The University of the State of New York

The State Education Department
State Review Officer
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No. 22-095

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

Appearances:
Law Offices of Adam Dayan, PLLC, attorneys for petitioners, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Theresa Crotty, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for respondent (the district) to directly fund their son's home-based services using an applied behavior analysis (ABA) methodology. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 was diagnosed as having an autism spectrum disorder in December 2009 and has a history of challenges with social reciprocity, communication skills and the presence of repetitive and restrictive behaviors (Parent Exs. M at p. 8; S at pp. 1-2). From November 2009-August 2010, the student attended an 8:1+2 special class which employed the TEACCH methodology and received related services including, speech-language therapy, occupational therapy (OT) and physical therapy (PT) (Parent Ex. S at p. 1).[1] In September 2010 (at age three)

[1] Although not explained in the hearing record, "TEACCH" is used as the acronym for the "Treatment and Education of Autistic and other Communication-handicapped Children" (see, e.g., Application of a Student with

the student began attending Manhattan Children's Center (MCC) and his attendance there continued through the student's 2021-22 school year (ninth grade) (id. at p. 2). [2,3]

In a letter to the CSE dated June 17, 2021, the parent indicated that on June 10, 2021 she took a virtual tour of the proposed assigned public school site identified in the district's May 25, 2021 final notice of recommendation (FNR) (Parent Ex. B at p. 1). The parent advised the district that the assigned school was not appropriate to meet the student's "unique special education needs" for several reasons (id.). First, the parent explained that it was hard to determine the appropriateness of the assigned school just by talking to school staff (id.). She reported that she was told that students would be grouped by skill set but explained that as she was not able to observe the other students in the classroom, she did not know their skill sets and therefore could not make a determination (id.). Next, the parent expressed concern that the assigned school did not provide ABA and that the student required "structured individualized attention" by an ABA provider throughout the school day (id.). The parent reported that the student received 30 hours of ABA per week which had fostered his progress in all areas and which "work[ed] for him" (id.). According to the parent, staff at the assigned school told her that they used ABA and the TEACCH method; however, it was not clear how many hours would be allocated to ABA and how many to TEACCH (id.). She noted in her letter that when the student was previously taught with TEACCH she did not see much progress (id.) In addition, the parent indicated that due to the student's severe peanut allergy, the assigned school would be unsafe because it was not a peanut-free school (id.). Next, the parent indicated that in order for the student to participate in a club that provided access to neurotypical peers the student would have to be picked up by his parents as the club ended too late for the student to take the bus (id.). The parent also informed the CSE that the assigned school was far from the student's home and that she worried about the amount of time the student would spend on the bus daily (id.). Lastly, the parent stated that she did not receive a copy of the student's IEP and that she could not fully evaluate the school program for the student's 2021-22 school year without seeing the goals and mandates listed in the student's IEP (id.).

Between May 5 and July 7, 2021, the parents and the director of administration at MCC executed an enrollment contract for the student's attendance at MCC for the 2021-22 school year, respectively (Parent Ex. C at p. 5).

On April 24 and May 2, 2021, the student underwent a private neuropsychological evaluation (July 2021 neuropsychological evaluation) at the parents' request due to "concerns about [the student's] general development and functioning in the context of having a history of autism spectrum disorder" (Parent Ex. M at p. 1). The July 2021 neuropsychological evaluation indicated that the parents' primary concerns were related to the student's behavior but also noted

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a Disability, Appeal No. 20-164).

[2] MCC has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] The hearing record indicates that the student attended MCC from the 2010-11 through 2021-22 school years except for a short period of time in 2012 when the student did not attend MCC due to funding issues (Parent Ex. S at p. 2).

that the student was "below grade level across the different areas of academic skills development, except for spelling" (id. at p. 2).

A CSE convened on July 23, 2021 to develop the student's IEP for the 12-month 2021-22 school year (ninth grade) (Parent Ex. N at p. 9). Finding the student eligible for special education and related services as a student with autism, the CSE recommended an 8:1+1 special class placement in a district specialized school along with related services of individual OT twice per week for 30 minutes, OT in a group of two twice per week for 30 minutes, individual speech-language therapy twice per week for 30 minutes, speech-language therapy twice per week in a group of two for 30 minutes, and one 60-minute session per month of parent counseling and training (id. at pp. 1, 9).

A. Due Process Complaint Notice

In a due process complaint notice dated August 18, 2021, the parents alleged that the district failed to adequately address the student's needs and provide the student with an appropriate program and placement resulting in a denial of a FAPE for the 2021-22 school year (Parent Ex. A at p. 7). Specifically, the parents alleged that the July 2021 IEP failed to include an ABA-based program for the student as well as after-school ABA sessions (id. at p. 6). The parents further alleged that the assigned school was not appropriate because it did not provide ABA instruction, it would not be nut-free, and it was too far from the student's home (id.). As relief, the parents sought the following: (1) a determination that the district failed to offer the student a FAPE for the 2021-22 school year; (2) a determination that equities favor the parents; (3) tuition reimbursement or direct funding for the student's attendance at MCC for the 2021-2022 school year; (4) an order that the district provide or fund home-based instruction and services, including ABA instruction; (5) compensatory education in the form of make-up hours that that the district failed to deliver to the student; (6) an order that home-based instruction services and compensatory education be provided over the course of a full seven-day period, during holidays, vacations, and summer months to prevent substantial regression; (7) appropriate transportation to and from MCC, including but not limited to limited travel-time, a 1:1 travel aid; (8) reimbursement for any transportation expenses incurred by the parent (id. at pp. 7-8).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on October 1, 2021 and multiple status conferences were held between November 1, 2021 and March 4, 2022 (Tr. pp. 1-33).[4] The evidentiary phase of the impartial hearing began and concluded on April 26, 2022 (Apr. 26, 2022 Tr. pp. 1-22).[5] In a decision, dated June 16, 2022, the IHO held that the district failed to present

[4] In an order of consolidation dated August 19, 2021, the IHO denied the parents' request for consolidation of the due process complaint notice regarding the student's 2020-21 school year and this matter with a due process complaint notice filed regarding the student's 2021-22 school year (IHO Ex. IV at p.1). The IHO found that the 2020-21 due process complaint notice was "well-advanced" in ongoing settlement negotiations and would be delayed if the matters were consolidated with possible negative effects on the student's education interests and financial detriment to the parents (id.).

[5] The transcripts of the prehearing and status conferences dated October 1, 2021 through March 4, 2022 are

any evidence in the case, present witness testimony, place any documents in evidence in the proceeding and address or sustain its burden of proof, and therefore, the district denied the student a FAPE for the student's 2021-22 school year (IHO Decision at p. 8). With respect to the student's unilateral placement, the IHO found that MCC was an appropriate unilateral placement for the student's 2021-22 school year because MCC provided the student with individualized instruction, appropriately addressed the student's needs and the student made progress (id. at pp. 9-12). Turning to equitable considerations, the IHO held that there was nothing in the hearing record to suggest that the parents interfered with the CSE's evaluations of the student or prevented the district from offering the student a FAPE (id. at p. 12). The IHO further held that the parent visited the assigned school and sent a 10-day notice to the CSE indicating that the assigned school was not appropriate to meet the student's needs but that she was open to any other recommendation from the CSE (id. at p. 12). The IHO also held that the parent participated in a CSE meeting in July 2021 at which she discussed the student's need for an ABA program and concerns about the assigned school but the district failed to take any steps to respond to the parent's 10-day notice or address the parent's concerns regarding the recommended program for the student's 2021-22 school year (id.). As such, the IHO found that equitable considerations favored the parents' request for tuition reimbursement for the student's 2021-2022 school year and ordered the district to reimburse the parent for the amount she had already paid towards tuition at MCC and for the unpaid tuition balance for the student's 2021-22 school year (id. at p. 14).

Turning to the parents' request for home-based services, the IHO denied the parent's request for district funding of three hours of home-based ABA instruction, finding that the district was under no obligation to recommend or provide any home-based ABA to "generalize the [s]tudent's skills outside the classroom, or to provide additional instruction to improve his skills and maximize [the student's] potential" (IHO Decision at p. 16). Although the IHO noted that the student's receipt of a home-based ABA program would undoubtedly benefit the student, the IHO found that services that are intended to generalize skills outside the classroom are not required to be provided by the district under the IDEA (id. at p. 15). Lastly, the IHO found that the student was entitled to round-trip door-to-door special education transportation and ordered the district to reimburse the parents for the expenses incurred in transporting the student to and from the MCC for the student's 2021-22 school year (id. at p. 17).

IV. Appeal for State-Level Review

On appeal, the parents argue that the IHO erred in finding that the district was not required to fund the student's home-based ABA services. More specifically, the parents argue that the IHO erred in finding that the student's at-home ABA services were intended to maximize the student's potential. The parents also argue that the IHO erred in finding that the student did not require home-based services to make progress. Lastly, the parents argue that the IHO erred in giving inadequate weight to the recommendation in the neuropsychological evaluation and testimony

consecutively numbered pages 1-33 (Tr. pp. 1-33). The transcript of the evidentiary phase of the impartial hearing dated April 26, 2022 is consecutively numbered pages 1-22 (see Apr. 26, 2022 Tr. pp 1-22); therefore, cites to the impartial hearing transcript dated April 26, 2022 will be preceded by the date of the proceeding.

from two witnesses stating that the student's at-home ABA services were necessary for the student to prevent regression and progress in the curriculum.

In an answer, the district generally argues to uphold the IHO's decision in its entirety. Initially, the district does not cross-appeal the IHO's findings, including the award of tuition reimbursement at MCC and transportation expenses. The district argues that although home-based services may benefit the student, the district is not obligated to fund home-based services to maximize the student's potential. The district also argues that the IHO correctly found that services obtained by parents for a student that are primarily for the purpose of generalizing skills are not generally reimbursable under the IDEA. The district also argues that the parents' request for home-based services would provide services in excess of what is required to provide the student with a FAPE and the award of tuition at MCC by the IHO was sufficient appropriate relief.

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]

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-

[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).

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

In the instant case, as mentioned above, the district has not cross-appealed the IHO's findings that the district denied the student a FAPE for the 2021-22 school year, MCC was an appropriate unilateral placement for the student, and equities favored the parents' request for tuition reimbursement for the student's 2021-2022 school year. Moreover, the district has not cross-appealed the IHO's findings that the parents are entitled to tuition and transportation reimbursement. 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. Home-Based Services

The crux of the parties' dispute is whether the IHO erred in failing to order the district to fund three hours per week of home-based ABA services for the student.

Although the parents assert that the student requires home-based ABA services in order to make progress, the hearing record indicates that the primary purpose of these services was to enable the student to generalize skills from the school to the home. 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]).

In this case, the July 2021 neuropsychological evaluation report recommended, among other things, that the student continue to receive three hours of home-based ABA services per week in order to help the student develop essential life skills outside of school and to help the student "generalize skills" he may learn in school in other contexts (Parent Ex. M at p. 10). The director of Learner's Compass (director) testified by affidavit that her agency provides home-based ABA for the student and that the student receives three hours of home-based services per week in 3-hour blocks (Parent Ex. T at p. 2). The director further testified that the student makes progress every year and that the student learns from repetition, so home-based ABA services are necessary for the student "to repeat what he is learning in school and generalize behaviors to the home and community" (id.). Moreover, the parent testified by affidavit that the student receives home-based services to "help him reinforce skills he is learning at school" (Parent Ex. S at p. 4).

Notwithstanding the above, the student's home-based provider testified by affidavit that she works on cognitive and academic skills with the student (Parent Ex. U at p. 2). The home-based provider further stated that the student has "gone up a reading level over the past year" (id.). The home-based provider also stated that she works on leisure and play skills with the student (id.). In addition, the student's home-based provider testified that she works on the goal of improving self-management with the student and the student has built self-awareness (id.). The home-based provider stated that without home-based services the student would regress (id.). The home-based provider also stated that if she missed any sessions with the student, it would lead to maladaptive behaviors (id.). In addition, she stated that home-based services have directly led to a decrease in problematic behavior (id.).

Additionally, the director of MCC testified by affidavit that the student attends a "Crossbridge" program at MCC consisting of 2:1 classrooms for students (Parent Ex. V at p. 4). The director of MCC further stated that the student's school day consists of a six hour day of both 2:1 and 1:1 instruction using ABA (id. at p. 5). The director of MCC also testified that the student participated in small and large group instruction with 2:1 instruction and support (id.). The director of MCC indicated that in addition to individualized instruction, the student also receives speech-language and OT services (id.). The director of MCC further stated that the student made meaningful progress at MCC; including math and social communication skills (id. at pp. 7; 11). Additionally, the director of MCC stated that the student had a behavior plan to address behaviors within a school setting (id. at p. 7). The director of MCC further stated that the student continues to require 2:1 instruction that utilizes ABA in order for the student's needs to be addressed (id. at p. 8). The student's home-based provider indicated that she "occasionally speak[s] to [the student's] teachers at MCC," is "generally aware of what [the student] is learning in school" and "review[s] his IEP's and make sure to target similar goals" (Parent Ex. U at p. 2).

My review of the evidence in the hearing record leads me to the conclusion that the IHO did not err in the weighing of the evidence to reach the conclusion that the primary functions of the student's home-based ABA services were for generalization purposes and that the additional home-based services, while no doubt beneficial, were not necessary in order to provide the student with services that were reasonably calculated to enable the student to receive educational benefits, the standard enunciated in Rowley and Endrew F. As noted above, the IDEA ensures the provision of an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132). The home-based provider made two statements that the student would regress without home-based services and that missed sessions would lead

to maladaptive behaviors, but she did not provide a basis for that opinion which appears to be an assumption of what could happen in theory rather than what specific facts about the student lead her to make those statements. The other, stronger evidence in the hearing record reflects that the recommendation for three hours of home-based services was predominantly for purposes of generalizing the student's skills to the home or community setting. Moreover, the hearing record is devoid of any evidence or testimony from the parent, MCC staff or from Learner's Compass as to how the student would regress behaviorally or academically at school without home-based services or that home-based services was necessary in light of the student's programming at MCC which extensively utilized ABA. 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).

Therefore, there is insufficient basis to reverse the IHO's determination that the student did not require three hours of home-based ABA services in order to receive educational benefit (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 and community setting, and home-based ABA was not integral to the student's progress at MCC where he also received ABA services. Although the home-based services provider testified that she was generally aware of what the student was learning in school, worked on the student's homework with him and reviewed his IEPs, she had only occasional communication with his teachers, and there is no evidence that the home-based services were utilized specifically to reinforce or augment the instructional and behavioral supports and interventions the student received in class (see Parent Ex. U at p. 2) Additionally, the parent testified that in 2012, she learned that the student could receive home-based ABA services to help the student "catch up" after missing appropriate services (Parent Ex. S at p. 2) Accordingly, it appears that the home-based ABA services originated in response to missed services, and continued once a benefit to the student was recognized, but such services were not coordinated with his educational program at MCC and primarily focused on his need to generalize skills to other settings such as the home and community. 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 there is insufficient reason to overturn the IHO's determination that the student is not entitled to three hours per week of home-based ABA services as per the parents' request, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
September 15, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER