



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-100

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

Appearances:

Law Office of Michelle Siegel, attorneys for petitioners, by Lesley Berson, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for individual home-based applied behavior analysis (ABA) services for their daughter. 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

Due to concerns about the student's development, the Early Intervention Program (EIP) conducted an assessment of the student, and she subsequently received a diagnosis of autism and EIP services consisting of instruction using ABA, speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Exs. B at p. 1; Y at ¶ 3). For the 2019-20 school year, the student attended a district center-based, pre-kindergarten program in a 6:1+2 special class placement with individual speech-language therapy, OT, and PT until March 2020, at which time the student transitioned to remote services due to the COVID-19 pandemic and statewide school building closures (Parent Exs. B at p. 2; Y at ¶¶ 4, 6). Prior to March 2020, the student also received one session per week of private speech-language therapy services and had been "approved for 20 hours of ABA," but those services were not provided "due to COVID-19 and change in insurance plan" (Parent Ex. B at p. 2). During the 2020-21 school year the student received

services as a preschool student with a disability, and according to an October 2020 neuropsychological evaluation report, a June 12, 2020 IEP recommended a 6:1+2 special class placement in a district center-based pre-kindergarten program with three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual OT, three 30-minute sessions per week of PT, and four 60-minute annual sessions of parent counseling and training (id.).

The parents referred the student for a neuropsychological evaluation, which was conducted over four dates in September and October 2020, "to provide an assessment of [the student's] current cognitive, pre-academic, language, social-emotional, and adaptive functioning and to guide educational and treatment planning" (see Parent Ex. B).¹ Based upon the results of the evaluation, the private neuropsychologist determined that the student met the criteria for a diagnosis of autism spectrum disorder (ASD), severe, with an accompanying language impairment (id. at pp. 9-10, 12).

On May 27, 2021, a CSE convened to determine the student's initial eligibility for school-age special education services for the 2021-22 school year (kindergarten) (see Dist. Ex. 2). The CSE found the student eligible for special education as a student with autism (id. at p. 1).² According to the May 2021 IEP, the CSE had available a March 2021 classroom observation, an undated preschool teacher report, an undated social history update, a February 2021 speech-language progress report and suggested annual goals, a March 2021 OT progress report and suggested annual goals, a January 2021 PT progress report, School Function Assessment results, Gilliam Autism Rating Scale – Third Edition (GARS-3) parent and teacher form results, Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) teacher and parent responses, and the October 2020 private neuropsychological evaluation report (Dist. Ex. 2 at pp. 1-8, 12-13, 16-18; see Parent Exs. B; V; Dist. Exs. 6, 11-15, 17-19).

The May 2021 CSE recommended the student attend 12-month programming consisting of a 6:1+1 special class in a specialized school for math, English language arts (ELA), social studies, and science along with the related services of one 30-minute session per week of individual counseling, three 30-minute sessions per week of individual OT, one 60-minute session per month of group parent counseling and training, two 30-minute sessions per week of individual PT, and five 30-minute sessions per week of individual speech-language therapy (Dist. Ex. 2 at pp. 26-28, 32-33).³ The May 2021 CSE also recommended an "iPad with the supports of communication application" to be used at home and at school (id. at p. 28). Further, the May 2021 IEP identified

¹ The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical in content. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

² The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ At the May 2021 CSE meeting the student's classroom teacher believed that the district's AIMS program would "be a good program for [the student] for [k]indergarten" (Dist. Ex. 2 at p. 2). The mother testified that she investigated and applied to the district's AIMS program but later withdrew the application when she learned that "it was not a viable program option" for the student (Tr. p. 13; Parent Ex. Y at ¶¶ 11-12).

the following resources and strategies to address the student's management needs: "structured academic environment with a small student to teacher ratio"; extra time to complete tasks; positive reinforcement; teacher check-ins; breaks; support to improve social interactions, repetition and review; scaffolding and differentiated instruction and assignments; graphic organizers; small group instruction, direct teacher modeling; collaboration with related service providers; visual and auditory cues; redirection; multisensory instruction; and opportunity to practice skills in "real-world contexts" (id. at pp. 9-10). Further, the May 2021 CSE recommended the following transportation accommodations: transportation from the closet safe curb location, 1:1 paraprofessional, air-conditioned vehicle, limited travel time, and a route with fewer students (id. at pp. 31, 34).

On June 23, 2021, the parents entered into a contract for the enrollment of the student at The Keswell School (Keswell) for the 10-month 2021-22 school year (September 9, 2021 through June 23, 2022) (see Parent Exs. D; I).⁴

In a letter dated August 25, 2021, the parents expressed disagreement with the May 2021 IEP and informed the district of their intent to unilaterally place the student at Keswell for the 2021-22 school year and "seek tuition reimbursement or direct funding" for that placement (see Parent Exs. F; Y at ¶ 14). The student attended Keswell for the 2021-22 school year (Parent Exs. T; W at ¶ 9; Y at ¶¶ 14-15).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 17, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see IHO Ex. I).^{5, 6}

Specifically, the parents alleged that the May 2021 CSE's recommendation for a 6:1+1 special class was not sufficiently supportive to meet the student's needs as she required an ABA program with individual support throughout her school day (IHO Ex. I at pp. 3-4). In addition, the parents specifically alleged that the May 2021 IEP was inappropriate because: the program recommendation was predetermined; the CSE did not engage in a discussion about annual goals; the IEP failed to accurately describe student's present levels of performance; annual goals were

⁴ The Commissioner of Education has not approved Keswell as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

⁵ The hearing record includes two proposed amendments/corrections to the due process complaint notices dated October 25, 2021 and November 10, 2021, respectively (see IHO Ex. II; Parent Ex. A). As to the former, the IHO declined to accept it as an amendment to the September 2021 due process complaint notice since the parents had not made an application to amend the complaint and because it was, in any event, unnecessary given the district's concession that it failed to offer the student a FAPE (IHO Decision at pp. 3-4). In addition, according to the IHO, the parents confirmed that they were not relying on the November 2021 due process complaint notice, and it was not "processed through the [impartial hearing] office" (Tr. p. 24; IHO Decision at p. 3). Accordingly, for the purpose of this appeal all references will be to the September 17, 2021 due process complaint notice (see IHO Ex. I).

⁶ On January 27, 2022, the parties agreed that pendency was pursuant to the June 12, 2020 IEP with door-to-door special transportation, limited time travel, and a transportation paraprofessional (see Parent Ex. P).

not specific, achievable, or ambitious; annual goals had no short-term objectives; the recommended 6:1+1 special class was contrary to neuropsychologist's recommendation that the student attend a classroom with a smaller student-to-teacher ratio; the CSE failed to offer 1:1 support, discuss or recommend a functional behavioral assessment (FBA), or recommend a toileting paraprofessional; the CSE improperly recommended counseling; and the parent was denied parent meaningful participation in the CSE process (id. at pp. 4-6).

Next, the parents claimed that Keswell was an appropriate unilateral placement for the student that "provide[d] instruction, supports, methodologies, supervision, and services that [were] specifically designed to meet [the student's] unique needs so that she c[ould] make meaningful educational progress" (IHO Ex. I at p. 7). Lastly, the parents argued that the equitable considerations weighed in favor of their request for tuition reimbursement (id.).

As relief, the parents sought a determination that the student was denied a FAPE for the 2021-22 school year (IHO Ex. I at p. 7). The parents additionally sought a determination that the student was entitled to 12-month services (id.). The parents requested tuition reimbursement for Keswell from September 9, 2021 and continuing through June 23, 2022 (id. at p. 8). Further, the parents sought 20 hours per week of home-based ABA services as well as door-to-door special transportation (id.). Lastly, the parents sought reimbursement of transportation expenses they incurred when the district failed to provide the student transportation during the 2021-22 school year (id.).

B. Impartial Hearing Officer Decision

An impartial hearing in the Office of Administrative Trials and Hearings convened on November 10, 2021, and concluded on June 16, 2022, after eight days of proceedings (Tr. pp. 1-185).⁷ In a decision dated June 29, 2022, the IHO determined that the district failed to offer the student a FAPE for the 2021-22 school year, that Keswell was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 8, 14, 17, 21).⁸

⁷ Some of the transcripts of the impartial hearing included with the hearing record on appeal were submitted as portable document formats (PDFs) labeled with incorrect dates, which were carried over on the district's certification of the hearing record, and/or nonsequential volume numbering and pagination and duplicative content. The pdf labeling and dates listed on the district's certification of the hearing record have been disregarded and the dates appearing on the first page of the respective transcripts are presumed to be accurate. Transcripts of initial proceedings (prehearing and/or status conferences) held on November 10, 2021, January 26, 2022, and March 11, 2022 are paginated separate from the remainder of the transcripts and will be cited with reference to the hearing transcript date and page number(s). The substantive proceedings are contained within transcripts dated April 14, 2022 (Volume I, pages 1-75), April 25, 2022 (Volume II, pages 76-94), May 12, 2022 (Volume III, pages 95-104), and June 16, 2022 (Volume IV, pages 105-45) (see Tr. pp. 1-145). The two additional transcripts submitted with the hearing record bearing the date May 12, 2022 and identified as Volume II with pages 1-10 are duplicative in content to the May 12, 2022 transcript (Volume III, pages 95-104) and will not be cited.

⁸ The IHO permitted direct testimony via affidavits (see Parent Exs. W-Y) consistent with State regulation, which provides that "[t]he [IHO] may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination" (8 NYCRR 200.5[j][3][xii][f]). The IHO in his decision mentions that the parents' affidavit was not sworn (Parent Ex. Y); however, prior to cross-

Initially, the IHO acknowledged the district's concession that it failed to offer the student a FAPE for the 2021-22 school year, and then proceeded to discuss whether the parents established the appropriateness of Keswell (IHO Decision at p. 8).⁹

The IHO recounted the direct affidavit testimony of the Keswell classroom supervisor who described that the student was in a class with two other students and received individual ABA instruction together with five sessions per week of speech-language therapy and four sessions per week of OT (IHO Decision at p. 10). The IHO described the related services, adapted physical education, and assistive technology that the student was engaged in at Keswell (*id.*). The IHO also noted the testimony of the Keswell classroom supervisor that the special program was "tailored" for the student's "unique and individual needs" (*id.* at p. 12). Further, the IHO described that Keswell conducted a behavior assessment and developed a behavior intervention plan to "reduce and replace" the student's problem behaviors (*id.* at p. 11). The IHO held that the evidence in the hearing record demonstrated that the program at Keswell was "specifically designed to cater" to the student's autism and language-based learning disabilities resulting in the student's progress for the 2021-22 school year and that, therefore, the parents met their burden of proving that Keswell was an appropriate unilateral placement (*id.* at pp. 12-14).

Next, the IHO addressed equitable considerations finding that the parents timely notified the district of their intent to unilaterally place the student at Keswell satisfying the 10-day notice requirement (IHO Decision at p. 15). The IHO found that the parents signing an enrollment contract for Keswell prior to the start of the 2021-22 school year, and the parents' withdrawal of their application for the student to attend the AIMS program, a program that was raised by one district staff member as a possible option for the student but which was not recommended by the district, were not relevant equitable considerations (*id.* at p. 16). Accordingly, the IHO held that the parents' request for relief should not be reduced due to those equitable considerations and they were entitled to funding for the cost of the student's placement at Keswell for the 2021-22 school year (*id.* at p. 17).

The IHO then proceeded to separately address the amount claimed by the parents for tuition reimbursement (IHO Decision at pp. 17-18). The IHO found that the fact that the May 2021 CSE recommended more related services than Keswell rendered Keswell's tuition rate "excessive and unreasonable" (*id.*). The IHO also noted the testimony of the Keswell classroom supervisor that the student's ABA providers at Keswell were not licensed behavior analysts (LBAs) or "certified behavior analyst assistants" (*id.*).¹⁰ Based upon the foregoing, the IHO held these were "equitable

examination, the parents' attorney confirmed with the mother, who was under oath, that the affidavit was true and correct to her knowledge (Tr. p. 125).

⁹ The district called one witness to testify and then later conceded that it denied the student a FAPE for the 2021-22 school year (Tr. pp. 28-65, 98-99).

¹⁰ The district raised a concern in its closing statement that implied the presence of unauthorized practice of ABA instruction (Tr. pp. 140, 141). I do not have authority in this forum to resolve unauthorized practice allegations directly. The issue of whether parental reimbursement for a unilateral placement is barred by a lack of State licensure or certification is discussed in Florence County Sch. Dist. Four v. Carter, (510 U.S. 7 [1993]), but Carter did not speak on issues such as the unauthorized practice of a profession or the extent of a State's authority to regulate professions.

factor[s]" that warranted a reduction of tuition reimbursement (*id.*). Accordingly, the IHO ordered the district to reimburse the parents 80 percent of the total cost of the Keswell tuition for the 2021-22 school year (*id.* at pp. 17, 21).

In connection with home-based ABA services, the IHO relied on the testimony in the hearing record that the student made progress at Keswell and, more specifically, that the student's tantrums decreased, she could use the augmentative communication device for "meaningful communication about her wants and needs," the behavior intervention plan was effective in addressing the student's behaviors, and the student improved in the area of toileting (IHO Decision at p. 18). The IHO also addressed that the student was in an extended day program at Keswell, and it was not practical for the student to also have home-based ABA "fit into the day" (*id.* at p. 19). Therefore, the IHO found the home-based ABA services were not warranted given the student's extended school day at Keswell with full-time 1:1 ABA services (*id.*).

With respect to the parents' request for door-to-door transportation of the student to and from Keswell for the 2021-22 school year, the IHO held that since the school year had ended an order for transportation was "unnecessary" (IHO Decision at p. 19). Then, the IHO addressed the parents' claim for reimbursement of transportation costs and found that the parents were entitled to reimbursement for private transportation services when the district failed to provide transportation for the student (*id.* at p. 20). In reviewing the invoices submitted by the parents for transportation reimbursement, the IHO found "no justification for why the person accompanying the [s]tudent needed to use the same car service after dropping off the [s]tudent to return home (or to use it to travel to school to pick up the [s]tudent), as opposed to other public transport" (*id.*). The IHO found this to be unwarranted based upon the student's needs and, therefore, reduced any receipt indicating a "round trip" by one-half (*id.*). Based upon the foregoing, the IHO awarded the parents reimbursement a reduced amount for transportation costs (*id.* at p. 21).

IV. Appeal for State-Level Review

The parents appeal and challenge, among other things, the IHO's determinations to reduce reimbursement for the costs of Keswell and the parents' transportation costs. In response to those aspects of the parents' appeal, the district agrees to fund the full Keswell tuition for the 2021-22 school year and reimburse the parents the total amount of incurred transportation costs and asks the undersigned to modify the IHO's order accordingly; therefore, the only disputed issue left for review is whether the IHO erred in denying the request for 20 hours per week of individual home-based ABA services (*see* Answer at ¶¶ 6, 8).¹¹

In the remainder of their appeal, the parents argue that the IHO erred in denying home-based ABA services as the private neuropsychologist detailed the student's need for home-based ABA to address the student's "lack of safety awareness, her lack of toilet training, adaptive living skills like dressing and washing herself, and her emotional regulation." The parents allege that there was "no evidence in the [hearing] record that suggest[ed] that the [s]tudent would be able to

¹¹ The district affirmatively asserts in the answer that it is not challenging the IHO's finding that the district failed to offer the student a FAPE for the 2021-22 school year; as such, this determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 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]).

learn those skills without home-based ABA." As relief, the parents seek an award of 20 hours per week of home-based 1:1 ABA services.

The district on the other hand seeks to uphold the IHO's denial of 20 hours per week of home-based ABA services. The district argues that it is not required to "maximize" the student's services and the home-based ABA services are "in excess of what is required by the [district] to provide [the student] with a FAPE." Additionally, the district asserts that the services provided to the student at Keswell were sufficient to address the student's needs and that the parents admitted that the skills were carried over into the home and other environments. Lastly, the district argues that the parent is not entitled to seek both "tuition reimbursement and compensatory education for [the] same time period" and the parents request for home-based ABA services on a compensatory basis should be denied.

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]).¹²

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).

¹² 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).

VI. Discussion

At the outset—and as noted above—in its answer, the district has agreed to reimburse the full tuition at Keswell for the 2021-22 school year and reimburse the parents for full transportation costs (Answer at ¶¶ 6, 9-10). In light of the district's agreement, I will order the district to reimburse the Keswell tuition and transportation costs. I turn now to the remaining relief sought by the parents.

The parents appeal the IHO's denial of home-based ABA services for the student (see IHO Decision at pp. 18-19). The parents refer to the private neuropsychologist's evaluation report that recommended home-based ABA services "to prevent regression" and to address the student's lack of skills in the areas of safety awareness, toilet training, adaptive living skills, and emotional regulation (Req. for Rev. at ¶ 4). The parents further assert that the examples referenced by the IHO in his decision were not similar or related to those skills for which the student requires home-based ABA services (Req. for Rev. at ¶ 4; see IHO Decision at p. 19). Conversely, the district argues that the IHO's award adequately compensates the student for the denial of a FAPE, and that student is not entitled to home-based ABA services.

However, before turning to the discussion of the student's need for home-based ABA services, I shall briefly review the student's program at Keswell.

Keswell "provides an interdisciplinary instructional model with 1:1 staff to student ratio" "where [s]peech, [o]ccupational [t]herapist and ABA instructors collaborate to ensure programming includes aspects of each discipline throughout the day" (Parent Exs. D at p. 1; K at p. 1; N at p. 1). According to the evidence in the hearing record, Keswell offered an extended day program from 8:45 a.m. until 4:45 p.m. five days per week (Parent Exs. D at p. 1; N at p. 2; U).¹³ Keswell develops their own IEP for each student that has "targets and goals for each related service" (see Parent Exs. N; W at ¶¶ 14, 17). The Keswell classroom supervisor testified that the student's classroom during the 2021-22 school year consisted of three teachers who rotated between three students (the student and two other students) to provide one-to-one ABA instruction (Parent Exs. N at p. 1; W at ¶¶ 9, 14).

Review of the hearing record indicates that Keswell provided the student with 40 hours of school-based instruction per week, which included approximately 30 hours of individualized instruction utilizing the principles of ABA and at least one daily small group session led by an ABA instructor, along with daily 45-minute sessions of individual speech-language therapy, four 45-minute sessions of individual OT per week, and three adapted physical education sessions per week with a 1:1 instructor (see Tr. pp. 118, 121-22; Parent Exs. D at p. 1; N at p. 1; W at ¶ 14).¹⁴ The December 2021 Keswell progress report noted that the individual ABA instruction was recommended to "develop communication, attending and behavioral controls as well as to acquire and generalize skills across all domains" (Parent Exs. N at p. 34; W at ¶ 29). The student also had a case manager who monitored her progress towards target skills and problem behaviors,

¹³ The student was "gradually phased" into the extended day program starting with staying at school until 2:00 p.m. with the time increasing every week until staying for the entire extended school day (Parent Ex. N at p. 2).

¹⁴ The student was enrolled in the 10-month program at Keswell beginning September 2021 (see Parent Exs. D, I).

determined targets to introduce once she mastered existing targets, communicated daily with the student's family, notified the supervisor of any issues regarding skills acquisition, behaviors, etc., conducted the Assessment of Basic Language and Learning Skills (ABLLS) assessment, and determined what to introduce into her IEP, and modified or implemented what was discussed during supervision or "co-treat" meetings (Parent Exs. N at p. 2; W at ¶ 9).¹⁵ Additionally, the student was provided with an iPad to help with communication using the Proloquo2Go application (Parent Exs. N at p. 5; W at ¶ 19).

Review of the evidence in the hearing record shows that there was no recommendation for home-based ABA services by anyone at Keswell (see Parent Exs. K; L; N; O; W). Further, there was no evidence in the hearing record that the student received home-based ABA services during the 2021-22 school year (see Answer at ¶ 18). The student's need for home-based ABA services was first raised by the private neuropsychologist in her October 2020 evaluation report that was conducted at the request of the parents in September/October 2020 (see Parent Ex. B).¹⁶ Based on the evaluation results, the private neuropsychologist recommended that the student receive individual home-based ABA services (*id.* at p. 11).¹⁷ In her report, the private neuropsychologist recommended that the home-based program include "direct instruction, family education, and educational coordination in order to increase generalization of skills and consistency across environments" (*id.*). The neuropsychologist also recommended that ABA services be provided in the home and in the community "to improve [the student's] safety awareness and increase her adaptive and daily living skills, including eating, dressing, navigating, and personal care" (*id.*). She further recommended a "minimum of 20 hours per week in order to provide parent education, aid in carry-over of skills, and prevent regression by increasing generalization of skills and consistency across multiple environments" (*id.*).¹⁸

In direct affidavit testimony, the private neuropsychologist testified that, based upon her evaluation of the student in September and October 2020, the student "required intensive, specialized interventions on a 1:1 basis both at school and at home to appropriately support her needs" (Parent Ex. X at ¶¶ 17, 33; see Parent Ex. B). She further opined that the student required "a school and home-based program of [ABA] therapy" (Parent Ex. X at ¶ 33). The recommendation for an individual program was based upon the neuropsychologist's observation that the student required scaffolding and attention to complete "almost any" tasks, and concerns about her lack of safety awareness, risk of elopement, and communication challenges (*id.* at ¶ 34).

¹⁵ The ABLLS was administered to the student when she started at Keswell in September 2021 to assess her "pre-academic skills, attending, communication, receptive and expressive language, adaptive life skills, play and leisure skills, and gross motor and fine motor skills" (Parent Ex. W at ¶ 12). At that time, the student's skills were "quite limited across all domains"; she did not communicate verbally, and her non-verbal communication was "extremely limited" (*id.* at ¶ 13).

¹⁶ The private neuropsychologist did not conduct an observation of the student in the classroom as part of the private neuropsychological evaluation (Tr. p. 113).

¹⁷ At the time of this recommendation, the student was attending a prekindergarten center-based program in the district schools (Parent Ex. B at p. 1).

¹⁸ The May 2021 IEP recommended one 60-minute session per month of group parent counseling and training (see Dist. Ex. 2 at p. 27).

The private neuropsychologist also testified "that ABA was a critical piece" of the student's program to decrease her "maladaptive behaviors," motivate the student with rewards, and focus on functional behaviors in all domains (*id.* at ¶ 35). Further, the private neuropsychologist opined that, due to the student's "severe and pervasive" deficits, she required a home-based ABA program of 20 hours per week to address the student's lack of safety awareness, toilet training, adaptive living skills, and emotional regulation (*id.* at ¶ 37). Since the October 2020 evaluation, the private neuropsychologist testified that she learned of the student's attendance and progress at Keswell during the 2021-22 school year from the parents (Tr. pp. 113-14; Parent Ex. X at ¶¶ 39, 40). She testified that she learned the student made progress at Keswell, specifically, that the student's tantrums decreased, she had been trained in an augmentative communication device, and improved her toileting training (Parent Ex. X at ¶ 40). Lastly, the private neuropsychologist testified that the individual ABA program at Keswell was "precisely" what the student required to address her deficits (*id.* at ¶¶ 39, 41).

Although the private neuropsychologist testified that the student continued to need 20 hours per week of a home-based ABA program in addition to the Keswell program, the evidence in the hearing record shows that the private neuropsychologist had not evaluated the student since October 2020, which was before the student attended the 10-month 2021-22 school year 1:1 ABA program at Keswell (*see* Parent Exs. B at p. 1; D; X at ¶¶ 17, 41). Nevertheless, the progress reports and testimony of the classroom supervisor and the student's mother demonstrated that the student made progress while at Keswell without home-based ABA services.

According to the hearing record, the student made progress across all domains during the 2021-22 school year (*see* Parent Exs. N; O; W at ¶¶ 19-22, 26-29; Y at ¶¶ 15-19, 21-23). The December 2021 Keswell progress report indicated that the student made progress in her expressive and receptive language, pre-academic, visual performance, play and leisure, activities of daily living (doffing coat, personal hygiene, toileting, and drinking with a cup), and behavioral skills (*see* Parent Ex. N). According to the Keswell classroom supervisor, since September 2021 the student improved her ability to communicate using an iPad with the Proloquo2Go application and mastered identifying items on her class schedule (Parent Ex. W at ¶¶ 4, 19, 20). The Keswell classroom supervisor further indicated that the student made "some progress" in each of the following domains: play and leisure, adaptive living, and academic skills (*id.* at ¶ 22). She specifically noted that the student had made "significant progress" in pre-academic skills and noted that she had mastered independently matching 10 identical objects (*id.* at ¶ 21). Further, the classroom supervisor opined that that the student's interfering behaviors (dropping to the floor, elopement, out of seat behavior, tantrums, vocal protests, mouthing, non-contextual vocalizations, and self-touching) were a challenge to her progress; however, she noted that the student's behavior intervention/reduction plan had been effective to reduce and replace the interfering behaviors, and she was responding well and was beginning to understand the replacement behaviors being taught (i.e., requesting wants instead of vocalizing, protesting, or tantrums) (Tr. pp. 119-20; *see* Parent Exs. L; N at pp. 1, 29-34; W at ¶¶ 20, 22-24, 26-28).¹⁹

¹⁹ The student's interfering behaviors (tantrums) increased in the fall 2021 because according to the parents the student was sleeping poorly (Parent Exs. N at pp. 31-34; W at ¶ 25). As a result, Keswell developed an amended behavior intervention/reduction plan using techniques such as using a break area, rocking chair, and pillow (*see* Parent Ex. L; Parent Exs. N at p. 31; W at ¶ 25).

Over the course of the 2021-22 school year, the parents noticed the student made "some significant progress," specifically noting the biggest improvement had been in her emotional regulation, as they observed a significant "decrease in the number of meltdowns and tantrums" in both duration and intensity (Parent Ex. Y at ¶ 15). The parent further described that the student had improved enough to sit at the dinner table for up to 10 minutes (with consistent supervision), which she linked to her being explicitly taught how to do so at Keswell (*id.* at ¶ 16). The parent testified that the student's communication had "improved markedly" because Keswell had "helped her become more capable with her assistive and augmentative communication device" and opined that this contributed to the decrease in tantrums from the frustration of not being able to express herself (*id.* at ¶ 17). Additionally, the parent testified that she had been allowed to visit in person and that she went weekly to observe how the faculty worked with the student (*id.* at ¶ 20). She further testified that Keswell worked with the student on specific issues that affected the family such as going on walks in the community, and described that Keswell staff took the student on walks and specifically targeted appropriate walking behaviors, and she opined that the student's behavior had improved as a result (*id.* at ¶ 21). According to the parent, the student used to have "extremely adverse reactions to someone touching her hair or having her temperature taken" which became a concern when the student needed to undergo testing for seizures (*id.* at ¶ 22). The parent testified that the student's teachers worked on improving the student's tolerance to both hair touching and temperature taking and when the time came for testing, the parent reported that the student "tolerated it far better than [the parent] could have imagined" (*id.*). Further, the parent testified to seeing positive changes in the student's social skills at home as well, specifically noting that she was occasionally able to engage in interactive play such as catch or "chase" with a sibling, and that her sibling even taught her how "to give a kiss" (*id.* at ¶ 23).

Despite the evidence of progress the student made at Keswell both at school and at home, the parents continued to argue that the student required 20 hours per week of home-based ABA services (*see* Parent Ex. Y at ¶ 25). The parent testified that "it is very important for [the student] to receive reinforcement of behaviors across different settings and situations" and to "master activities of daily living" (*id.*). 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]).

Based on all of the foregoing, there is insufficient basis in the hearing record to modify the IHO's determination that, based upon the student's extended day program together with the student's demonstrated progress "transferring skills to other settings in the current school setting without

any home-based services," the home-based ABA services were not warranted under the circumstances (see IHO Decision at p. 19). The evidence in the hearing record indicates that the student was receiving primarily individual instruction utilizing the principles of ABA during an extended school day five days per week, and, as discussed above, the student's teachers were quite attentive to her needs outside of the school day, including those of her family, and integrated specific skill development into their instruction. Further, the hearing record indicates that the student made progress across all domains which was carrying over into her home and community settings. As such, the hearing record does not support the student's need for a home-based ABA program (see 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]). While the home-based ABA services may have been beneficial, they 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 Andrew 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). 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).

VII. Conclusion

Having determined that there is insufficient reason to overturn the IHO's determination that the student is not entitled to 20 hours per week of individual home-based ABA services, the necessary inquiry is at an end. As set forth above the student is entitled to full tuition reimbursement for Keswell and transportation expenses for the 2021-22 school year.

THE APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated June 29, 2022, is hereby modified to award the parents full tuition reimbursement costs for Keswell; and

IT IS FURTHER ORDERED that the IHO decision, dated June 29, 2022, is modified to award the parents reimbursement for round trip transportation costs.

Dated: Albany, New York
October 28, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER