The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 21-047

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

Appearances:
The Law Office of Gottlieb & Gottlieb, LLP, attorneys for petitioner, by Marc A. Gottlieb, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be fully reimbursed for her daughter's tuition costs at the Keswell School (Keswell) for the 2019-20 and 2020-21 school years. Respondent (the district) cross-appeals from the IHO's determination that Keswell was an appropriate placement for the student for the 2019-20 and 2020-21 school years. The appeal must be sustained in part. The cross-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 in this appeal has attended a nonpublic school (NPS) since at least the 2019-20 extended school year (see Parent Exs. G, O at p. 1). From May through November 2018, a three-day due process hearing was held for the student concerning the 2016-17, 2017-18, and 2018-19 school years. In a decision dated April 22, 2019 the IHO who presided over that proceeding found the district failed to offer the student a FAPE for all three school years, and ordered it to reimburse the parent for the cost of tuition at the student's non-public school (NPS) for the 2018-19 school year along with the costs the parent incurred for a functional behavior

assessment (FBA) and behavior intervention plan (BIP), 540 hours of applied behavior analysis (ABA) therapy and/or special education teacher support services(SETSS), and related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Ex. A at pp. 3, 11-13). In addition, the IHO ordered the CSE to reconvene "forthwith" and consider all of the student's evaluations and other relevant information and produce a new IEP for the student for the 2019-20 school year (id. at p. 13).

By letter to the district, dated June 17, 2019, the parent asserted that the CSE had not convened a CSE meeting for the student for the 2019-20 school year (Parent Ex. B). The parent provided the district notice that she was enrolling the student at the Manhattan Star Academy (MSA) for the 2019-20 extended school year and would hold the district responsible for the student's tuition at MSA (Parent Ex. B). According to the MSA admissions coordinator, by the summer of 2019, the student's needed level of support outgrew MSA's ability to provide support to her (Tr. p. 38). On July 1, 2019, the parent signed a contract with the Keswell School (Keswell) for the 10-month, 2019-20 school year (Parent Ex. K). On July 2, 2019 the parents filed a due process complaint notice (Parent Ex. AG at p. 1). In a letter to the district dated August 20, 2019, the parent again asserted that the CSE had not convened a CSE meeting for the student for the 2019-20 school year and advised the district that she intended to place the student at Keswell for the "extended twelve-month school year" and hold the district responsible for the student's tuition (Parent Ex. I). On August 30, 2019 a subsequent IHO issued a pendency decision finding that the student's 12-month pendency placement consisted of placement at MSA, along with the related services of OT, PT, speech-language therapy, and applied behavioral analysis (ABA) services (Parent Ex. AG at p. 2). The IHO also ordered the district to reimburse the parent for her outlays and to directly fund MSA for the balance due (id.).

According to the parent, on April 24, 2020 the CSE convened to create the student's IEP for the 2020-21 extended school year (Parent Ex. AE at p. 2).[1] A July 22, 2020 prior written notice indicated that the student was offered a placement in a 8:1+1 special class in a twelve-month, district specialized school (Parent Ex. AE at p. 3).

On April 29, 2020 the parent filed a due process complaint notice concerning the 2019-20 school year and on June 30, 2020 the parent filed a due process complaint notice concerning the 2020-21 school year (see IHO Ex. I at p. 1).[2]

In a letter to the district dated June 10, 2020, the parent asserted that the CSE had not offered the student a FAPE for the 2020-21 school year and advised the district that absent an appropriate public placement she had no choice but to return the student to Keswell for the extended twelve-month program and hold the district responsible for the student's tuition at the school (Parent Ex. T).

[1] The April 2020 IEP was not included in the hearing record and the information regarding the April 2020 CSE meeting is taken from the allegations contained in the parent's September 21, 2020 due process complaint notice.

[2] The April 2020 and June 2020 due process complaint notices were not made a part of the hearing record.

A. Due Process Complaint Notice

In a September 21, 2020 amended due process complaint notice, the parent asserted that the district did not offer the student a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. AE).

With respect to the 2019-20 school year, the parent asserted that the district failed to hold a CSE meeting and create an IEP for the student, thus denying her a FAPE (Parent Ex. AE at p. 1).

With respect to the 2020-21 school year, the parent raised a number of allegations regarding the April 2020 CSE process and the substance of the IEP developed at that meeting (id. at p. 2). The parent further contended that the district did not provide her with a copy of the IEP; she asserted she received a prior written notice that was late and indicated that the CSE did not consider adequate documentation and offered a placement that was not capable of implementing the IEP (id.at p. 3).

For relief, the parent requested an award of tuition reimbursement and/or funding for both the 2019-20 and 2020-21 school years, pendency and implementation of the interim order on pendency from the prior proceeding, specialized transportation, reimbursement for private transportation costs, related services, compensatory services, and reimbursement for the cost of independent testing and evaluations (Parent Ex. AE at p. 3).

B. Impartial Hearing Officer Decision

A hearing convened and concluded on November 13, 2020 (Tr. pp. 12-76).[3] During the hearing, the district notified the IHO that it was not presenting a case, but was not conceding FAPE; the district also declined making an opening statement (Tr. pp. 18-19, 22). Counsel for the parent clarified that the September 21, 2020 amended due process complaint notice covered all of the parent's claims (Tr. p. 24). The parent sought tuition for MSA for July and August 2019 and for Keswell for September 2019 through June 2020 and the entire 2020-21 school year (Tr. pp. 22-24).

On November 13, 2020, the IHO, after discussing consolidation during the hearing, issued an order consolidating the parent's April 29, 2020 due process complaint notice and June 30, 2020 due process complaint notice, as amended by the September 21, 2020 amended due process complaint notice (Tr. pp. 25-28; IHO Ex. I; see Parent Ex. AE).

In a decision dated January 8, 2021, the IHO found that the district did not meet its burden of showing that it offered the student a FAPE for the 2019-20 and 2020-21 school years because it did not submit any evidence at the hearing (IHO Decision at p. 4).[4] The IHO went on to review the evidence submitted by the parent in support of showing that the programs offered by MSA and Keswell during the 2019-20 and 2020-21 school years were appropriate (id. at pp. 4-12). The IHO

[3] A pre-hearing conference was held on September 25, 2020 (Tr. pp. 1-11).

[4] The IHO decision is not paginated. Citations refer to the decision as received, with page 1 being the cover page.

found MSA was an appropriate placement for the student for July and August 2019 (id. at pp. 13-14). Regarding Keswell, the IHO determined that the parent met her burden of showing that the school provided the student an appropriate program from the first day of school in September 2019 through March 16, 2020 when the school closed due to the Covid-19 pandemic (id. at pp. 14-15). The IHO then reviewed the remote instruction offered by Keswell beginning March 23, 2020 through the end of the 2019-20 school year and found that the "live remote sessions addressed [the student's] needs to a limited extent" (id. at p. 15). The IHO noted that the student only attended remote live sessions for two hours per day and that "[t]he parent did not testify and there is no evidence about the content of the materials and videos that were provided for the student in addition to the live sessions, or whether the parent was able to work with the student on any written work or videos that were sent home and meant to be utilized without live remote assistance" (id.). Based on this, the IHO determined that, for this portion of the school year, the parent was entitled to "2/8 of the daily portion of the tuition" (id.at pp. 15-16). The IHO applied a similar analysis to the July and August portion of the 2020-21 school year (id. at p. 16). Turning to the program offered by Keswell beginning in September 2020, the IHO noted that Keswell was open for in person classes and the parent chose to keep the student at home for remote learning (id.). The IHO found that for the 2020-21 ten-month school year, Keswell provided the student with three hours of remote learning per day, while Keswell provided other students eight hours per day of in-person instruction (id.). The IHO then determined that the parent should receive "payment equal to 3/8 of the daily rate" of the student's tuition (id.).

The IHO further found that equitable considerations favored the parent as there was no indication in the hearing record that the parent was not cooperative with the district and the parent provided the district with notice of her intent to unilaterally place the student and seek funding from the district for both school years (IHO Decision at p. 17).

As relief, the IHO ordered the district to reimburse the parent, or directly pay MSA, for the cost of the student's tuition at MSA for July and August 2019, not to exceed $17,308; to reimburse the parent, or directly pay Keswell, for the cost of the student's tuition at Keswell for the period from September 2019 through March 16, 2020; to reimburse the parent, or directly pay Keswell, for the cost of 25% of the student's tuition at Keswell for the period from March 16, 2020 through the end of the 2019-20 school year and for July and August 2020; and to reimburse the parent, or directly pay Keswell, for the cost of 37.5% of the student's tuition at Keswell for the ten-month portion of the 2020-21 school year (IHO Decision at pp. 18-19). The IHO also directed the district to pay the full cost of the student's tuition at Keswell for any portion of the 2020-21 school year that the student returns to in-person instruction (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals, asserting that having found that the district did not offer the student a FAPE and that the parent's placement were appropriate, the IHO improperly reduced the tuition reimbursement award for Keswell.[5] The parent asserts that, but for the Covid-19 pandemic, the student would have received in-person instruction at Keswell and that the pandemic cannot be

[5] The parent's filing included a "Verified Petition." As the regulations governing practice before the Office of State Review refer to the name of the pleading to initiate review as a "request for review" (8 NYCRR 279.4[a]), the parent's pleading will be referenced as such herein.

attributed to the parent or to the school. The parent also provides a comparison between what the student may have received if the student were at public school during the pandemic with what Keswell provided to the student. The parent requests the IHO's reduction of the tuition award be overturned and that the district be directed to reimburse the parent for 100% of the cost of the student's tuition at Keswell for the 2019-20 and 2020-21 school years.

In an answer and cross-appeal the district denies all of the allegations set forth in the request for review and requests that the parent's request for review be rejected due to failure to comply with the practice regulations because it is not titled properly, it is unsigned, and it is unverified. The district also cross-appeals the IHO's determination that Keswell was an appropriate placement for both the 2019-20 and 2020-21 school years. Specifically, the district asserts that the remote learning aspect of the Keswell program was inappropriate. The district also cross-appeals from the IHO's findings regarding equitable factors, asserting that the parent did not demonstrate that she cooperated with the student's remote instruction program.

In an answer to the district's cross-appeal, the parent addresses the allegations raised in the district's answer and cross-appeal.

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]).[6]

[6] 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).

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

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

VI. Discussion

A. Preliminary Matters

1. Scope of Review

The district does not appeal the IHO's determinations that it failed to present any evidence that it offered the student a FAPE for either the 2019-20 or the 2020-21 school years, nor does it appeal from the IHO's finding that the parent cooperated with the district and provided the district with notice of her intent to unilaterally place the student at MSA and Keswell (IHO Decision at p. 17). Therefore, these findings are final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

2. Compliance with Practice Regulations

The district asserts that the request for review should be dismissed due to a lack of compliance with the regulations governing practice before the Office of State Review. Specifically, the district asserts that the request for review is not titled properly, is unsigned, and is unverified.

State regulations provide that each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3).

State regulations provide that "[a]ll pleadings and papers submitted to a[n] [SRO] in connection with an appeal must be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Turning initially to the district's contentions relative to the form of the request for review, titling the document as a "Verified Petition" rather than as a request for review is the type of error that could be considered an easily corrected procedural error or mere technicality; however, it should be noted that, separate from the allegations raised by the district, the document filed by the parent did not include a "Notice of Request for Review." As noted above, the notice of request for review serves the important purpose of providing a respondent with the critical regulatory directives for properly responding to an appeal. Accordingly, such an error may result in the dismissal of a request for review; however, in this instance, the district does not allege that it was prejudiced in its ability to timely prepare, serve, or file an answer. Accordingly, I decline to dismiss the parent's request for review given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that it suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

Turning next to the allegations that the request for review was not signed or properly notarized, the request for review identified as "Verified Petition," affirmation of verification, and affirmation of service, all indicate that they were signed by the attorney for the parent and rather than being signed are marked as a conformed signature. Initially, there is nothing in the practice regulations, and the attorney for the parent has not pointed to any authority for the proposition that submission of a document bearing a conformed signature meets the requirement that all pleadings must be signed (8 NYCRR 279.8[a][4]).[7]

Parent's counsel asserts that as an attorney he is entitled to verify the request for review on behalf of the parent and that State regulation does not specifically require a parent to verify the pleading. Counsel, who has appeared before the OSR on numerous occasions is incorrect. The applicable regulation clearly states that "All pleadings shall be verified. The request for review shall be verified by the oath of at least one of the petitioners" unless the request for review is filed by a school district (8 NYCRR 279.7[b]; see Application of a Student with a Disability, Appeal No. 20-079 [noting that an attorney signing the verification is not in compliance with State regulation]).

[7] Additionally, to the extent that a temporary makeshift procedure for allowing parties to securely encrypt and transmit information electronically to the Office of State Review on a voluntary basis was permitted at the time this appeal was filed, the instructions for complying with this procedure explicitly required that all pleadings submitted "be signed the same way a paper pleading is signed."

Having been notified of these errors by the district, counsel for the parent could have easily corrected these deficiencies; however, compounding the problems with the request for review, the parent's answer to the cross-appeal is similarly not signed or properly verified. The answer to cross-appeal, affirmation of verification, and affirmation of service all indicate a conformed signature of the parent's attorney.

Further, to the extent that the district asserts that the parent's native language being other than English is an additional reason why a verification is necessary in this matter, the verification requirement is intended to ensure that the petitioner has read the request for review, knows the contents of the request for review, and attests that the contents of the request for review are true (8 NYCRR 279.7[b][1]). Accordingly, the lack of a verification is troubling, regardless of the parent's native language.

In this instance, parent's counsel's compounded failure to comply with the practice regulations weigh heavily in favor of dismissing the parent's appeal. However, considering possible confusion due to the adjustments in the procedures during the ongoing Covid-19 pandemic, and considering that the parent is at least aware of the attorney-client relationship due to her appearance during the hearing, in an exercise of my discretion, I will accept the request for review for consideration. Nevertheless, in order to ensure that the parent is aware of this proceeding, a copy of the decision will be mailed directly to the parent at her address as listed in the September 21, 2020 amended due process complaint notice, as well as to counsel for the parent.

Finally, the parent's attorney is specifically cautioned that, "while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's or a particular attorney's repeated failure to comply with the practice requirements" (Application of a Student with a Disability, Appeal No. 19-060; Application of a Student with a Disability, Appeal No. 19-058; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

B. Unilateral Placement

As noted above, the district does not contest the IHO's determination that it failed to offer the student a FAPE for both the 2019-20 and 2020-21 school years, and instead, challenges the IHO's determinations that Keswell was an appropriate unilateral placement for the student, raising concerns regarding the period when the student participated in remote learning. The district does not contest the appropriateness of Keswell for the period when the student received in-person instruction. Therefore, the inquiry will be limited to the appropriateness of Keswell for the 2019-20 and 2020-21 school years. More specifically, for the 2019-20 school year, the focus will be on considering the effect of the switch to remote instruction in March 2020 on the appropriateness of Keswell for the student for that school year and, for the 2020-21 school year, on the parent's decision to place the student in a remote learning program 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). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

A brief discussion of the student's educational needs is necessary to evaluate the appropriateness of the unilateral placement of the student at Keswell. As noted above, the student attended MSA for July and August 2019 (Parent Ex. G). A progress report generated by the student's MSA providers in August 2019 indicated that, with respect to social/emotional development, the student continued to require verbal cues to respond to greetings (Parent Ex. H at p. 1). The student's MSA teacher reported that the student engaged in play with peers but during simple games required adult modeling and verbal cues (id.). The student also required modeling and supervision in order to share toys, and verbal prompts to follow the classroom schedule (id.). According to the teacher, the student required verbal cues in order to complete ADLs related to toileting and feeding (id. at p. 2). With respect to academics, the teacher indicated that in math, the student continued to work on adding sums to 20 with adult support; in reading, she required verbal prompts to attend to a reader, read, and respond to questions about a text; and in writing, she continued to work on copying words and sentences by correcting letter size, when prompted, without getting upset (id.). In terms of speech and language, the August 2019 progress report indicated that therapy during the summer had focused on facilitating the student's ability to produce 2-3 word utterances and following single-step instructions embedded in familiar routines, game play, and navigating the school environment (id. at p. 4). The student's speech therapists reported that the student benefitted from aided language stimulation and "sabotage" strategies to participate in speech therapy activities (id.). The student's MSA occupational therapist reported that during the summer session the student participated in sensory motor obstacle courses to improve her sequencing and sensory processing skills; she noted that the student required verbal and tactile prompts to stay on task (id.). With respect to handwriting, the occupational therapist reported that the student used a mature tripod grasp and practiced sizing and forming her letters with verbal and visual prompts to guide her (id. at p. 6). The student also required minimal to moderate tactile and verbal cues to complete cutting activities (id.). According to the student's MSA physical therapist, the student's summer therapy sessions focused on generalizing skills learned during adapted physical education when participating in community walks, water play, and playing on the playground (id. at p. 8). More specifically the physical therapist reported that the student worked on body and safety awareness and motor planning (id.). The associate director of the lower school at Keswell (associate director) reported that, in September 2019, the student presented with several maladaptive behaviors including self-injurious behavior, tantrums, aggression, out of seat behavior, dropping to the floor, eloping, vocal protesting, inappropriate self-touching, non-contextual vocalizations and non-contextual hand movements, and object manipulation (Parent Ex. AF at pp. 3). The associate director reported that the student demonstrated strengths in receptive language, visual performance, and reading skills, but she did not consistently demonstrate them (id.). According to the associate director, the student's self-directedness interfered with her ability to learn new skills, generalize mastered skills, and interact with others (id.). In September 2019 the student was unable to learn in a group setting and was unable to sit appropriately in a group setting without engaging in maladaptive behaviors, even with 1:1 support (id.).

1. 2019-20 School Year

As an initial matter, the IHO found that as of September 2019, when the student started at Keswell, the instruction provided at Keswell addressed the student's needs. The IHO specifically noted that Keswell provided the student with eight hours of learning per day, 1:1 support throughout the day, as well as related services, and further that the student made "significant

progress in regulating her behaviors" (IHO Decision at pp. 6-10, 14-15). Neither party appeals from this finding; the district, instead requests an examination of the period the student received remote instruction separate from rest of the school year (Answer and Cross-Appeal ¶15). However, in considering the appropriateness of Keswell for the remote instruction portion of the 2019-20 school year, such determination cannot fairly be made without assessing the appropriateness of the program provided to the student during the course of the entire school year and taking into account the unprecedented disruptions to the educational system in New York caused by the Covid-19 pandemic.

In March 2020, every school in the State was required to close down in-person instruction and transition to remote learning. The State Education Department provided guidance, in conformity with federal guidance, that school districts would be provided as much flexibility as possible factoring in the health and safety of students and faculty (see "Provision of Services to Students with Disabilities During Statewide School Closures Due to Novel Coronavirus (COVID-19) Outbreak in New York State," Office of Special Educ. [March 27, 2020], http://www.p12.nysed.gov/specialed/publications/2020-memos/nysed-covid-19-provision-of-services-to-swd-during-statewide-school-closure-3-27-20.pdf). State guidance noted that "schools may not be able to provide all services in the same manner they are typically provided" (id.). Accordingly, given the unforeseen nature of the pandemic and the fact that all schools in New York, whether private or public, were similarly impacted by their inability to provide in-person instruction as of March 2020, it cannot be said that the parent "chose" a remote program for the student or that any feasible alternative existed at that time to the extent remote instruction alone might not have provided the same type of specialized instruction the parent sought when she first enrolled the student at Keswell at the beginning of the 2019-20 school year. As a result, I will consider the appropriateness of Keswell for the student for the entirety of the 2019-20 school year, taking into account both the portion of the school year during which the student received remote instruction and the program offered to the student upon her enrollment at the school in September 2019.

Keswell is a1:1 non-approved, NPS for students with autism spectrum disorder (Parent Ex. AF at p. 1). Students at the school are grouped by skillset and age, with no group having an age range greater than three years (id.). Classrooms at Keswell have no more than 5 students, and all classrooms maintain a 1:1 ratio throughout the school day; instructors rotate across all students in the classroom on 45-minute intervals (id. at p. 2). The staff rotation throughout the day is necessary to develop and ensure generalization of skills (id.). Upon acceptance, Keswell staff develop an internal IEP following an initial assessment period, and again at the end of the school year (id.). Each student is then provided an individualized curriculum based on the IEP goals (id.).

The hearing record shows that beginning in September 2019 the student attended a 1:1 ABA classroom at Keswell with four other students (Parent Ex. O at p. 1). She received 40 hours of school-based instruction including approximately 30 hours of individualized ABA instruction (id.). In addition, the student received daily 45-minute sessions of individual speech-language therapy along with four 45-minute sessions of individual OT and one small group session of OT with behavioral support, per week (id). Initially the student's day was from 8:45 a.m. to 2:00 p.m. but it was gradually extended to 4:45 p.m. (id.). However, "in March 2020 the school was closed due to the pandemic, and virtual learning began" and continued through the end of the school year (Parent Ex. Q at p. 1). During this time the student's schedule consisted of four daily live sessions

that included ABA, speech-language therapy and OT (id.). The Keswell associate director indicated that each live session was 30-minutes long and that the student received speech-language therapy each day as one of the sessions, OT for four 30-minute sessions per week, and the remaining sessions were ABA (Tr. p. 61).

In addition to providing the student with 1:1 ABA and related services, Keswell developed an education plan for the student for the 2019-20 school year (see Parent Exs. O; Q). The student's Keswell plan included goals and objectives that targeted the student's expressive and receptive language (verbal acknowledgement, following directions, receptive identification/discrimination, making spontaneous requests, labeling pictures and objects, functional use of yes/no, use of intraverbals and attention to group book activities); community skills (tolerating environmental variation and demonstrating community safety); academics (following photographic or written schedule, imitating motor actions, imitating block designs, sequencing patterns to match a visual model, building foundational math skills, developing understanding of basic measurement, algebra and mathematical concepts, developing foundational reading skills, and developing basic spelling and written communication skills); social and leisure skills (increasing appropriate response to toys, demonstrating appropriate leisure engagement, developing interactive play and taking turns with peers, participating in group instruction, following class routines); ADLs (toilet training, dressing, personal hygiene, eating and table skills, and community participating skills); and behavior skills (increasing cooperation and reinforcer effectiveness, increasing on-task and attending skills, increasing eye contact and reducing self- stimulatory behavior, and demonstrating independent use of a reinforcer system) (Parent Ex. Q at pp. 1-27). The associate director from Keswell reported that the student's math goals were based on the Harcourt math curriculum and Reading Milestones was used for her reading goals (Parent Ex. AF at p. 2). She described accommodations and supports that were adopted specifically for the student including the use of an individualized work station with all the materials needed to implement the student's IEP goals and behavior plan; use of a break box filled with objects for the student to engage in non-contextual hand and object manipulation and to assist the student with learning how to request a break; implementation of an "'accepting no" plan; use of social stories and visual schedules specific to the student's routine, including stories that addressed antecedents to the student's maladaptive behavior; and use of a safe space outside of the classroom when the intensity of the student's tantrums posed a safety concern for her or others (id. at pp. 4-5).

Keswell progress reports highlighted the student's progress at the school between September 2019 and June 2020 (Parent Ex. Q). In comparing the student's functioning levels from September 2019 to September 2020, the Keswell associate director reported that when the student started school she did not have any replacement behaviors (e.g. requesting something instead of crying) and therefore the frequency and intensity of her behaviors, in particular her self-injurious behaviors, tantrums, out-of-seat behavior, eloping and dropping to the floor, were high (Parent Ex. AF at p. 3). The associate director indicated that as the school year progressed, the student demonstrated progress in accepting and utilizing instructor prompts to engage in replacement behaviors instead of her maladaptive behaviors, but continued to require full adult support to utilize the prompts throughout the day (id.) The associate director opined that the strategies employed by Keswell were appropriate and noted that data collected by staff showed that at the start of the school year, the student averaged two tantrums per day, with an average duration of 11-minutes and overall highs of four tantrums and a cumulative duration of 85 minutes in one day(id. at p. 6). However, at the point just prior to March 2020 when the school was compelled to end in-person

classes due to the Covid-19 restrictions discussed above, the student averaged one tantrum per day, with an average duration of four-minutes , and overall "highs" of two tantrums per day and a cumulative duration of 17 minutes (id.).

The Keswell associate director also testified that during the 2019-20 school year, the student met 64 short-term objectives, primarily in the receptive, expressive, and academic domains and that while the student still struggled with community skills, social and leisure skills, ADLs, and behavior skills, she still made some progress in those areas (id.). The hearing record shows that during the 2019-20 school year, the student met a number of her short-term objectives related to receptive and expressive language goals, did not meet any of the short-term objectives with respect to "community skills," met many of her short-term objectives with respect to academic skills, met one short-term objectives regarding social/leisure skills, met a few of her short-term objectives related to ADL skills, and met one out of her short-term objectives with respect to behavior skills (Parent Ex. Q at pp. 2-27).

Based on the above, I find that Keswell's program for the student, which included 1:1 ABA instruction, speech-language therapy, and OT, provided her with specialized instruction that addressed her unique needs and was reasonably calculated to enable the student to receive educational benefits (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Frank G., 459 F.3d at 364-65; see Gagliardo, 489 F.3d at 114-15). Moreover, the hearing record demonstrates that the student made some progress during the 2019-20 school year. As a result, although there is not as much information in the hearing record regarding the program provided to the student during the period of time she received remote instruction and considering that the remote program did not provide as many hours of instruction that the student received when she attended in-person, in assessing the program provided to the student at Keswell for the entirety of the 2019-20 school year—taking into account the unique circumstances leading to the closing of the school for in-person instruction in March, 2020—the parent has met her burden of showing that Keswell was an appropriate placement for the student for the 2019-20 school year. Accordingly, I find that the parent is entitled to tuition reimbursement for the entirety of the 2019-20 school year, including for that time period during which Keswell moved to remote instruction.

2. 2020-21 School Year

On appeal, the parent contends that the IHO inappropriately reduced an award of tuition reimbursement for Keswell for the 2020-21 school year arguing, much as she did with respect to the 2019-20 school year, that the remote instruction program provided to the student by Keswell was appropriate to address the student's unique needs, and that the parent should not be penalized for the unprecedented educational disruption attributable to the Covid-19 pandemic. In its cross-appeal, the district argues that the IHO correctly determined that the remote instruction program provided to the student by Keswell for the 2020-21 school year only addressed her needs "to a limited extent" and, therefore, the IHO should not have awarded any tuition reimbursement to the parent for that year.

Initially, at the start of the 2020-21 school year, the Covid-19 pandemic continued to raise questions as to how schools could best meet the educational needs of the student's they served (see "Supplement #2 - Provision of Services to Students with Disabilities During Statewide School

Closures due to Novel Coronavirus (COVID-19) Outbreak in New York State," Office of Special Educ. [June 2020], available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-2-covid-qa-memo-6-20-2020.pdf; "Supplement #3 - Provision of Services to Students with Disabilities During Statewide School Closures due to Novel Coronavirus (COVID-19) Outbreak in New York State," Office of Special Educ. [June 2020,] available at http://www.p12.nysed.gov/specialed/publications/2020-memos/special-education-supplement-3-covid-qa-memo-6-20-2020.pdf).

Nevertheless, unlike with the 2019-20 school year, where the student spent a portion of the school year receiving in-person instruction and the hearing record included documented reports of the student's progress, for the 2020-21 school year, at least through the date of the hearing, the student received instruction remotely for the whole school year. Keswell remained closed to in-person instruction during July and August 2020, but reopened for in-person instruction in September 2020 (Tr. p. 59). The student remained in the remote learning program, at the parent's election (id.).(Tr. p. 59) Accordingly, the parent was required to demonstrate at the impartial hearing that the instruction and related services that were delivered remotely to the student constituted specialized instruction that addressed the student's unique needs under the Burlington Carter standard.

With respect to the student's needs for the 2020-21 school year, as noted above, the hearing record shows that at the end of the 2019-20 school year/beginning of the 2020-21 school year the student exhibited areas of relative strength in receptive language, visual performance, and basic reading and math skills (Parent Exs. Q at p. 1; AF at p. 3). Academically, the student continued to demonstrate consistent progress with her pre-academic skills, however skills involving the use of objects were challenging at times due to the student's strong impulse to engage in non-contextual hand movements with the objects (id. at p. 10).

The June 2020 Keswell progress report suggested that at the start of the 2020-21 school year, the student's math skills were approximately at a first-grade level and her reading skills were approximately at a late first grade-early second grade level (Parent Ex. Q at p. 17). With respect to math skills, the student could independently complete math addition and subtraction problems for numbers 10 and under, independently count by twos up to 20, and was able to receptively identify coins, but had not mastered receptively identifying the values of those coins (id.). With respect to reading and writing skills, the student could identify and label upper- and lower-case letters, identify the sounds of letters, inconsistently label the sounds, and read approximately 200 words (id.). With respect to time management the student could independently follow an activity schedule, however, her ability to do so was compromised by her impulse to rearrange the items, being fixated on the arrangements that she initially had, and engaging in non-contextual hand movements with objects associated with the activities (id.).

Turning to social/emotional needs, the student continued to demonstrate social/emotional deficits and several maladaptive behaviors that interfered with her acquisition of new skills across domains including: engaging in non-contextual vocalizations and object manipulation; self-injurious behaviors (head hitting, arm/hand banging, biting & hair pulling), tantrums, aggression (kicking and biting), dropping to the floor, out of seat behavior, vocal protesting, non-contextual vocalizations, body tensing, inappropriate self-touching, eloping, mouthing and non-contextual hand movements (Parent Ex. Q at pp. 1, 28). According to the June 2020 progress report, the

student continued to struggle with accepting instructions and redirections, participating in group activities, as she often became agitated by the placement of objects and or furniture by others, and being directed to refrain from non-contextual vocalizations and hand movements (id. at p. 1). Socially, the student did not go out into the community due to her level of self-directed behaviors, refusal to hold an instructor's hand during transitions within the school, and inconsistencies accepting replacements (id. at p. 10). The progress note indicated that over the course of the 2019-20 school year, the student demonstrated a decreased tolerance with regard to instructors pointing to prompt her to identify or label an item, as well as seeing instructors with other students point to items (id.).

In June 2020 Keswell developed an integrated IEP and behavior reduction plan for the student for the 2020-21 school year (Parent Exs. AA, AB). The hearing record reflects that from September 2020, the student received two hours per day of ABA instruction, except that on the day that she did not receive OT, she received two-and-a-half hours of ABA instruction (Tr. pp. 61, 65).[8] She also received one 30-minute session of speech-language therapy daily and one 30-minute session of OT, four times per week (Tr. pp. 61, 64). Accordingly, the student received a total of three hours of instruction and related services per day. Additionally, during remote learning, the student's related services were reduced from 45-minute sessions to 30-minute sessions (Tr. at p. 61; Ex. O at 1). Although the Keswell associate director briefly testified that the program offered to the student by Keswell was appropriate (Parent Ex. AF at p. 7); she also testified that the student required "full adult support . . . throughout the day," "direct instruction to practice and utilize replacement strategies," and "continuous, full-day 1:1 instruction to acquire and utilize replacement behaviors during times that she is more prevalent to demonstrating maladaptive behaviors" (id. at p. 3). Considering this testimony with the fact that the student would have ordinarily received (and did receive during the pre-pandemic portion of the 2019-20 school year) eight hours of instruction and related services when she attended an in-person program at Keswell (Tr. p. 63; Parent's Ex. O at p. 1), it is difficult to envision, without further evidence, how the remote program was appropriate for the student. Indeed, in support of her reduction of the tuition reimbursement for September 2020 onward to the end of the 2020-21 school year, the IHO correctly noted that the student only received instruction and related services remotely for 3/8 of what would have normally been an eight-hour school day for the student at Keswell (IHO Decision at pp. 15-16).

With respect to the remainder of the school day, the associate director testified that assignments and videos were sent home for the student (Tr. at p. 58; Ex. AF at p. 6). However, the hearing record is devoid of any testimonial or documentary evidence concerning the content of the assignments or videos, how the student accessed these materials, or whether the student was assessed with respect to her completion of any assignments or engagement with the videos.

With respect to progress during the 2020-21 school year, according to the associate director at Keswell, between July and October 29, 2020, the student had met 33 short term objectives on her IEP, primarily within receptive, expressive and academic domains (Parent Ex. AF at p. 7). She also testified that community skills, social and leisure, ADL skills, and behavior skills continued

[8] The amount of ABA instruction was increased from one hour to two hours daily beginning in September 2020 (Tr. pp. 61, 65).

to be more challenging for the student, but the student was nevertheless making real, meaningful progress, and as an example noted that within the ADL skills domain, the student had learned to brush her hair and wash her face with only verbal support (id.). Although the associate director reported that staff collected data throughout the student's live sessions (Tr. p. 66), the data was not entered into evidence.

Overall, the testimony regarding the student's need for full-day instruction, combined with the reduced number of hours the student received instruction in the student's remote learning program for the 2020-21 school year, and the dearth of evidence in the hearing record concerning the student's program for the remainder of the school day weighs against a finding that the remote learning program the student received met her needs. Moreover, the hearing record is similarly bereft of information concerning how the one-to-one instruction and related services were modified for remote, as opposed to in-person, delivery. Accordingly, the parent has failed to meet her burden to demonstrate that the remote learning program offered by Keswell for the 2020-21 school year, which was significantly modified from the program she received in-person during the pre-pandemic portion of the 2019-20 school year despite minimal change in her main areas of unique need from that time period, addressed her special education needs.

C. Equitable Considerations

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]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to

assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO found, and the district does not contend otherwise, that the parent cooperated with the district at all times during both the 2019-20 and 2020-21 school years. Accordingly, equitable considerations favor the parents, and there is no basis upon which to reduce the requested relief on equitable grounds in this matter.

VII. Conclusion

Based on the above, I find that the hearing record supports a finding that Keswell was an appropriate unilateral placement for the 10-month portion of the 2019-20 school year, but does not support a finding that it was appropriate for the 2020-21 school year (see Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65; Walczak, 142 F.3d at 129.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated January 8, 2021 is modified by reversing that portion which found that Keswell was a partially appropriate placement for the student for the 2019-20 school year and reduced the award of tuition reimbursement on that basis;

IT IS FURTHER ORDERED that the IHO's decision dated January 8, 2021 is further modified by reversing that portion which found that Keswell was an appropriate placement for the student for the 2020-21 school year and awarded relief related to that school year;

IT IS FURTHER ORDERED that the district shall, upon presentation of proof of payment, reimburse the parent for the full cost of the student's tuition and related expenses at Keswell for the September-June portion of the 2019-20 extended school year.

Dated: **Albany, New York**
May 6, 2021

STEVEN KROLAK
STATE REVIEW OFFICER