The University of the State of New York

The State Education Department
State Review Officer
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No. 21-023

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

Appearances:
The Legal Aid Society, attorneys for petitioners, by Katherine M. Groot, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Nathaniel Luken, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which found the petitioners' daughter ineligible for special education services from respondent (the district) beyond September 1, 2019 and limited tuition reimbursement for The Keswell School (Keswell) for the 2019-20 school year to the student's attendance during summer 2019. The district cross-appeals from the IHO's award of tuition reimbursement for summer 2019. The appeal must be dismissed. The cross-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). 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 parties' familiarity with the student's educational history is assumed and given the limited information contained in the hearing record, the following pertinent information has been gleaned largely from the due process complaint notice and is not contradicted by the hearing record. Briefly, the student was 21 years old at the time of the due process complaint notice and has a diagnosis of autism spectrum disorder (Parent Ex. A at p. 1). She is non-verbal and displays severe deficits in the areas of academics, language, appropriate social interaction, self-regulation, leisure, self-care and adaptive behaviors (id.; see Parent Ex. H at pp. 1-2). The student has attended

Keswell since the 2015-16 school year (Parent Ex. A at p. 2; see Parent Ex. I at p. 2). The district paid for the student's tuition at Keswell for the 2015-16 and 2016-17 school years (Parent Ex. A at p. 2). During the 2017-18 school year, the parents executed a renewable settlement agreement with the district for the student's attendance at Keswell (id.; see Parent Ex. L).[1] For the 2017-18 school and 2018-19 school years the district paid for the student's tuition at Keswell pursuant to the stipulation of settlement (Parent Ex. A at p. 2; see Parent Exs. L; M).

On March 21, 2019 the parents submitted a ten-day notice of unilateral placement to the district informing it of their intention to place the student at Keswell for the 2019-20 school year at public expense (Parent Ex. A at p. 2; see Parent Ex. B). On March 25, 2019, the parents executed a contract for the student's attendance at Keswell for the "twelve month extended day (8:45am-4:45pm) school program" including applied behavior analysis (ABA), speech-language therapy, and occupational therapy (OT) for the 2019-20 school year (Parent Ex. C).

On February 20, 2020, the parent filed a due process complaint notice concerning the 2019-20 school year (id.).

A. Due Process Complaint Notice

The parties' familiarity with the contents of the due process complaint notice dated February 20, 2020 is assumed and the entirety of the claims presented will not be repeated in detail herein. Briefly, the parents alleged that the district deprived the student of a free appropriate public education (FAPE) by failing to convene a CSE or develop an IEP for the 2019-20 school year or to conduct a timely re-evaluation of the student (Parent Ex. A at pp. 2, 3). The parents claimed that the student had not been re-evaluated by the district since October 2014 (id.). The parents also contended that the student was entitled to a FAPE for the entirety of the 2019-20 pursuant to the New York City's Chancellor Regulation A-101(C)(5) which allows students to remain in school until the end of the school year in which they turn 21 even if they have received commencement credentials (id. at pp. 2-3).

The parents also sought tuition reimbursement for their unilateral placement of the student at Keswell for the 2019-20 school year on the basis that the school provided the student with ABA and developed a program that addressed her severe developmental needs through integration between classroom work, community functioning, and related therapies (Parent Ex. A. at p. 3). The parents argued that the student had made progress at Keswell and that the equities favored full tuition reimbursement for the 2019-20 school year (id. at p. 4).

B. Impartial Hearing Office Decision

The parties proceeded to an impartial hearing on March 1020, 2020, and the hearing was completed on that day (Tr. pp. 1-37). Thereafter, the IHO issued a decision dated April 27, 2020

[1] The March 2018 stipulation was primarily entered to resolve the parents' claims related to the 2017-18 school year but included a term that it was "a renewable agreement" and that the terms could "be renewed for up to two school years: July 1, 2018 through June 20, 2019 . . . and July 1, 2019 through June 30, 2020" (Parent Ex. L at pp. 1, 4). Thereafter, in October 2019, a renewed agreement was entered for the 2018-19 school year (Parent Ex. M).

IHO Decision at p. 9). At the outset, the IHO noted that the district had filed a motion to dismiss in conjunction with its post-hearing closing brief and that the parents had responded to the motion to dismiss (id. at p. 2).

In determining the issue of the student's eligibility for special education for the 2019-20 school year, the IHO first analyzed the relevant State law concerning when a student, by reason of age, becomes ineligible to receive further special education and related services from a district (IHO Decision at pp. 5-6). The IHO noted that a "student with a disability" who is eligible for special education is defined in New York as "a student with a disability as defined in section 4401(1) of the Education Law, who has not attained the age of 21 prior to September 1st and who is entitled to attend public schools pursuant to section 3202 of the Education Law, and who, because of mental, physical or emotional reasons, has been identified as having a disability and who requires special services and programs approved by the department (8NYCRR§200.1[zz])" (id.) The IHO further stated that "[s]ection 4401 (1) defines a student with a disability as a person under the age of twenty one who ais entitled to attend public schools pursuant to section 3202 and who because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education" (id. at p. 6). In addition, the IHO noted that section 3202 of the Education Law provides that a person over five and under twenty one years of age who has not received a high school diploma is entitled to attend the public schools maintained in the district in which such person resides without the payment of tuition (id. at p. 6).

The IHO then noted that pursuant to Education Law 4402(5), notwithstanding the provisions of section 3202, a child with a handicapping condition who reaches the age of twenty one during the period commencing with the first day of July and ending on the thirty first day of August, if otherwise eligible, will be entitled to continue in a July and August program until the thirty-first day of August or until the termination of the summer program, whichever occurs first (IHO Decision at p. 6).

With respect to the IDEA, the IHO affirmed that although the IDEA mandates that a FAPE be made available to all children with disabilities, aged 3 through 5, and 18 through 21, pursuant to section 1412(a)(1)(b), the IDEA also has established that its age requirements do not apply in a state to the extent that its application to those children would be inconsistent with state law or practice or the order of any court, respecting the provision of public education to children in those ages ranges (IHO Decision at p. 6). Accordingly, the IHO determined that "the provision of FAPE for students over 18 and certainly for students over 21 is a matter to be determined solely under state law and not federal law" (id.).

In construing the relevant State law in "sum total," the IHO found that in New York a student with a disability is defined as a student who has not attained the age of 21 prior to September 1 of the school year in question. As a result, the IHO found that "after September 1, 2019, when the [s]tudent had already turned 21, she was no longer defined as a student with a disability, or entitled to services" (IHO Decision at p. 6).

In addressing the question of the Chancellor's Regulation, the IHO found that "[w]hile the Chancellor may have issued a general regulation regarding permission for students to remain in school through the end of the school year that they turn 21, this does not change the definition of a student with a disability under state law" (IHO Decision at p. 7). The IHO further noted that "the

Chancellor is unlikely to have intended to change the requirements for the provision of special education as the regulation does not refer to special education" and further stated that "the [district], itself, has generated a [Standard Operation Procedure Manual] which states clearly in footnote 58 on page 51, that a student is ineligible for special education if he or she has attained the age of 21 as of September 1 of the school year" (id.). Accordingly, the IHO determined that she had no authority to find the student eligible for special education beyond September 1, 2019 (id.).

Moving on to the issue of FAPE and the appropriateness of the student's unilateral placement, the IHO noted that, because the student was entitled to services during July and August 2019, she would address those issues within the context of that limited time period (IHO Decision at p. 7). The IHO noted that the district did not present a case regarding the provision of FAPE for the summer of 2019 and determined that the district did not provide FAPE during that period (id.). The IHO noted that the parents submitted evidence regarding the student's program and progress and the district did not object to those exhibits during the hearing (id.). The IHO found that the evidence submitted by the parents at the hearing indicated that the student was assessed by Keswell at the start of the school year and that the school developed an "integrated individual education plan for each of the domains, or specific target areas, which included speech and language, life skills, community skills, health and sexual safety, academics, social and leisure skills, employment readiness/vocational endurance, behavior and self-regulation; and adaptive physical education" (id. at pp. 7-8). The IHO also noted that a behavior intervention plan was updated to continue to reduce the student's maladaptive behaviors and help her build prosocial adaptive behaviors (id. at p. 8). The IHO further found that Keswell provided the student with approximately 30 hours of individualized 1:1 instruction using the principles of ABA and utilized an "integrative" model where the student's speech, OT and ABA instructors collaborated to ensure that her programming included aspects of each discipline throughout the day (id.). With respect to related services, the IHO found that the student received two 45-minute sessions of speech-language therapy and three 45-minute sessions of OT (OT) each week and continued to improve in each domain of need with some difficulty in progressing with health and sexual safety issues (id.). The IHO also stated that she found it "surprising that the [district] contests the appropriateness of . . . Keswell . . . simply by asserting that . . . Keswell School did not provide sufficient evidence of its appropriateness, as the [district] has funded that program for the past two years, and has offered no reason why it is now inappropriate" (id. at p. 8). As a result, the IHO determined that because the evidence in the hearing record supported a finding that Keswell was appropriate and the district did not raise any equitable concerns, the parents were entitled to tuition reimbursement for the student's attendance at Keswell during summer 2019 (id.).

Finally, the IHO found that the parents had not raised any Section 504 claims with the requisite specificity in either the due process complaint notice or during the hearing and, accordingly, she would not address Section 504 in the decision (IHO Decision at pp. 8-9).

IV. Appeal for State-Level Review

The parents appeal. The parents contend that the student was entitled to a FAPE for the entirety of the 2019-20 school year. The parents assert that the student turned 21 during August 2019 and was therefore eligible for special education for the 2019-20 school year and until she turned 22 in August 2020. Specifically, the parents argue that because New York State in practice provides public education to non-disabled students between the ages of 18 and 21, inclusive, it is

also required to do so for students who are eligible for special education. The parents also assert that, pursuant to section A-101(C)(5) of the Chancellor's Regulations, the district has expanded access to education for all students between the ages of 18 and 21, inclusive, by allowing them to remain in school for the entirety of the year in which they turn 21. The parents also assert that they adequately raised a Section 504 claim in the due process complaint notice and the IHO erred by declining to address it in her decision.[2]

The parents seek to submit additional evidence including a bilingual psychological evaluation dated September 11, 2019, an email exchange between the parents and the district concerning the evaluation dated June 15-16, 2020 and a CSE meeting notice dated April 13, 2020. The parents argue that the evidence should be accepted on appeal because it was not available at the time of the hearing and it demonstrates that the district, consistent with its policy and practice, considered the student eligible for special education and related services for the entirety of the 2019-20 school year.[3]

The district answers with various admissions and denials. The district also argues that the IHO correctly found that the student's eligibility for special education did not extend beyond September 1, 2019, and asserts that the Chancellor's Regulation relied on by the parents is a discretionary rule that does not abrogate the existing State statutory law governing eligibility.

With respect to the IHO's award of tuition reimbursement to the parents for the student's attendance at Keswell during summer 2019, the district cross-appeals. The district contends that the evidence in the hearing record was "sparse" and did not sufficiently explain how the program offered by Keswell specifically addressed the student's deficits or adequately connect the student's progress to any specific instruction provided by the school. The district also argues that the reasons it agreed to fund the student's unilateral placement at Keswell in the past were not in evidence, and the IHO erred in considering prior agreements to fund the student's placement at Keswell as a factor in determining the school's appropriateness for the 2019-20 school year. Accordingly, the district argues that the IHO's determination finding that Keswell was an appropriate unilateral

[2] State law does not make provision for review of section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parents' claims regarding section 504 and such claims by the parents will not be further discussed herein (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]).

[3] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). While it appears that the evidence the parents seek to admit on appeal was not available at the time of the impartial hearing, the parents' claims concerning eligibility ae governed by federal and state statutory authority as discussed further herein and therefore the documents proffered by the parents are not necessary to render a decision in this matter.

placement should be reversed and the award of tuition reimbursement to the parents for summer 2019 vacated.

The parents answer the district's answer and cross-appeal by continuing to argue that the IHO erred in limiting the student's eligibility for special education during the 2019-20 school year to summer 2019, and to contend that the IHO correctly determined that Keswell was an appropriate unilateral placement for the student.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[4]

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

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

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).

V. Discussion

A. Student Eligibility for the 2019-20 School Year

In challenging the IHO's determination that the student did not remain eligible for special education during the 2019-20 school year beyond September 1, 2019, the parents rely on a Chancellor's Regulation which provides that students may continue to attend school for the entirety of the school year during which they turn 21. As discussed below, however, the parents' reliance on a regulation which has limited local applicability and is not part of the State-wide statutory scheme or the regulatory framework for implementing the Education Law in New York, and which is also district-specific and discretionary in nature, is misplaced.

Under New York law, a student with a disability is defined in section 4401(1) of the Education Law as a student "who has not attained the age of 21 prior to September 1st" (8 NYCRR 200.1[zz]). In other words, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until the conclusion of the ten-month school year in which he or she turns age 21 (see Educ. Law §§ 3202[1], 4401[1], 4402[5][b]; 8 NYCRR 100.9[e]; 200.1[zz]; see also 34 CFR 300.102[a][1], [a][3][ii]). For a student with a disability otherwise eligible for special education who reaches age 21 during the period commencing July 1st and ending on August 31st, he or she is entitled to continue in a July and August program until August 31st or until the end of the summer program, whichever occurs first (Educ. Law § 4402[5]).

With respect to the age requirements promulgated pursuant to the IDEA, the statute provides that "[a] free appropriate public education is available to all children with disabilities ... between the ages of 3 and 21, inclusive (20 U.S.C. § 1412[a][1][A]). "Inclusive," in this provision, has been interpreted to indicate that a child remains eligible for a FAPE under the IDEA until his or her 22nd birthday (see St. Johnsbury Acad. v. D.H., 240 F.3d 163, 168 [2d Cir. 2001]). The IDEA also provides, however, that "[t]he obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children aged . . . 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice" (20 U.S.C. § 1412[a][1][B][i]). Thus, as State law is more restrictive than the IDEA with respect to the termination of eligibility due to age, it controls the terms of the student's eligibility for a FAPE under the IDEA (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 86 n.4 [2d Cir. 2005]).Chancellor's Regulation 101 Section I(C)(5) states, in relevant part, that "[a]ttendance is required through the end of the school year in which children turn 17 and, if no high school diploma has been granted, they may remain in school until the end of the school year in which they turn 21, even if they have received commencement credentials." Chancellor's Regulation 101 Section IX provides that "[t]his Regulation or any portion thereof may be waived by the Chancellor or designee if it is determined to be in the best interests of the NYC school district."

The parents primarily rely on the Chancellor's Regulation and have not proffered any authority supporting their contention that a discretionary local district-specific rule overrides the provision of the IDEA which allows states to promulgate more restrictive age parameters for IDEA eligibility than those mandated by the IDEA or the State laws which have established an eligibility age limit of under 21 in New York. As argued by the district, the Chancellor's Regulation at issue here is more properly construed as a district-specific, discretionary program that would not serve to invalidate the State's statutory cap on age eligibility for special education as determined by the legislature. Indeed, the Chancellor's Regulations indicate that they can be waived at the discretion of the Chancellor or a designee. Section I A-101 in particular only provides that a student "may"—permissibly, not mandatorily—continue to attend school for the entirety of the school year during which he or she turns 21. Accordingly, as opposed to the prescriptive and binding authority of the federal and State law concerning the special education eligibility age limit, I am constrained to find that the Chancellor's Regulation in question is merely a locally-effective, district-specific rule that the Chancellor or his or her designee may utilize or waive at their discretion (see Castle Rock v. Gonzalez, 545 U.S. 748, 756 [2005] ["A benefit is not a protected entitlement if government officials may grant or deny it in their discretion"]).

While I am sympathetic to the parent's concerns that the district may be applying the Chancellor's Regulation in a discriminatory manner with respect to similarly situated general education and special education students, my capacity to review educational issues is limited to those which arise under the IDEA and its State counterparts and does not encompass assessing the validity of local discretionary rules—or their application to individual students—particularly when the gravamen of the underlying dispute, such as the one here related to the age of eligibility for special education in New York, can be resolved by reference to existing federal and State law interpreting the IDEA (see A.M. v. NYC Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under the New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA and its state counterpart"]). As a result, there is no reason to disturb the IHO's finding that the student was not eligible for special education services or a FAPE from the district beyond September 1, 2019.

B. Unilateral Placement

The district does not appeal the IHO's finding that the district failed to prove that it provided the student with a FAPE for summer 2019. Accordingly, the sole remaining substantive issue to be determined is whether the parent's unilateral placement of the student at Keswell during summer 2019 was appropriate. In a cross-appeal, the district contends that the parents did not demonstrate that Keswell provided specially designed instruction to meet the student's unique needs and, to the extent the student made progress at the unilateral placement, there was insufficient evidence in the hearing record to support a finding that her progress was related to the instruction and related services she received at Keswell.

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, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). 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. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "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; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; 34 CFR 300.39[a][1]; Educ. Law § 4401[1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Hardison v. Bd. of Educ., 773 F.3d 372, 386 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

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; see Frank G., 459 F.3d at 364-65).

In support of their request for tuition reimbursement, the parents submitted a school description generated by Keswell, the affidavit testimony of the director of Keswell and the integrated individual education plan for the student and related progress reports for the 2019-20 school year.

Keswell utilizes a therapeutic and educational model for children with autism that integrates ABA, speech-language therapy and OT. It provides a teacher -student ratio of 1:1 for instruction. The school also uses a multidisciplinary teaching approach and individual positive behavior support plans to address the often complex educational and behavioral needs of its students (see Parent Ex. E).

The director of Keswell testified that every student at the school had an educational plan that integrated classroom work, community functioning and related therapies (Parent Ex. I at p. 1). She further stated that the curriculum at Keswell was firmly based in ABA methodology and the school's instructors and providers worked closely together to interface goals, techniques and consistency of behavior plans across each student's educational programming (id. at p. 2). The director testified that speech-language therapy was integrated in all aspects of learning at Keswell and the speech-language pathologists on staff held master's degrees, were trained in PROMPT, and also had training in behavioral techniques to maintain the students' focus and attention during 1:1 therapy sessions (id.). The speech-language therapists also coordinated with the ABA instructors to ensure that communication goals were generalized and practiced across settings (id.). With respect to OTOT at Keswell, she noted that the occupational therapists helped students develop their fine motor, graphomotor, typing, feeding, community, daily living and vocational skills and were trained to implement behavior supports (id.). She further testified that the occupational therapists developed sensory diets for the students that were followed by the ABA instructors throughout the day to help students learn to regulate themselves (id.). The director noted that many of the students at Keswell enter the school with difficult behaviors and the school is experienced in developing and implementing behavior plans across all aspects of the students' education (id.).

The director testified that the student had attended Keswell since September 2015 and was assessed by the school staff at the start of the 2019-20 school year (Parent Ex. I at p. 2) She further testified that the assessments conducted, and her own observations of the student, supported a conclusion that the student had significant deficits in age-appropriate speech and language, academics, behavior and self-regulation, as well as executive functioning and social and life skills (id.). She testified that as the director of the school she regularly observed the students on a daily basis and interacted with the staff regarding the student's behaviors and skills acquisition (id.). She noted that since enrolling at Keswell, the student had significantly increased her ability to communicate and had reduced her maladaptive behaviors (id.). The director observed that the student had also made significant gains in her ability to be around peers more safely, although she continued to work on how to be a part of a group and to learn skills she would need to function in an adult program (id.).

The director testified that for the 2019-20 school year, the student was in a classroom staffed by a teacher with a Master of Education degree, two instructors who had attained Masters level of education, one registered behavior technician with a Bachelor of Arts degree and two other instructors who had attained a Bachelors level of education (Parent Ex. I at pp. 2-3). She further

testified that the student also received speech-language therapy and OT as related services (id. at p. 3). The director opined that Keswell was an appropriate placement for the student because it met her individual need for 1:1 instruction in an ABA-based program that addressed her significant behavioral challenges and developmental delays (id.).

The integrated individual education plan (Keswell IEP) developed by Keswell for the 2019-20 school year recommended that the student receive 30 hours a week (out of a 40 hour week of in-school instruction) of individualized 1:1 instruction using ABA, two 45-minute sessions of speech-language therapy weekly, and three 45-minute sessions of OT a week (Parent Ex. H at p. 1). The Keswell IEP described the student as non-verbal and noted that she mainly used gestures and one-word approximations in both English and Cantonese to request desired items or to identify topics (id.). She also utilized an AAC device to communicate (id.). The Keswell IEP noted that the student became frustrated if she was unable to communicate clearly or be understood and would then engage in self-injury or aggressive behaviors (id.). The maladaptive behaviors exhibited by the student and tracked by her instructors and providers included non-compliance, vocal perseveration, spitting, self-injurious behavior, aggression, spinning, eloping, disrobing and vomiting (id.). The function of the behaviors varied between trying to access desired items/activities, to access information, attention seeking, automatic reinforcement and to escape from work demands (id.).

The Keswell IEP stated that the student needed constant monitoring and quick and specific redirection by instructors with respect to her maladaptive behaviors (Parent Ex. H. at p. 1). The IEP further noted that the student needed careful guidance back to tasks as she was very sensitive to any shift in the behavior of her teachers and that sensitivity could at times result in an increase in the frequency and intensity of the behavior being addressed (id.). However, the IEP also noted that the student had demonstrated significant improvement in regulating her behavior in high emotion situations and her disrobing, vomiting and eloping incidents were "near extinction," although her attention-seeking behaviors such as vocal perseveration, self-injury and spitting were more difficult to redirect (id.). Teacher guidance was deemed necessary to re-establish attending after the student exhibited attention-seeking behavior and the student could escalate to aggression or self-injury if not successfully redirected (id. at p. 2). The Keswell IEP noted that the student learned best when provided with high levels of positive reinforcement and visual supports (id.). The school successfully utilized a visual reward system with the student which rewarded her for the completion of a series of tasks (id.).

The Keswell IEP also noted that the student demonstrated delays across all domains, including language, appropriate social interactions, self-regulation, leisure and academics (Parent Ex. H at p. 2). It further stated that the student continued to make steady progress across all domains and had shown significant improvement in accepting teacher prompts and corrections as well as delayed access to desired items and activities (id.). The student continued to require 1:1 ABA instruction for skill acquisition and maintenance (id.).

The Keswell IEP also established goals for the student in the domains of speech and language, life skills, community skills, health and sexual safety, academics, social/leisure, employment, behavior regulation, adaptive physical education and occupational therapy.

With respect to speech and language, Keswell developed 31 goals for the student, including in the areas of improving her ability to follow directions, to expand receptive vocabulary, to improve her understanding of linguistic concepts, to improve her understanding questions, to improve her use of the AAC device, to improve her problem solving skills, to improve her use of phrase forms and syntax, to expand her expressive vocabulary, to improve her use of linguistic concepts, to respond to and ask questions, to improve her conversational skills and to improve her social interaction and perspective taking (Parent Ex. H at pp. 2-5).

Keswell also created 30 life skills goals for the student including in the areas of independent dressing, personal hygiene, toileting, clothing and laundry, eating and meal skills and household chores and maintenance (Parent Ex. H at pp. 7-9). With respect to community skills, Keswell developed 24 goals for the student in the areas of community mobility, community knowledge and safety, purchasing, visiting a restaurant and leisure activities in the community (id. at 9-11). The student also had 7 goals in the area of health and sexual safety including social and stranger safety, sexual safety and navigating medical encounters (id. at pp.12 -13).

With respect to academics, Keswell developed 16 goals for the student in the areas of arithmetic and number concepts, geometry and measurement concepts, applied math, reading skills including sight words and functional reading, decoding and writing (Parent Ex. H at pp.13-15).

The student also had 17 social skills/leisure goals including leisure skills, social interaction and referencing, dyad and small group instruction and classroom routines (Parent Ex. H at pp. 16-18). She also had 7 goals in the areas of employment readiness and vocational endurance, working at the school's copy center and job sampling (id. at pp. 18-19).

With respect to the student's behavior and self-regulation, Keswell developed 19 goals including tolerating variations, self-regulation and decreasing challenging behaviors as outlined in her behavior plan (Parent Ex. H at pp. 20-21).

The student also had 20 adaptive physical education goals (Parent Ex. H at pp. 22-25) and 16 OT goals in the areas of motor planning, balance and strength, fine motor and visual perception, self-care and community integration (id. at pp. 27-32).

Moreover, although the district does not dispute that the student made progress[5] at Keswell and the award of tuition reimbursement is limited to the months of July and August 2019 only, I note that the Keswell IEP includes detailed progress reports from January 2020 that demonstrate that despite her persistent behavioral challenges and significant developmental delays in all domains, the student progressed toward her goals in almost all areas of need, and showing particular advancement in the areas of her greatest need, including her ability to function in the community, decrease the frequency of her maladaptive behaviors and to communicate with more

[5] While not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in evaluating the appropriateness of a unilateral placement (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

tolerance for frustration and misunderstanding (Parent Ex. H at pp. 6-6, 9-10, 12, 13, 16, 18, 19, 21-22, 27-32).

Based on the above evidence in the hearing record, I find no basis to disturb the IHO's finding that Keswell was an appropriate unilateral placement for the student during summer 2019. Although the record is perhaps not as fully developed as it would have been if recent evaluations or testimony from the student's providers had been included, the parents nonetheless introduced into evidence detailed progress reports from Keswell as well as the integrated individual education plan developed for the student by Keswell for the 2019-20 school year. The parents also submitted the affidavit testimony of the director of Keswell who affirmed the appropriateness of the student's program and progress during the 2019-20 school year. Moreover, the district has not disputed its failure to evaluate the student since the fall of 2014 or to convene a CSE and develop an IEP for the 2019-20 school year. In addition, the district failed to present a case at the impartial hearing. Accordingly, under the circumstances of this case—where it did not present a case on the issue of FAPE at the impartial hearing and elected not to submit any evaluative information or assessments of the student as evidence of the district's view of the student's special education needs into the hearing record—the district has effectively abandoned any opportunity to assert at either the impartial hearing or on appeal its position regarding the student's special education needs and the extent to which the parent's unilateral placement either addressed or failed to address those needs. As a result, to the extent evaluation reports or assessments submitted by the parent as evidence of the appropriateness of Keswell were not sufficiently comprehensive for the purposes of determining the student's needs, the responsibility for such deficiency lies with the district and not the parent (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]; see also Application of the Dep't of Educ., Appeal No. 20-131; Application of the Dep't of Educ., Appeal No. 18-125; Application of a Student with a Disability, Appeal No. 180-049; Application of a Student with a Disability, Appeal No. 15-076; Application of a Student Suspected of Having a Disability, Appeal No. 15-038; Application of a Student with a Disability, Appeal No. 14-033; Application of a Student with a Disability, Appeal No. 14-028; Application of a Student Suspected of Having a Disability, Appeal No. 14-003; Application of the Dep't of Educ., Appeal No. 13-198; Application of the Dep't of Educ., Appeal No. 13-072; Application of a Student with a Disability, Appeal No. 12-027). While the district is correct that its previous settlement with the parents and agreement to pay for Keswell for prior school years would not, in and of itself, support a finding that Keswell was also appropriate for the 2019-20 school year, its failure to evaluate the student or create an IEP for the 2019-20 school year, or to present a case at the impartial hearing, effectively precludes it from arguing on appeal a credible alternate view of the student's needs or successfully rebutting the evidence proffered at the hearing by the parents in support of the appropriateness of Keswell as a unilateral placement for the student.

Accordingly, based on the evidence submitted by the parents at the impartial hearing, Keswell addressed the student's complex and challenging maladaptive and interfering behaviors, developmental delays, communication, speech-language, daily living and safety needs by providing behavioral supports and interventions, one-to-one ABA in a small class, goals for speech-language, OT, daily living skills, health and safety, academics, self-regulation, community, leisure, and vocation, as well as speech-language therapy and OT as related services. Moreover,

while not dispositive, the student also made progress toward her goals, including progress in some of her most challenging and persistent behaviors. As a result, the parents met their burden of demonstrating that Keswell provided the student with specially designed instruction and related services which addressed the student's unique individual needs and afforded her the opportunity to make progress, and the IHO correctly awarded the parents tuition reimbursement for the student's attendance at Keswell during summer 2019.

VI. Conclusion

Having determined that the IHO correctly found that the student did not remain eligible for special education or a FAPE from the district beyond September 1, 2019, and that the parents were entitled to reimbursement for the student's tuition at Keswell for summer 2019, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
March 15, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER