing to indicate that the student did not require home-based services in order to make that progress in her school program (id.). Although the summary indicated that the student was "able to maintain acquired skills and progress through the curricula" given the "consistency and intensity of a 12-month program," there is no information in the progress report

iepguidance/IEPguideDec2010.pdf). Here, the student's progress under the prior IEP is important for the purposes of understanding which services may or may not have contributed to such progress. Leading up to the relevant CSE review, the IDEA required the district to have provided the parents with periodic reporting regarding the student's progress towards achieving her annual goals while she was provided with in-school programming during the 2018-19 school year (see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3][ii]; 8 NYCRR 200.4[d][2][iii][c]). Further, when the CSE convened, it should have reviewed whether or not the student had achieved some or all her annual goals from her last IEP (see 20 U.S.C. § 1414[d][4][A][1]; 34 CFR 300.324[b][1][i]; 8 NYCRR 200.4[f]). However, the hearing record is devoid of any of these documents and contains only anecdotal references to the student's progress.

[16] Other than the BCBA-D, no teacher or school related service provider of the student testified at the impartial hearing.

[17] The January 22, 2019 educational progress report is unsigned (see Dist. Ex 5 at p. 3). Testimony by the district psychologist indicated she was not aware that the document was unsigned (Tr. p. 72).

[18] The January 22, 2019 educational progress report primarily provided generic information about what the student's class was working on with regard to English/language arts and communication, science, and social studies (Dist. Ex. 5 at p. 2).

or the hearing record that would indicate whether the student would have been able to do so without the support of the home-based ABA services.

Based on the above, the district did not offer sufficient evidence at the impartial hearing to demonstrate the student did not need home-based services or to overcome the IHO's credibility determination, and as such, the district has failed to meet its burden to show that the student did not need home-based ABA services in order to receive a FAPE. While there is a considerable amount of evidence that home-based ABA services were beneficial to the student, which even the district does not strongly dispute, the question is whether home-based ABA services were necessary for the student to make progress at school (Tr. pp. 86, 120-21, 124-25; Parent Ex. G at pp. 5-7). Absent this evidence, and because the student received the home-based ABA services under pendency, there is no reason to disturb the IHO's decision to award home-based ABA services.[19]

B. Relief

1. Home-Based Services—Parent Training and Supervision

Turning to the district next argument, that the IHO erred in ordering reimbursement in the form of parent training and supervision, I note that the district does not challenge the ABA services delivered to the student for the 2019-20 school year as being inappropriate to address the student's needs. However, the district argues that the IHO erred in ordering reimbursement and that the district should not be responsible to pay for parent training and supervision, if provided, arguing that the parent failed to present evidence that Gotham Children provided such services during the 2019-20 school year. Contrary to the district's argument and as further described below, the hearing record bears out that Gotham Children provided parent training and supervision to the student for the 2019-20 school year.

[19] In addition, while it was not available to the February 2019 CSE, I note that the BCBA-D completed a progress report and treatment plan update, dated February 1, 2020, that offers one approach for how the student's continued need for home-based services could be assessed (Parent Ex. G). The update reflected that a reassessment of the student was conducted in December 2019 using the VB-MAPP, which was described as containing five components (milestones assessment, barriers assessment, transition assessment, task analysis, and a curriculum placement guide) that are designed to assess a student's existent skills, determine appropriate treatment plans and placement, and to assist in developing treatment goals and objectives (id. at p. 2). The results of the milestones assessment showed the student demonstrated most skills in the level 1 (birth to 18 months) area, many skills in level 2 (18-30 months) and some skills in level 3 (30-48 months), and the report included an overview of the skills assessed and the student's areas of need (id. at pp. 3-4). An updated assessment grid showing the student's previous progress from her initial assessment up to the time of the update was also included in the report (id. at pp. 5-7). The update also included a clinical interpretation/response to treatment summary of the student's performance as well as updated treatment goals that were presented in grid format, which laid out each goal, the student's baseline performance on that goal, mastery criteria, a box to record when the student mastered the goal, and the instructional/behavioral methods utilized to address the goal (i.e., manding training, discrete trial teaching, natural environment teaching, modeling) (id. at pp. 8-10). Goals targeted the following areas: manding; tacting; listener responding; social behavior and social play; reading; math; and spelling (id.). The update indicated that ongoing data collection and analysis of progress would be used to determine the need for continued ABA treatment and based on this a plan would be determined to fade services or transition and that the VB-MAPP transition assessment could be used to identify whether the student has made meaningful progress, acquired the skills necessary for discharge, and /or to set priorities regarding discharge (id. at p. 10).

The February 1, 2020 progress report and treatment plan update completed by the student's BCBA-D indicated that the student had been receiving ABA services from Gotham Children since October 2017 and that the student's home-based ABA team consisted of a "case supervisor (BCBA-D) and two Board Certified Behavior Analyst (BCBA) therapists who me[]t weekly for instructional program reviews and every-other-week for program review meetings with parent(s)" (Parent Ex. G at pp. 1, 11). The report indicated that the services "typically occur[red] Tuesday, Thursday, and Saturday for 3-hour sessions with 1 hour of supervision on Saturday" (id. at p. 1).

The BCBA-D testified that "science" indicated that supervision of therapists and the provision of parent training was "best practice" (Tr. p. 89). She explained that supervision was necessary to ensure that every trained therapist on the team was being reliable and implementing the program that had been designed (Tr. pp. 89, 101). She further explained that parent training was to make sure that anything the providers targeted in the home was also continually practiced within the family and could be generalized though the family (id.).

The district also argued that, because the student's IEP called for parent counseling and training, the hearing record did not support reimbursement for the privately obtained services, in other words, that the service was duplicative. The parent's attorney confirmed that the student was receiving individual parent counseling and training through the school (Tr. p. 146). The student's IEP shows that the CSE recommended parent counseling and training four times per year for 60 minutes (Dist. Ex. 1 at p. 1). While the hearing record is not as fully developed on this point as I might have preferred, the testimony of the BCBA-D summarized above is the available evidence and tends to support the conclusion that the parent training provided as part of the home-based services was only one aspect of the service provided by Gotham Children. The BCBA-D's testimony supports that the activities were different from the school-based parent counseling and training recommended on the student's IEP, and that in addition to the parent-focused component, there was a therapist supervision component that, at least in Gotham Children's pedagogical model, was closely related to the provision of home-based services to the student using the ABA methodology.[20] The district's argument against reimbursement is akin to an allegation that, at least the parent training aspect of the unilaterally-obtained services are excessive.[21] However, in

[20] Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]).

[21] 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. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). 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 (L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational

this case, the district's argument falls short, especially when its contentions that the student did not require home based services at all have already failed for lack of convincing evidence. Based on the hearing record before me, I decline to disturb the IHO's determination awarding the parent the costs of the parent training component on the basis that the parent did not demonstrate their appropriateness or that they were excessive.

The foregoing evidence sufficiently supports the IHO's order that the district fund one hour per week of supervision and one hour per week of parent training from Gotham Children for the 2019-20 for the services that were delivered. Accordingly, the district shall be required to reimburse the parents such services upon the parent's submission to the district of Gotham Children's records showing the number of home-based sessions delivered during the 2019-20 school year.[22]

2. Rate

Turning to the district's next challenge, namely that the IHO erred in awarding home-based services by Gotham Children at the rate of $250 per hour, the district argues that the rate is unreasonable given evidence in the hearing record of lower rates charged by other providers for comparable services. In response, the parent argues that the district presented evidence at the impartial hearing that Kids of New York charged $150 to provide a different student with services for the 2019-20 under unknown circumstances, but that the same agency also had increased their rates for this student in January 2018 to $250 per hour.

The dispute in this case has several distinguishing facts compared to a growing number of recent matters in which undersigned has addressed the district's objections to paying the amount of remuneration that parents have sought for special education services (see Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087), but the dispute as framed by the parties and the IHO is troublesome. Unlike those other rate disputes in the prior two appeals, here the parent's underlying allegations are directed at perceived flaws in the design of the services recommended in the IEP, rather the district's failure to deliver services called for by in its own planning documents. Thus, the parents, who were clearly dissatisfied with the IEP proposed by the CSE that lacked home-based services, unilaterally decided to continue those services even though the CSE had reached the conclusion that the home-based services were no longer necessary. This is clearly a unilateral placement case under the Burlington/Carter framework because the parent is seeking to have non-approved, home-based services added to the student's IEP, even if the district does not strongly contest that the home-

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"]; 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"]).

[22] It is unclear what happened to the delivery of home-services after the outbreak of the COVID-19 pandemic, but I do not intend for the district to fund unilaterally obtained services that were not delivered and for which there is no evidence of a parental obligation. Nothing in this decision absolves the district of its responsibility to provide stay put services to the student which are further discussed below.

based ABA services selected by the parent are inappropriate for the student in the sense that the student fails to benefit from them. During the impartial hearing, the parties delved into the costs of the privately selected services – which costs are a component of a public school IEP, and district continued to use defenses to the parent's actions that are common in Burlington/Carter reimbursement cases such as arguing that the costs of the unilateral services were both unneeded and excessive in cost. Accordingly it is inescapable that the district disagreed with the parents and refused to put home-based services into the student's IEP for the 2019-20 school year and that this case must be viewed as a unilateral placement case with respect to the home-based services that the parents obtained for the student during the 2019-20 school year that were not part of the proposed IEP.

However, unlike the majority Burlington/Carter cases, there is no evidence of a written contract between Gotham Children and the parent or any evidence that the parent paid out of pocket for services from Gotham Children during the 2019-20 school year. Further, the IHO in this matter did not characterize the actions of the parent in this matter as a unilateral decision or address the lack of evidence of a contract between the parent and Gotham Children, and the district has not appealed that aspect of the IHO's decision or otherwise raised the deficiency in the parent's evidence on this point.[23] Now, on appeal, the district is more clear in its request for review that the parent engaged in unilateral action (Req. for Rev at p. 8), but the parent is silent in the answer on the framework in which the rate dispute should be addressed.

It should be reiterated here that the caselaw supports reimbursement and direct payment remedies in a unilateral placement case, even where the unilateral aspect only represents a portion of the student's program, and that the parent carries a burden of production and persuasion related to the private, unilateral services obtained. 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.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also 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]). In E.M., the court faulted the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school, but the question in E.M. was not whether oral contracts obligating the parents will suffice to be enforceable (E.M., 758 F.3d at 456–57). Instead E.M. held that some blanks that the parties did

[23] State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

not fill in in the written agreement would not render the entire contract void and that indicated that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458).[24]

Here, as there is no proof in the hearing record that the parent was legally obligated to pay Gotham Children 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. However, this case presents an alternative basis for reaching the same result, as the district was obligated to fund the ABA services delivered to the student by Gotham Children pursuant to its pendency obligation. In fact, it is unclear why the 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 the higher rate charged by the agency, particularly since the IHO's pendency order appropriately did not specify the rate for the services (see IHO Ex. I; see also Application of a Student with a Disability, Appeal No. 20-023).[25] The district points to no caselaw holding that it can underfund pendency services owed to a student because the costs of the services have increased over time. As the Second Circuit explained three years ago

> In Carter, the Supreme Court held that courts should determine the "appropriate and reasonable level of reimbursement ... required" under the IDEA, and stated that "[t]otal reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable." 510 U.S. at 16, 114 S.Ct. 361. The corollary to this holding is that total reimbursement is appropriate where the cost is reasonable, even where the cost is more than it might have cost the state to provide the service in the first place. This is because "public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child a [FAPE] in a public setting, or place the child in an appropriate private setting of the [s]tate's choice." *Id.* at 15, 114 S.Ct. 361.

(L.K., 674 F. App'x 100, 10). In this case the consequences of the district's denial of a FAPE related to the 2016-17 and 2017 18 school year simply continue to follow the district though its obligation fund the Gotham Children's services under pendency (see Parent Ex. D).

However, as the district asserts on appeal that the IHO erred in setting the rate at $250 based on the reasonableness of the rate of the services ordered by the IHO and in order to lay the matter to rest at the administrative level, that argument shall be briefly addressed on the merits

[24] 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 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]).

[25] Pendency in the first instance is a matter of identifying "the general type of educational program in which the child is placed," and does not guarantee a particular provider or, by extension, a particular rate (Concerned Parents, 629 F.2d at 753, 756; see T.M., 752 F.3d at 171).

notwithstanding that it appears that the district remains liable for the higher rate pursuant to its pendency obligations.

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"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]).

In its request for review the district argues that, if reimbursement is deemed warranted, the order directing the district to fund the home-based services should be modified to reduce the rate to $125 per hour (Req. for Rev. at p. 9). During the impartial hearing, the district offered evidence of rates charged by two other independent agencies for delivering special education teacher support services (SETSS) and/or ABA services to other students during the 2019-20 school year to demonstrate that the $250 rate charged by Gotham Children was unreasonable (see Tr. pp. 77-82; Dist. Ex. 6). Specifically, testimony by the director of Always a Step Ahead, an agency that provides SETSS services to students with autism, indicated that the agency's "enhanced rate" for 1:1 SETSS services ranged from $110 to $150 during the 2019-20 school year, depending on the severity of the case (Tr. pp. 77-79, 80-81).[26] She further testified that the rate for SETSS providers who have ABA experience is $150, although she did not specify what credentials such providers would hold (Tr. p. 81).[27]

In addition, in a March 6, 2020 response to a subpoena in an unrelated matter pertaining to a different student, the executive director of Kids of New York produced a document showing that the rate of pay per hour for one of the therapists who provided direct services to a student for the 2019-20 school year was $100 per hour with an overtime rate of pay of $150 per hour (Dist. Ex. 6 at pp. 3, 5). However, this document is of limited utility in demonstrating a market rate since it is not clear from the subpoena disclosure what hourly rate the agency charged the parent (or the district) in that case for ABA services and therefore it is not a convincing comparison (id. at pp.

[26] Testimony by the director did not indicate if the rate was per hour (see Tr. pp. 79, 81).

[27] In New York, ABA, the practice of ABA, and the licensure of professionals who may permissibly hold themselves out "licensed behavior analyst" or "certified behavior analyst assistant" 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" because a very broad exception allows 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]). As it is unclear whether the so-called SETSS providers with ABA experience about which the director of Always a Step Ahead testified had ABA credentials specified in State statute. If not, it would not seem that the rates about which she testified could be properly compared to the rates charged by the BCBA-B and BCBAs who delivered services to the student in this instance.

3, 5).[28] Moreover, other evidence in the hearing record reflects that the agency Kids of New York charged a higher rate for services for this student in particular. As noted above, the agency Kids of New York, provided services to the student during the 2015-16 and 2016-17 school years (Parent Ex. I at p. 1). In an affidavit dated October 11, 2017, the executive director of Kids of New York documented the agency's provision of home-based ABA services to the student in previous years, and stated that the rate for continuation of such services for the 2017-18 school year would be $200 per hour (Parent Ex. I at p. 1). Further, according to the January 2018 IHO decision involving this student, the clinical director from Kids of New York testified that the district changed their rules and required that "SETSS" be provided by certified special education teachers and as of January 1, 2018 Kids of New York increased their fee for these services to $250 per hour (Parent Ex. D at p. 9).[29] According to the IHO decision in the prior matter, the clinical director from Kids of New York further testified that "[s]ince they didn't have a therapist available to cover all ten hours the student required, they attempted to assist the Parent in finding a different company to provide the required hours, which was "Gotham Children,'" who also charged $250 per hour for ABA services (id.).[30]

In offering this evidence, the district appeared to treat SETSS and ABA services as one and the same without explanation.[31] Moreover, for the reasons addressed above, the evidence

[28] The subpoena requested "[d]ocuments showing the amount received or earned per session by each of the therapists who provide[d] services to Student during the 19-20 year," rather than the rate the agency charged the parent (or the district) for the services overall, the latter of which could plausibly be greater since an agency might bundle costs of operations into the rate charged the consumer (see Dist. Ex. 6 at p. 1). Further, although the response to the subpoena from the executive director of Kids of New York listed three therapists with different credentials (names redacted) who worked with the student in that case and apparently disclosed several documents, the sole document included with the district's exhibit was a "Notice for Hourly Rate Employees" form for one employee (id. at pp. 3, 5). It is unclear whether other documents included with the response to the subpoena (but omitted from the district's exhibit) were responsive to the question about the rate of pay of the therapists. Moreover, the subpoena response from the executive director indicated that the therapists that worked with the student in that case were paid an annual salary and did not earn a specific amount for their sessions with the student, further calling into question what the disclosed form with the listed hourly rate referred to (id. at p. 3).

[29] That Kids of New York, an independent agency, reacted by modifying its rates to accommodate a "requirement" imposed by the district is likely indicative of the district's reliance on an illegal policy of using independent contractors to deliver services that it is required by law to deliver to students. I have recently opined on this state of affairs in the district as it seems to be contributing to a deluge of cases entering due process system (Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087).

[30] Testimony by the BCBA-D provider from Gotham Children indicated that while the agency charged $250 per hour, she is paid $125 or $150 per hour (Tr. p. 107).

[31] As I have warned the district in the past, it is not clear at all that the parties are working with the same definition of "SETSS," a term that, unlike all of the elements of the student's programming, is not described in New York State's continuum of special education services. Whether the SETSS service is "a flexible hybrid service combining Consultant Teacher and Resource Room Service " that was instituted under a temporary innovative program waiver to support a student "in the general education classroom" as once represented to me by the district in another case (after my insistence that evidence of the service be produced by the district in right of record inadequacies) (Application of a Student with a Disability, Appeal No. 16-056), or whether SETSS in this proceeding means some other a la carte service that is completely disconnected from supporting the student in a

offered by the district is either insufficiently specific to allow for an appropriate comparison to the rate charged by Gotham Children and/or it is contradicted by other evidence in the hearing record. While the district may have been on the right track in terms of building a case that identifed the type evidence involving competing market rates for private services in order to challenge the rate charged by a parent's chosen provider, here the evidence produced was not sufficiently convincing because of the flaws identified herein.

Based on the above, the evidence in the hearing record was mixed regarding the rates charged by private providers for home-based ABA services and while the rate charged by Gotham Children was at the top of the range that other ABA providers charge, it was not outside of that range, and it was not an abuse of the IHO's discretion to reject the district's argument that the $250 rate charged by Gotham Children was unreasonable. Accordingly, I will not disturb the IHO's discretionary determination in this instance.

3. IEP Amendment

The district contends that the IHO erred in ordering the district to reconvene the CSE to amend the student's 2019-20 IEP to include home-based services. Awarding prospective services to a student, under certain circumstances, has the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

In this matter, by the time the IHO issued his decision on June 17, 2020, over a year had passed since the parent filed her due process complaint notice, the 2019-20 school year had effectively ended due to the coronavirus (COVID-19) pandemic forcing the closure of schools, and the CSE should have met to develop the student's program for the 2020-21 school year (see 20 U.S.C. § 1414[d][4][A]; Educ. Law § 4402[2]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]). Moreover, on November 22, 2019, the district conducted a psychoeducational evaluation of the student (Dist. Ex. 2 at p. 1).

Based on the foregoing, the February 2019 IEP challenged in the present matter is no longer in effect, the IHO's order specific to the 2019-20 school year would have limited or no impact, and the CSE should have already convened to consider the student's progress under his current

general education classroom setting, the record simply does not indicate in any meaningful way. Further, it is unclear if independent providers have the same definition of the service and if or how ABA services falls under the same rubric. I have warned the district previously that I will not take judicial notice of the meaning of the term or favor one party over another as to its meaning (Application of a Student with a Disability, Appeal No. 17-103). Here, where the district is pointing the cost of SETSS services to demonstrate a purported market rate for the ABA services the parent obtained, it is incumbent on the district to demonstrate that the services are even comparable.

programming and any new evaluative information. Under the circumstances, rather than awarding indefinite, prospective relief, the more appropriate course is to limit review in this matter to remediation of past harms that have been explored through the development of the underlying hearing record. If the parent remains displeased with the CSE's recommendations for the student in some subsequent IEP(s), she may obtain appropriate relief by challenging the IEP(s) in a separate proceeding (see Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the school year for which such placement is sought has been developed and the parent challenges that IEP]).

VII. Conclusion

Based on the foregoing, the district failed to meet its burden to show that it offered the student a FAPE for the 2019-20 school year in the absence of home-based services. Further, there is insufficient evidence in the hearing record to modify the IHO's discretionary determination requiring the district to fund the costs of 10 hours of home-based ABA services per week from Gotham Children at the rate of $250, along with the costs of one session of supervision and one hour of parent training per week, upon proof of delivery and payment of services. However, the IHO's order requiring the CSE to reconvene and add home-based services on the student's IEP for the 2019-20 school year, which has already ended, must be reversed. Instead, the parties should follow the statutory process for making that determination.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 17, 2020 is modified by reversing that portion which ordered the CSE to reconvene to add home-based services to the student's IEP for the 2019-20 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER