



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 21-086

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

Appearances:

The Cuddy Law Firm, PLLC, attorneys for petitioner, by Francesca Antorino, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to directly fund both her son's tuition costs at the Manhattan Children's Center (MCC) for the 2020-21 school year and home-based services using an applied behavior analysis (ABA) methodology. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

In this matter, as noted by the IHO, the hearing record is sparse with respect to evaluative and other information about the student, with an evaluation report from 2015 being the most recent assessment included in evidence (see Parent Ex. P; IHO Decision at pp. 3-4). Within the October 2015 psychological evaluation report the evaluator noted that the student resided in a dual English/Spanish speaking household and had been exposed to two languages since birth, however dominance in English was noted and was the language of his then-current schooling (Parent Ex. P at p. 1). The evaluator reported that the student's clinical records indicated that he met the diagnostic criteria for autism spectrum disorder (ASD), borderline cognitive intelligence, and dyspraxia (id.). Additionally, the evaluator reported that results of a 2014 speech-language evaluation were "significant for a mixed expressive and receptive language impairment as part of

his ASD diagnosis" and that he exhibited "significant articulation difficulties" (id.). At that time, the student was considered a good candidate for an augmentative and alternative communication (AAC) device given his success in using such a device during the evaluation (id.).

According to the parent, beginning when he was five years old, the student had attended MCC, described as "an independent special education school that specialize[d] in serving children on the [a]utism [s]pectrum in a highly individualize[d] ABA setting, in which children receive[d] one to one instruction for the majority of the school day" (Parent Ex. P at p. 1).¹ Reportedly, at the time of the October 2015 evaluation, the student was receiving speech-language services three times per week, occupational therapy (OT) two times per week, and ABA services in the home for five hours per week (id.).

Results of the 2015 psychological evaluation indicated that the student's full-scale IQ was consistent with results from a previous assessment and fell within the borderline range (Parent Ex. P at p. 6). The report indicated that the student demonstrated a significant difference between his average to low average nonverbal skills and his significantly delayed verbal skills (id.). Measures of the student's adaptive functioning yielded scores in the low range for communication, daily living skills, and socialization, and on an assessment of "autism symptomatology" the student was rated in the severe range, consistent with his diagnosis of autism (id.).

According to the student's June 2020 MCC educational progress report, from July 2019 until March 2020 the student's day consisted of five hours of both 2:1 and 1:1 individualized instruction utilizing ABA and one hour in a 4:1 ratio during instructional lunch and leisure skills (Parent Ex. O at p. 1). In addition, the progress report indicated that the student received three 30-minute sessions of individual speech-language therapy, one 30-minute lunch consultation by a speech therapist, two 30-minute sessions per week of individual OT, and one 30-minute lunch consultation by an occupational therapist (id.). Beginning March 16, 2020, according to the June 2020 progress report, MCC began providing remote learning/instruction through a combination of synchronous video sessions and asynchronous learning/instruction for classroom instruction when school buildings were not permitted to be open due to the coronavirus pandemic as per the directive of State authorities (id.).

In a June 16, 2020 letter, the parent notified the district of her intention, in the absence of any placement for the student, to send the student to MCC for the 12-month 2020-21 school year and seek district payment of tuition costs, related services and transportation (Parent Ex. B).

On July 9, 2020, the parent executed an enrollment contract with MCC for the 2020-21 school year (Parent Ex. J at pp. 1-5).

In an October 15, 2020 school location letter, the district identified the specific school site to which the student was assigned to receive services recommended within an IEP developed on October 7, 2020 (Parent Ex. N at pp. 1-3).

¹ The Commissioner of Education has not approved MCC as a school with which school districts may contract with for the instruction of students with disabilities (8 NYCRR 200.1[d]; 200.7).

A. Due Process Complaint Notice

By due process complaint notice dated July 1, 2020, the parent alleged that the district failed to provide the student with a FAPE for the 2020-21 school year (Parent Ex. A at pp. 1, 4).² The parent alleged that the district failed to hold a CSE meeting for the student for the 2020-21 school year, failed to conduct triennial evaluations, failed to conduct a vocational assessment, and failed to recommend transition planning for the student (id. at pp. 4-5).

The parent argued that MCC was appropriate for the student and that equitable considerations weighed in favor of awarding the parent public funding of tuition to MCC for the 2020-21 school year (Parent Ex. A at pp. 5-6). In addition, the parent requested an immediate pendency order allowing the student to remain in his current educational placement at MCC and receive five hours per week of home-based ABA instruction (id. at p. 3). The parent claimed that the student's "stay-put" placement stemmed from a January 23, 2019 IHO decision regarding the 2018-19 school year (id. at pp. 1-3).

As relief, the parent requested an immediate order from the IHO establishing MCC as the student's pendency placement and five hours of home-based ABA instruction, a finding that the district denied the student a FAPE for the 2020-21 school year, an order for the district to evaluate the student in all areas of need, an order of direct payment of the student's placement at MCC beginning in July 2020 through the end of the 2020-21 school year including transportation and related services, and an order of public funding for five hours per week of ABA instruction in the home setting to address the student's needs and train the parent to reinforce the behavioral intervention plan (BIP) (Parent Ex. A at pp. 6-7).

B. Impartial Hearing Officer Decision

The parties convened for status conferences on December 9, 2020 and January 25, 2021 and proceeded to a hearing on January 26, 2021 (Tr. pp. 1-132). In a decision dated March 3, 2021, the IHO noted that the district had not presented a case in this matter and therefore found the district failed to offer the student a FAPE for the 2020-21 school year (IHO Decision at p. 3). With respect to the parent's program, the IHO found there was a "startling lack of information, assessments, and specificity in the exhibits submitted" by the parent, the only evaluation submitted into evidence was from 2015, and that the parent did not submit any progress reports from the 2020-21 school year from which the IHO could derive student progress (id. at pp. 3-4). Next, the IHO found that "[t]he information provided by MCC [was] general," that it was "impossible" to determine the student's reading level, and "difficult" to determine whether the student's behavior had improved over the school year (id. at p. 4). The IHO stated that MCC assessed the student with the Assessment of Functional Living Skills (AFLS) yet the results were not put into evidence (id.). In addition, the IHO found no evidence as to how much the student's problem behaviors had decreased over the current school year or how effective the ABA program had been at MCC or at home (id.).

² According to the due process complaint notice, the student is eligible for special education and related services as a student with autism, which is not in dispute on appeal (see Parent Ex. A at p. 1).

Based on the foregoing, the IHO found that the parent had not met her burden of proof in this matter and denied her request for tuition funding (IHO Decision at pp. 4-5). Regarding the parent's request for home-based ABA services, the IHO found that "there [was] no evidence as to why that program [was] needed in order to provide FAPE; or the effectiveness of the program" (*id.* at p. 5). The IHO also noted that there was no evidence as to why the school-based program was inadequate, why the student required home-based services to receive an appropriate education in school, or what progress the student had made with the home-based services (*id.*). Although determining that she did not need to reach the issue, the IHO stated that she did not find "any equitable considerations that would impede an award of tuition" (*id.*). Lastly, finding that the student was in need of "a new evaluation," the IHO ordered the district to "conduct a thorough evaluation in all areas of need, within 30 days of the date" of the decision (*id.*).

IV. Appeal for State-Level Review

The parent appeals³ the IHO's findings, first arguing that the IHO erred in failing to find MCC to be an appropriate placement for the student and in applying the wrong legal standard. The parent argues that the IHO did "not need to determine 'progress over the past school year' rather the IHO need[ed] to determine if when the [p]arent placed the [s]tudent at MCC it was reasonable" to provide meaningful benefit for the student. In addition, although the parent asserts that progress is not necessary to prove that a program is appropriate, she argues that the student made progress at MCC during the 2020-21 school year. The parent further argues that she has cooperated with the district and that there is nothing in the hearing record that would preclude or limit her from obtaining funding for MCC.

The parent next argues that the IHO erred in failing to order the district to fund home-based ABA services for the student. In support of her position, the parent points to witness testimony that the student needed five hours of ABA instruction across a 52-week school year to address academic deficits and behavioral needs, to generalize skills across the school day and in the home environment. The parent also asserts that during a gap in services, the student regressed "significantly" and also regressed during school breaks.

The parent requests relief in the form of tuition funding for MCC for the 2020-21 school year, funding for five hours per week of home-based ABA services for the 2020-21 school year, and an order that the district conduct an evaluation of the student in all areas of need within 30 days of the SRO's decision.

In an answer, the district denies the allegations set forth in the parent's request for review and states that it "effectively conceded" that it failed to provide the student with a FAPE during the 2020-21 school year. The district asserts that the IHO's award of a new evaluation adequately

³ By letter dated June 25, 2021, the parent submitted an amended request for review to the Office of State Review along with a cover letter requesting that it "be substituted for" the April 9, 2021 request for review. In relevant part, the letter stated that "[r]ecently, the SRO ha[d] indicated that the parent's attorney's office was not applying the appropriate formatting when filing its requests for review" and, as a result, the parent's attorney had reviewed the practice regulations and amended the request for review in this matter accordingly. By letter dated June 28, 2021, I granted the parent's request, treating it as a request for leave to amend her request for review, and permitting the district to serve and file an answer or to rest on papers previously filed; by letter dated June 29, 2021, the district responded that it wished to rest on its previously filed answer.

compensated the student for the deprivation of a FAPE and that no further relief is necessary. Next, the district argues that the IHO correctly held that MCC was not an appropriate placement for the student for the 2020-21 school year. Specifically, the district contends that the IHO properly concluded that the information provided by MCC was too "general" for the parent to have satisfied her burden to show that the student's program at MCC was specially designed to meet his unique needs, and that MCC provided minimal data as to how the student was functioning and without the level of specificity needed to assess his academic abilities or the extent of his progress. Additionally, the district argues that the failure to submit any subsequent progress reports made it almost impossible to evaluate the student's progress over the course of the 2020-21 school year. Lastly, the district alleges that the IHO correctly denied the parent's request for home-based ABA services. The district requests dismissal of the parent's request for review and affirmance of the IHO's decision in its entirety.

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" (Andrew 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 Andrew 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-

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" (Andrew F., 137 S. Ct. at 1000).

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. Scope of Review

Here, the district has not cross-appealed the IHO's finding that the district denied the student a FAPE for the 2020-21 school year or the IHO's order directing the district to conduct an evaluation of the student in all areas of need within 30 days of the date of the decision (see IHO Decision at pp. 3, 5). Moreover, to the extent the IHO determined that equitable considerations did not bar tuition reimbursement to the parent, the district has also not cross-appealed this finding (IHO Decision at p. 4).⁵ As such, those findings have become final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

B. Unilateral Placement

First, the parent argues that the IHO applied the wrong legal standard and failed to assess whether the MCC program was reasonably calculated to provide the student with educational benefit at the time of the unilateral placement. The parent next argues that the IHO erroneously concluded that MCC was not appropriate for the student despite witness testimony that the program provided educational instruction specially designed to meet the student's unique needs. Further, the parent asserts that the IHO erred in stating that there was a lack of evidence that the student made progress, and regardless, a showing of progress is not necessary to prove that a unilateral placement is appropriate. Lastly, the parent alleges that the IHO erred by failing to order the district to fund the five hours per week of home-based ABA services.

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).

⁵ The IHO stated, in relevant part, that she did "not find . . . any equitable considerations that would impede an award of tuition," but further noted that she would not reach that issue because the parent, in the first instance, had failed to meet her burden with respect to the appropriateness of the unilateral placement (IHO Decision at p. 4).

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).

1. The Student Needs

While the student's needs are not in dispute on appeal, a short review thereof will serve to facilitate the inquiry at hand, namely whether the parent's unilateral program consisting of MCC and home-based ABA services was appropriate.

As discussed above, results of the 2015 psychological evaluation indicated that the student had received diagnoses of ASD, borderline cognitive impairment, and dyspraxia (Parent Ex. P at

p. 6). At that time the student exhibited reduced social interaction, self-directed interests and significant challenges with self-expression and articulation (id.). The student also exhibited behavioral atypicalities consistent with ASD and severe deficits in adaptive functioning (id. at pp. 6-7).

Regarding academics, the director of education at MCC stated that at the time of her testimony in October 2020, the student was reading second grade leveled readers and expanding his reading skills by learning to read level readers and answer inferential comprehension questions (Parent Ex. G at pp. 10, 12-13, 15; see Parent Ex. O at p. 2). According to the director of education, the student's ability to comprehend texts that he had read was lower than his ability to decode the text and that he needed to expand his understanding of what he had read (id. at p. 13). With respect to written tasks the director of education stated that this area presented challenges for the student, his performance was approximately at a kindergarten level, and that he continued "to require a dense schedule of reinforcement for both writing and spelling to maintain correct responding in th[ose] areas" (id.). The student's June 2020 educational progress report indicated that the student continued to present deficits in his spelling skills and he was working on spelling his last name (Parent Ex. O at p. 2; see Parent Ex. G at p. 13). Regarding math, the director of education testified that the student was learning to complete tasks commensurate with an early third grade level; however, the student struggled with the functional application of the math skills he had learned (Parent Ex. G at p. 13).

The speech supervisor at MCC testified that the student used a speech-generating device to "augment his verbal speech, which [was] often unintelligible to both familiar and unfamiliar listeners" (Parent Ex. I at pp. 3-4). According to the director of education, the student required adult support and facilitation when interacting with peers due to his poor articulation skills and motivation to interact with them (Parent Ex. G at p. 13). The director of education stated that the student demonstrated a low frustration tolerance when presented with novel or challenging tasks and required a program that provided him with opportunities to learn how to interact with typically developing peers and classmates (id. at pp. 14, 15). The June 2020 progress report stated that the student was working on walking for increased amounts of time during community outings without exhibiting inappropriate behaviors (e.g., touching others, screaming, etc.), that he had learned to walk for up to approximately nine minutes when provided a variable rate of reinforcement, and that then-current programming targeted an increased duration of time during community walks (Parent Ex. O at p. 3). Further, the student continued to work towards improving self-care and self-management skills (id.).

The director of education stated that the student required trial-by-trial data collection of responses and daily analysis of data to evaluate and adjust teaching strategies as well as ABA services because he required carefully monitored systems of reinforcement to acquire skills across all domains (Parent Ex. G at p. 14). In addition, the director of education stated the student continued to require a setting that conducted a functional behavioral assessment (FBA) and implemented a BIP using research-based tactics and that collected data on his responding contemporaneously throughout the day (id. at p. 15). Further, the student required daily analysis of the data to identify when changes to his programming should be made to include selection of instructional strategies that have an empirical basis (id.).

The June 2020 progress report indicated that the student's BIP included the following target behaviors: aggression, tantrum behaviors, self-injurious behaviors, and high-pitched vocalizations (Parent Ex. O at p. 3). Reportedly, results from the FBA indicated that tantrum behavior and aggression functioned primarily to gain access to attention or preferred items or to escape a demand situation (id.). Results of both direct and indirect sources of information indicated that the student's self-injurious behavior functioned to gain access to automatic reinforcement in the form of sensory stimulation, gain access to a preferred item, or to escape a demand situation (id.). According to the June 2020 progress report the student's high-pitched vocalizations had multiple functions including to escape a demand, access attention or a tangible, and to gain access to automatic reinforcement in the form of sensory stimulation (id. at p. 4).

2. MCC

According to the MCC 2020-21 program offerings and features document the school offered "a transdisciplinary approach to teaching in which all areas of a student's deficits [were] addressed through collaboration between professionals and the home in [MCC's] world-class, teaching model whose philosophical underpinnings [were] rooted in [] ABA" (Parent L at p. 2).⁶ The director of education stated that MCC provided an ABA program implemented by highly trained staff including Board Certified Behavior Analysts (BCBAs), a small class structure that allowed for one to one instruction, a verbal behavior component, social skills training, self-management instruction, appropriate levels of speech-language services incorporated throughout the day, appropriate levels of OT, co-treatment opportunities so that related services goals were included in classroom activities and objectives, a sensory gym, inclusion opportunities with non-disabled peers, opportunities to participate in activities in the community, transdisciplinary group instruction, participation in music therapy, and parent training and education and support for other family members (Parent Ex. G at pp. 11, 14; see Parent Ex. L at pp. 1-8).

a. Specially Designed Instruction

The director of education stated that during the 2020-21 school year the student was enrolled in a class of eight students with ages ranging from ten to fourteen years old supported by one teacher and four "ABA instructors" (8:1+4 student to teacher ratio) (Parent Ex. G at pp. 12, 15). According to the director of education the student's lead teacher was certified in special and general education and as a BCBA, and was a licensed behavior analyst in New York, which she explained was significant because the teacher was "highly qualified to work with and implement a program for a student" with autism (id. at p. 12). Further, she noted that one of the student's ABA instructors was also a BCBA and another was a Registered Behavior Technician (RBT) (id.).

Additionally, the student's program consisted of three individual sessions and one group session (2:1) per week of speech-language therapy because the student needed opportunities to work on individualized goals, expressive language, and conversation skills in both highly structured opportunities as well as with peers in the classroom (Parent Ex. G at p. 12; see Parent

⁶ The director of education defined ABA as "the science in which the procedures derived from the principles of behavior are systematically applied to improve socially significant behavior to a meaningful degree and to demonstrate empirically that the procedures employed were responsible for the improvement in behavior" (Parent Ex. G at p. 11). She stated that ABA was essential to the student's learning (id.).

Ex. M). The student also received two individual sessions and one group session (2:1) per week of OT (Parent Ex. G at p. 12; see Parent Ex. M). According to the director of education, during the individual sessions the student worked on skills which were generalized in group sessions (Parent Ex. G at p. 12). In addition to related services, the student's MCC class schedule for the 2020-21 school year revealed that the student's week included 33 periods of individualized instruction, five periods of self-management routines, five lunch periods (one with speech consultation and one with OT consultation), four periods of leisure skill instruction, two periods of science/social studies group, two periods of adaptive physical education, one period of a transdisciplinary group with speech and OT, one period of social skills group, and one music therapy group (Parent Ex. M).

Further, the director of education stated that MCC utilized criterion-based assessment in order to establish baseline goals and provide a foundation for what skills and behaviors needed to be addressed in the student's program (Parent Ex. G at p. 11). As an example, the director of education stated that for the student, the school utilized a criterion-based assessment called the Assessment of Functional Living Skills (AFLS) which included six different assessment protocols across school, community, home, and potential work settings (Parent Ex. G at p. 11; see Parent Ex. L at p. 2). The director of education explained that the results of the assessment, which were a component in the development of the student's goals for the year, were discussed with the parent and used to create a complete, comprehensive, and robust program that addressed the student's academic, communication, social skills, self-management, self-help, and "community of reinforcer/leisure skills" needs (Parent Ex. G at p. 12).

The director of education testified that to expand the student's understanding of what he had read the student was learning to respond to "wh-questions" and identify story elements such as main idea, character, and setting, and that throughout reading instruction staff provided vocal reminders for the student to slow down his rate of speaking and to utilize his speech generating device for clarification (Parent Ex. G at p. 13). Reportedly, the student was learning to use a modified spelling curriculum paired with the use of his speech generating device targeting phonemic and morpho-graphic patterns (id.). Functional goals such as spelling his last name were targeted, and the student was learning to define and identify subject and predicate clauses in sentences and how to convert regular and irregular verbs into past, present, and future tenses using a writing curriculum (id.). The director of education testified that since the student struggled with the functional application of math skills he had learned, staff was continuing to program for generalization and task analyzing skills so that the student would be able to incorporate those skills into his daily life (id.).

The director of education testified that she conducted an FBA and created a function-based corresponding BIP with the student's current and previous teachers, which was implemented across the school day (Parent Ex. G at p. 14). She stated that tactics within the BIP, which included functional communication training, differential reinforcement of alternative behaviors, and structured teaching opportunities to learn how to appropriately play, helped the student to engage in appropriate behavior throughout the day (id.).

Regarding social skills, the director of education stated that the student's program also included goals to address his social development, noting that the student required adult support and facilitation when interacting with peers since his social interactions were complicated by his

poor articulation skills and motivation to interact with peers (Parent Ex. G at p. 13). The director of education testified that those deficits were being addressed through social skills group instruction as well as opportunities to interact with pre-trained typically developing peers ("Peer Buddies") (id. at pp. 13-14). She explained that the Peer Buddy program involved typically developing high school juniors who were coached and assigned to work with a specific student throughout the year (id. at p. 15). The students played games and activities, practiced prompting, and also forged relationships (id.).⁷ In the weekly social skills groups the student also worked on following the group leaders' directions, complementing peers, orientating to and greeting peers, giving "high fives," appropriately gaining peers' attention, and waiting appropriately (id. at pp. 14, 15).

With respect to self-care and self-management skills the student's program included learning to follow a written schedule to complete self-care tasks for daily living such as toothbrushing, face washing, and hand washing (Parent Ex. G at p. 13). The director of education noted that those daily living skills also transcended into household and prevocational tasks such as loading and unloading the dishwasher and learning to file by alphabetical order (id.). According to the director of education, the student required a dense schedule of reinforcement, frequent redirection, and faded prompts to complete these tasks (id.).

The director of education opined that overall MCC was an appropriate setting for the student because it was able to meet his academic, communication/verbal behavior, social, behavioral, and emotional needs (Parent Ex. G at p. 15).

Turning to the related services provided at MCC, the director of occupational therapy (director of OT) at MCC stated that for the 2020-21 school year the student was working on goals to improve his ability to use sensory processing to understand and effectively interact with people and objects in school and home environments; to improve shoulder, arm, and hand control for greater success with activities of daily living and self-care tasks at home and school environments; to improve bilateral coordination, strength, motor planning, independence with completing health and wellness routines, and endurance to enhance efficiency and functional participation in school and home activities; and to improve visual perceptual and visual motor skills to have greater success with classroom and home activities (Parent Ex. H at pp. 8, 9). Specifically, the director of OT stated the student was working on properly disposing of trash and recycling, sweeping his room, and washing and drying dishes (id. at p. 9).

In addition, the director of OT explained that OT focused on improving the student's sensory processing, self-care, fine motor and gross motor skills and that areas of emphasis included improving his self-awareness in self-regulation, increasing his ability to independently access and effectively use technology, and completing daily tasks (Parent Ex. H at pp. 9-10). He stated the student was working on increasing frustration tolerance and coping skills by discussing ways to handle frustrating situations, as well as strategies to keep his body calm to complete work (id. at p. 10). The director of OT testified that since July 2020 the student had been receiving OT services remotely at which time the session was facilitated by his mother or some other caregiver (Tr. pp.

⁷ The director of education stated that the student would begin participating in the Peer Buddy program at the end of October 2020, when it resumed virtually following COVID-19 restrictions related to guidelines from the New York State Department of Health and social distancing (Parent Ex. G at pp. 14, 15).

66-67). He stated that there were some debriefing sessions with the parent at the end of sessions which could be a few minutes, or it could take longer if necessary (Tr. pp. 70-71). He explained that during those debriefings the therapists discussed how the session went, provided the parent with some strategies in terms of how to address any concerns that the parent may have had regarding the student's adaptive living skills, provided additional suggestions about "things that need to be done," and at times "prep[ed]" for the next session (Tr. p. 71).

Next, the MCC speech supervisor, who during the 2020-21 school year began working with the student in November 2020, stated the student engaged in behaviors which interfered with his ability to progress in his speech-language goals and that MCC had developed a BIP to address the student's maladaptive behaviors, which she utilized in her sessions (Parent Ex. I at p. 3).⁸ The speech supervisor stated that she was working with the student to increase his use of his ACC device by providing verbal prompts, maximum positive reinforcement, and verbal praise (*id.* at p. 4). She explained that the student was working on repairing communication breakdowns when his communication partner did not understand what he was saying and was working on compensatory strategies to help repair communication breakdowns (*id.*). The speech supervisor identified goals for the current year which addressed the student's receptive language, expressive language, pragmatic language, play skills, motor speech skills and his strategic competence skills with his ACC system (*id.*). According to the speech supervisor, in addition to three individual sessions per week of speech therapy, the student also received a one hour per week of a transdisciplinary instruction group which was planned through collaboration between three primary providers (classroom teacher, speech therapist, occupational therapist) to address functional goals targeting daily living, vocational skills and community-based instruction (*id.*). The purpose of the group was to teach the student adaptive skills (skills that he needed to perform everyday tasks) and that the group worked to help maximize independence and give the student the tools he needed to attend, learn and move in a larger group setting and when joining his family and outings in the community (*id.* at pp. 4-5).

Accordingly, contrary to the IHO's findings, the evidence in the hearing record establishes that the parent met her burden by demonstrating that MCC provided the student with a program specially designed to address his academic and developmental delays as well as his unique special education needs in the areas of speech and language, OT, daily living, peer interaction and functioning in the school environment and community.

b. Progress

While a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

⁸ The speech supervisor explained that she had served as the student's speech-language pathologist from 2013 through 2019, then supervised his next speech therapist from July 2020 through November 2020 before she began again working directly with the student (Parent Ex. I at p. 3).

The director of education testified that the student had made steady progress since he started at MCC in January 2013 (Parent Ex. G at p. 12). Specifically, she noted the student was expanding his reading skills by learning to read level readers and answer inferential comprehension questions, was "now" reading second grade leveled readers, and that in the areas of writing and spelling he had made progress and was performing at around a kindergarten level (*id.* at pp. 12-13). The director of education stated that the area of mathematics was one of notable growth and progress for the student this year, indicating that the student was now learning to complete tasks commensurate with an early third grade level, found the value of mixed dollar and coin amounts, used mental math to solve plus and minus "10" problems and subtraction problems under "20," and identified an unknown quantity in double-digit addition and subtraction problems (*id.* at p. 13). The parent stated that she noticed the student read more clearly than he used to, completed multiplication problems, and spelled much better than he did in the past (Parent Ex. E at p. 1).

The speech supervisor testified that the student had demonstrated improved reading comprehension skills, followed directions and responded to tasks during teletherapy sessions, and overall had made progress towards his speech-language goals (Parent Ex. I at p. 4). The director of OT stated the student had made progress in his "material management skills" and had increased independence in locating and gathering the materials he needed for his sessions (Parent Ex. H at p. 10). The director of education testified that since she wrote her affidavit the student had moved on from and had actually mastered some skills such as loading and unloading a dishwasher and learning to file by alphabetical order (Tr. pp. 86-87).

The director of education stated that during the 2020-21 school year three of the four target behaviors identified within the student's BIP had continued to decrease from the prior school year and that the student had learned to engage in some of the replacement behaviors being taught (Parent Ex. G at p. 15). Also, she testified that she believed that the improvement seen was attributable to the tactics that were put in place through the BIP (*id.*). The director of education stated that the student had made progress in utilizing his functional communication skills in lieu of engaging in problem behaviors to terminate a game when he wanted to play something else because he recognized he was losing the game (*id.* at p. 14).

The parent indicated that in the past she struggled to bring the student out into the community because he would "yell on and off the entire day," engage in aggressive behaviors such as hitting others, and bite himself (Parent Ex. E at p. 1). The parent testified that the student no longer hit others, could go a full day without yelling, and that if he went to bite himself, he stopped himself before he engaged in the behavior (*id.*).

Accordingly, although not dispositive, the hearing record indicates that the student did make some degree of progress during the 2020-21 school year, and this is a relevant factor which further supports a finding that MCC was an appropriate unilateral placement for him.

3. Home-Based ABA Services

The parent next argues that the IHO erred in failing to order the district to fund five hours per week of home-based ABA services for the student. In support of her position, the parent points to witness testimony that the student needed ABA instruction across a 52-week school year to address academic deficits and behavioral needs, to generalize skills across the school day and in the home environment, and prevent regression during school breaks. However, as detailed below,

the evidence in the hearing record reveals that the home-based ABA services were not necessary as MCC adequately addressed the student's identified needs, including those in the home environment.

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *8-*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; P.S. v. New York City Dep't of Educ., 2014 WL 3673603, at *13-*14 [S.D.N.Y. Jul. 24, 2014]; M.L. v. New York City Dep't of Educ., 2014 WL 1301957, at *11 [S.D.N.Y. Mar. 31, 2014]; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *14 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; Student X, 2008 WL 4890440, at *17; A.D. v. New York City Dep't of Educ., 2008 WL 8993558, at *7 [S.D.N.Y. Apr. 21, 2008]; see also Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1152-53 [10th Cir. 2008]; Gonzalez v. Puerto Rico Dep't of Educ., 254 F.3d 350, 353 [1st Cir. 2001]; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1293 [11th Cir. 2001]; JSK v. Hendry County Sch. Bd., 941 F.2d 1563, 1573 [11th Cir 1991]).

The director of Kid Success (director) testified that her agency provides academic and behavioral intervention services to individuals (Parent Ex. F at p. 1). She stated that as of July 2020, her staff provided the student with five hours of ABA services per week for the 12-month (52-week) school year and that she recommended the student continue to receive the same services for the upcoming 12-month school year including school breaks and holidays to prevent regression (id.).⁹ The director testified the student required that level of service in the home because he not only demonstrated academic deficits but also exhibited problem behaviors that impeded his availability for learning (Tr. pp. 100-01). She noted that the student continued to exhibit problem behaviors in the form of yelling and screaming as well as self-injurious behavior, such as biting his hand, particularly when novel and new challenging tasks were presented (Tr. pp. 101-02). The director described the student as someone who required not only the generalization of skills across the school day and in the home environment but also as one who had difficulty retaining information with respect to academics and behaviors (Tr. p. 101). Specifically, the director explained that the student required "constant repetition" with respect to academics and that if his behaviors were not addressed consistently the student would regress (Tr. pp. 102-03). The director noted that when there was a gap in the student's services from June 24, 2020 until October 18, 2020, because of "complications with COVID and delays in receiving the pendency order," significant changes were observed as the student's academics regressed significantly and his behaviors increased in that they saw more tantrumming, yelling, screaming and biting (Tr. pp. 103-05). At that point, the director explained, the "crux of the issue was the behaviors" and the focus

⁹ The director acknowledged that she was not the student's home-based provider yet stated that she was involved in the student's services to the extent that she had consultations with the provider regularly to discuss the student's progress, his academics, his behaviors, and what was transpiring with his programs and skill acquisition (Tr. p. 110).

was getting the student back to where he was prior to the gap so that he could become more available for learning (Tr. p. 104).

However, notwithstanding the director's point of view, the hearing record does not include evidence or testimony from MCC staff or the parent regarding the student's regression, or that home-based services were necessary in light of the student's programming at MCC. Indeed, as detailed below, the record shows that MCC provided support and training for the parent and addressed the student's needs not only at school but also in the home environment.

According to the director of education, MCC provided and the parent participated in, individualized parent counseling and training opportunities, where the parent contacted the school to seek individual help from staff and they worked on any issue within the classroom or at home together, for example, addressing the student's fear of leaving the house following being quarantined due to State mandates (Parent Ex. G at p. 14; see Tr. pp. 87-88). The director of education testified that to support this need they put in some programming to extend those skills at home such as teaching the student when he needed to wear a mask, what were healthy habits, how to protect oneself from getting sick, and that it was safe and okay to go outside (Tr. pp. 88-89).

The director of education also explained MCC held weekly parent classroom observations where parents observed classes for a half hour to an hour and then had a chance to ask questions and discuss with the teacher anything they saw and "how to apply something" (Tr. pp. 77-78). Due to the virtual format of instruction, during the 2020-21 school year the parent participated "pretty much on a daily basis because she support[ed] her son during remote instruction" and therefore had the opportunity to see any of his sessions including related services (Tr. p. 78). The parent stated that she was constantly in contact with the student's teachers and providers at MCC and spoke with them daily, attended the monthly workshops, and attended weekly parent support groups (Parent Ex. E at p. 1; see Tr. pp. 115-16, 118). She stated that she and MCC staff "work[ed] together . . . [w]hatever [the student] [did] at school, it carri[e]d to the home" (Tr. p. 116). The parent further explained that since classes went remote, the student had about five classes and that she was with the student the whole day and could "hear what he's doing," sat with him for projects, and at the end of the classes always discussed with the teacher "how it went," using email if time did not allow for a discussion, and the phone for "something major" (Tr. pp. 116-18).¹⁰

According to the parent, she attended the monthly workshops and weekly parent support groups that MCC held and testified that she felt MCC had helped her to deal with the student's issues that he demonstrated at home (Tr. pp. 118-20; Parent Ex. E at p. 1). The parent stated that "while we were in school," the weekly parent support groups were run by the social worker and that they were opportunities for parents to share experiences and frustrations with respect to their students' behaviors and work together and share interventions or responses (Tr. pp. 118-19; see Tr. p. 76). As examples, the parent further explained that the group was used as help in finding a dentist for special needs, help with doctors, or to arrange playdates (Tr. p. 119). The director of education further explained that the group was very parent-directed and that often the topics were dictated by what parents might need support with, such as problem behaviors or toileting (Tr. pp.

¹⁰ The parent explained that while she was with the student for remote sessions most of the time, if she needed to leave the house for something important, the student's 18-year-old sister would take care of him (Tr. p. 116).

76-77). Additionally, the director of education testified that the social worker mediated and helped direct the group and provided resources to families that may be of support (Tr. p. 77).

With respect to the director's opinion that the student required home-based services due to regression and increased behaviors, in August 2020 the parent testified that in the past she had struggled to bring the student out into the community because he would yell, engage in aggressive behaviors with others, and bite himself (Parent Ex. E at p. 1). However, in contrast to the director's testimony (Tr. pp. 103-05), the parent stated that the student no longer hit others, could go a full day without yelling, and that if he went to bite himself, he stopped himself before he engaged in the behavior (*id.*). As discussed above, MCC conducted an FBA and developed a corresponding BIP to help the student reduce problem behaviors and engage in appropriate behavior throughout the day (Parent Ex. G at p. 14).

Further, as discussed above, the evidence in the hearing record shows that MCC provided the student with instruction to address adaptive and ADL skills. Specifically, with respect to self-care and self-management skills the student's MCC program included learning to follow a written schedule to complete self-care tasks for daily living such as toothbrushing, face washing, and hand washing (Parent Ex. G at p. 13). The director of education noted that those daily living skills also extended into household and prevocational tasks such as loading and unloading the dishwasher and learning to file by alphabetical order (*id.*). In addition, the director of education explained that while the student was receiving remote instruction, daily living skills, prevocational skills and tasks were executed within his household (Tr. pp. 86-87).

Additionally, the director of OT at MCC stated that for the 2020-21 school year the student was working on goals for greater success and independence with activities of daily living, functional participation, and self-care tasks in the home (Parent Ex. H at pp. 8, 9). The speech supervisor at MCC also stated the student received transdisciplinary group instruction which addressed functional goals targeting daily living, vocational skills, and community-based instruction (Parent Ex. I at pp. 3, 4). Specifically, the purpose of the group was to teach the student adaptive skills (skills that he needed to perform everyday tasks) and that the group worked to help maximize independence and give the student the tools he needed to attend, learn and move in a larger group setting and when joining his family and outings in the community (*id.* at pp. 4-5).

The evidence in the hearing record shows that the primary functions of the student's home-based ABA services were for generalization purposes and to prevent the regression of skills that MCC was also addressing—primarily through ABA methods—during the school day (compare Tr. p. 101, with Parent Exs. G at pp. 11-15). While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]); see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

Accordingly, although the evidence in the hearing record supports a finding that MCC was an appropriate placement that addressed the student's needs, there is insufficient basis to reverse

the IHO's determination that the student did not require home-based ABA services in order to receive educational benefit (see IHO Decision at p. 5; see also Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services were unnecessary to ensure the student made progress in the classroom and would, instead, be aimed at managing behaviors outside the school day]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]). Rather, the hearing record supports a finding that the student received home-based ABA services primarily for the purpose of generalizing the student's skills to the home setting, and home-based ABA was not integral to the student's progress at MCC where he also received ABA services. While I understand the parent's desire to see additional improvements in the student's experiences in the home, the district was not required to provide "every special service necessary to maximize the student's potential" (Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 756 [2d Cir. 2018], cert. denied sub nom., 139 S. Ct. 322 [2018]).

VII. Conclusion

Having determined that the evidence in the hearing record shows that the district failed to offer the student a FAPE for the 2020-21 school year, that MCC was an appropriate unilateral placement and that equitable considerations weigh in favor of the parent's request for relief of tuition reimbursement at MCC. The parent's request for district funding of five hours per week of home-based ABA services is denied.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated March 3, 2021, is modified by reversing that portion which found that MCC was not an appropriate unilateral placement for the 2020-21 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parents for the cost of the student's tuition at MCC for the 2020-21 school year upon the parent's submission to the district of proof of payment; and

IT IS FURTHER ORDERED that if it has not already done so at this time, pursuant to the IHO's March 3, 2021 order the district shall conduct a thorough evaluation of the student in all areas of need within 30 days of the date of this decision.

Dated: Albany, New York
July 26, 2021

CAROL H. HAUGE
STATE REVIEW OFFICER