The University of the State of New York

The State Education Department
State Review Officer
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No. 22-144

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:
MSR Legal & Consulting Services, PLLC, attorneys for petitioners, by Oroma Mpi-Reynolds, Esq.[1]

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) be required to fund the costs of privately-obtained applied behavior analysis (ABA) services and related services delivered to the student for the 2022-23 school year. The appeal must be sustained.

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];

[1] Although the parents were represented by an attorney at the time their request for review in this appeal was filed, subsequently, the attorney withdrew her appearance. The parents thereafter acted pro se when they submitted a reply to the district's answer.

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 has received a diagnosis of an autism spectrum disorder and demonstrated impairments in social/emotional reciprocity, speech-language, and attention and self-regulation (Parent Ex. C at pp. 1-2, 12). She initially received services through the early intervention program, including ABA services delivered in both a daycare center environment and at home and

related services of speech-language therapy, occupational therapy (OT), and physical therapy (PT) (Parent Exs. C at pp. 1-2; T ¶ 3). Between February 2020 and June 2021, the parents placed the student at a preschool program, which she attended for three hours per day, and arranged for the student to receive private 1:1 ABA services both during and after school, as well as private related services after school (Parent Exs. C at pp. 1-2; Parent Ex. T ¶¶ 7-8).[2] According to the evidence in the hearing record, a CSE convened on May 19, 2021 and recommended that the student attend a general education class placement with integrated co-teaching (ICT) services and receive related services of counseling, OT, PT, speech-language therapy, and parent counseling and training (Parent Exs. C at p. 3; T ¶ 9).[3] For the 2021-22 school year, the parents unilaterally placed the student in a full day program at a general education parochial school and arranged for the student to receive private ABA services (up to 30 hours per week), as well as two 60-minute sessions per week of speech-language therapy, one 90-minute session per week of OT, and one 60-minute session per week of PT (Parent Exs. F at p. 1; H at p. 1; J at p. 1; T ¶ 10). The parent sought relief from the district to remedy its alleged failure to offer the student a FAPE for the 2019-20 through 2021-22 school years and received district funding of the costs of the student's private services (Parent Ex. T ¶¶ 7, 10).[4]

In an email to the district sent on June 3, 2022, the parents indicated that they had not heard from the district to schedule the student's annual CSE meeting (Parent Ex. D). In addition, the parents indicated that they were attaching several documents to the email, including an April 2021 neuropsychological evaluation report, a February 2022 OT progress report, a March 2022 speech-language therapy progress report, and an April 2022 PT progress report (id.; see Parent Exs. C; F; H; J).

In response to the parents' inquiry, on June 9, 2022, the district responded that, according to its records, a CSE meeting was held on May 19, 2022 (Parent Ex. M at p. 1). On June 15, 2022, the parents sent the district another email indicating that they did not participate in a CSE meeting purportedly held on May 19, 2022 and that, if such a meeting had convened, "it was done without notice to [the parents] and without [their] participation" (id.).

In a letter dated June 15, 2022, the parents notified the district that, as of that date, a CSE had not convened to develop an IEP for the student for the 2022-23 school year and that, additionally, the parents had not received notice of a particular public school site for the student to attend (Parent Ex. B at p. 1). The parents expressed their continued willingness to discuss and consider "all appropriate programs and placements with the [district]" but notified the district that, in the absence of an appropriate program and placement, the student would continue to attend the parochial school for the 12-month 2022-23 school year (id.). In addition, the parents notified the

[2] During the school closures related to the COVID-19 pandemic, the student received in-person ABA services in the home from March 2020 through June 2020 (Parent Ex. T ¶ 7).

[3] The hearing record does not include a copy of the May 2021 IEP.

[4] According to the parents, the parties settled the parents' claims pertaining to the 2019-20 school year and an IHO issued a decision in the parents' favor after a consolidated impartial hearing relating to the 2020-21 and 2021-22 school years (Parent Ex. T ¶¶ 7, 10). The hearing record lacked a copy of the IHO decision in the prior proceeding for the 2020-21 and 2021-22 school years.

district of their intent to seek "reimbursement and/or funding" from the district for the costs of the student's tuition at the parochial school and transportation, as well as the costs of "ABA/1:1 direct teaching/[special education itinerant teacher (SEIT) services]," related services, and evaluations of the student (id.).[5]

Beginning in June 2022, private Board Certified Behavior Analysts (BCBAs) began delivering 25 to 30 hours per week of ABA services to the student in the home for the summer portion of the 12-month school year (Parent Exs. N ¶¶ 3, 6; S ¶ 5; T ¶ 14). In addition, providers who worked with the student beginning at various point during 2021 continued to provide the student with two 60-minute sessions per week of speech-language therapy, one 90-minute session per week of OT, and one 60-minute session per week of PT (Parent Exs. O ¶¶ 5, 9; P ¶ 3; Q ¶ 7). In affidavit testimony, the parents stated their intent to continue to provide this level of services to the student, along with parent counseling and training for the parents, for the 10-month portion of the 2022-23 school year, in addition to the student's attendance at a general education nonpublic school (Parent Ex. T ¶ 14).

A. Due Process Complaint Notice

In a due process complaint notice dated June 30, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at pp. 1-2, 6).[6] In particular, the parents argued that the district failed to sufficiently evaluate the student and failed to convene a CSE or develop an IEP for the student for the 2022-23 school year (id. at pp. 2-4). In addition, the parents alleged that the district failed conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) despite the student's interfering behaviors and failed to develop annual goals or recommendations for related services and supports, including extended school day services, extended school year services, parent counseling and training, educational methodologies, or special transportation (id. at pp. 3-5). The parents further contended that the district did not provide them with prior written notice or notice of a school location for the student to attend (id. at pp. 3, 5).

The parents alleged that the unilateral placement of the student was appropriate and that equitable considerations weighed in favor of an order of relief (Parent Ex. A at pp. 2, 5-6). The parents requested the costs of the student's tuition at the parochial school, as well as the costs of transportation, 30 hours per week of "ABA/1:1 direct teaching/SEIT" services, four 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of OT, two 30-minute sessions per week of PT, two 60-minute sessions per month of parent counseling and training, and updated evaluations of the student (id. at p. 6).

[5] In an email dated July 1, 2022, the parents again provided the district with copies of evaluations and progress reports previously included with their June 3, 2022 email (compare Parent Ex. E, with Parent Ex. D).

[6] The parents also alleged violations of section 504 of the Rehabilitation Act of 1973 ("section 504"), 29 U.S.C. § 794(a), the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq., and State law and regulations (Parent Ex. A at p. 1).

B. Impartial Hearing Officer Decision

On August 3, 2022, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH), which concluded on August 25, 2022, after four days of proceedings inclusive of a prehearing conference and a status conference (see Tr. pp. 1-73). During the impartial hearing, the parents withdrew their request for district funding of the student's tuition costs at the parochial school and summer camp, but continued to seek the costs of the 12-month special education services that they unilaterally obtained (see Tr. pp. 34-35). As for its offer of a FAPE to the student, the district declined to present any testimonial or documentary evidence (see Tr. p. 67). In its closing statement, the district argued that the parents had not met their burden to prove that they had a legal obligation to pay for services delivered to the student during the 2022-23 school year (id.). After the district raised the question of the parents' legal obligation, the IHO offered the parties an opportunity to submit briefs on the specific issue (Tr. p. 69; see IHO Exs. I-II).

In a decision dated October 5, 2022, the IHO found that, by not presenting documentary or testimonial evidence at the impartial hearing, the district "effectively[] conced[ed]" that it failed to offer the student a FAPE for the 2022-23 school year (IHO Decision at pp. 7-8).

Turning to the parents' request for the costs of ABA services and related services delivered to the student, the IHO found that, although the parents "presented testimony and submitted documentary evidence in support of their position that the related services were appropriate and the Student was making progress with those services," the parents did not have standing to seek such relief (IHO Decision at p. 9). In particular, the IHO found that the parents did not present evidence of contracts with the providers of the services (id. at pp. 9-10). Absent such evidence, the IHO found that the parents had not shown that they sustained an injury as required to demonstrate standing (id. at p. 10). The IHO also indicated that, by not demonstrating a contractual obligation to pay for the services, the parents failed to meet their burden of proof under the second prong of the Burlington/Carter analysis applicable to claims for tuition reimbursement (id.).

The IHO went on to consider equitable considerations (IHO Decision at pp. 10-12). The IHO reasoned that, because the parents stated their intent to seek tuition reimbursement in their 10-day notice letter and in their due process complaint notice, the parents did not put the district "on proper notice as to the relief sought by the Parent[s]"; to wit, "payment for related services" (id. at p. 11). The IHO also indicated that the parents' June 15, 2022 notice to the district was not timely in that it "did not provide the District with enough time to convene an IEP meeting before the start of the school year on July 1, 2022" (id.). The IHO also remarked that the allegations in the due process complaint notice alleging both that no IEP was developed and that the IEP failed to include appropriate goals and services were "contradictory to each other and d[id] not put the District on notice" (id.). Based on the foregoing the IHO found that equitable considerations did not support the parents' request for relief (id. at p. 12).

As a final matter, the IHO opined that the matter was not a "tuition reimbursement case" because the parent did not seek tuition reimbursement for the costs of the private school tuition (IHO Decision at pp. 10-11). Instead, the IHO indicated that the proper mechanism for the parent to seek district funding of the ABA services and related services would have been to request an

individualized education services program (IESP) from the district before June first of the school year in question pursuant to Education Law § 3602-c (id. at p. 10).

While the IHO denied the parents the relief sought, she ordered the CSE to convene within 30 days to develop an IEP or an IESP for the student for the 2022-23 school year (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred in denying their request for reimbursement of the services delivered to the student as part of a unilateral placement. Initially, the parents note that the IHO correctly determined that the district failed to offer the student a FAPE. However, the parents assert that the IHO erred in finding that the parents had no standing to pursue reimbursement for the unilaterally-obtained services.[7] First, the parents contend that the district's failure to offer the student a FAPE constituted a statutory injury-in-fact that was sufficient to confer standing. Alternatively, the parents contend that they suffered financial injury as demonstrated by testimony from the providers about their rates and the frequency of their services and the parents' testimony that they paid for the therapies every week. The parents also submit several documents as additional evidence to demonstrate their financial injuries and request that the exhibits be considered. In addition, the parents argue that the IHO erred in finding that the parents were required to prove that they paid costs in advance in order to obtain relief in the form of reimbursement. The parents argue that they should not be required to demonstrate a contract for services because, unlike an enrollment contract, "most therapists operate under verbal contracts."

The parents assert that they met their burden to prove that the unilaterally-obtained ABA services and related services constituted an appropriate unilateral placement for the student. Next, the parents allege that the IHO erred in finding that equitable considerations did not support their request for relief. First, regarding their 10-day notice letter, the parents contend that the IHO erred in finding it untimely and in punishing the parents for waiving their original request for reimbursement for the costs of the student's tuition at the parochial school. The parents also argue that the IHO erred in finding allegations in the due process complaint notice to be contradictory, noting that, because the district did not timely convene a CSE to develop an IEP, it also did not recommend appropriate goals and services. In addition, the parents allege that the IHO erred in presuming that the matter should have involved dual enrollment when at no time did the parents indicate that they did not want a public placement for the student.

In an answer, the district responds to the parents' material allegations with a general denial and argue that the IHO's decision should be upheld in its entirety. The district also objects to consideration of the parents' additional evidence.[8]

[7] The parents also argue that the IHO acted in manner that was arbitrary and capricious when she adopted the district's argument in its entirety and ignored or discredited evidence in the hearing record and rested on arguments that the district did not raise at any point before its post-hearing brief.

[8] The parents prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of the parents' reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary

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

evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parents' right to file a reply. As such, the parents' reply fails to comply with the practice regulations and will not be considered.

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]).[9]

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

[9] 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).

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

Initially, as the district has not appealed the IHO's determination that it failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year, that finding is final and binding on the parties and will not be further discussed (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]). Accordingly, the remaining issues to be addressed relate to relief sought by the parents.

A. Unilaterally-Obtained Services

1. Financial Risk

One form of relief available to parents for a district's failure to offer a FAPE is tuition reimbursement, or as specifically sought here, reimbursement for the costs of unilaterally-obtained ABA services and related services. As set forth above, generally, 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 (Carter, 510 U.S. 7; Burlington, 471 U.S. at, 369-70; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252).

In other words, districts can be made to pay for special education services privately obtained for which parents have either paid or for which they have become legally obligated to pay. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

In this case the parents' request for 30 hours per week of "ABA/1:1 direct teaching/SEIT" services, four 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of OT, two 30-minute sessions per week of PT, and two 60-minute sessions per month of parent counseling and training that they unilaterally obtained without the consent of the district must be assessed under this framework. That is, having found that the IHO's determination that the district failed to offer the student a FAPE is final and binding, the issue is whether ABA and related services constituted an appropriate unilateral placement of the student such that the cost of the services are reimbursable to the parents or, alternatively, should be directly paid by the district to the provider upon proof that the parents are legally obligated to pay but do not have adequate funds to do so.

Furthermore, there is a subset of cases that have arisen in recent years where parents have not established that they have actually paid or have a financial obligation to pay costs for private services delivered to their children and, in several of such cases, seek district funding for the services under a theory of relief other than reimbursement (i.e., as compensatory education or as direct funding from the district to the providers). In those cases, the question of the parents' financial obligation to pay the private agencies for special education services delivered to the student have, in certain cases, become determinative (see e.g., Application of a Student with a Disability, Appeal No. 20-115; Application of a Student with a Disability, Appeal No. 20-087). The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). However, in order to obtain direct payment relief from a school district, a parent's financial obligation to pay must be established. As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 (1st Cir. 1984), aff'd Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]).[10] Congress itself took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under IDEA (20 U.S.C. § 1412[a][10][iii]). When the element of financial risk is removed entirely and the financial risk is borne entirely by an unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, I find it troubling because parents begin seeking the best private placements possible little consideration of what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" My experience is that record development under such circumstances tends to deteriorate and the parties' efforts to carry out the vision of the IDEA and its predecessor statute, namely to maximize the inclusion of students with disabilities in public schools rather than private institutions begins to suffer.[11]

[10] Parents' engagement in the cooperative process of obtaining a public placement with the consent of school district officials was also referenced very early on by the First Circuit when it explained that "[s]ome courts have made a distinction between a unilateral parental transfer made after consultation with the school system, yet still an action without the system's agreement, and transfers made truly unilaterally, bereft of any attempt to achieve a negotiated compromise and agreement on a private placement. We believe this to be a reasonable distinction, one which may be taken into account in a district court's computation of an award of equitable reimbursement (Burlington, 736 F.2d 773, 799 [internal citations omitted]).

[11] The Second Circuit expressed its concern in a case in which the record failed to demonstrate how either the parents or the school district had meaningfully engaged in the process of developing a public school placement for the student, stating that [w]e find this troubling, as the School District was no freer than were the Tuckers to leave to the other party the responsibility of searching for an acceptable placement" (Tucker, 873 F.2d at 567, abrogated on other grounds by Carter, 510 U.S. 7).

The foregoing concerns regarding direct payment and establishing the parents' legal obligation are decidedly less pronounced in instances where parents have themselves already fronted the costs for the unilaterally obtained special education services and, thus, have assumed financial risk.

In their affidavit testimony, the student's BCBAs, physical therapist, occupational therapist, and speech-language pathologist set forth their hourly rates for sessions with the student (Parent Exs. N ¶ 3; O ¶ 5; P ¶ 4; Q ¶ 6; S ¶ 5). The providers detailed that they delivered approximately 25 hours per week of ABA services, combined, one 60-minute session per week of PT, one 90-minute session per week of OT, and two 60-minute sessions per week of speech-language therapy to the student, as well as one two-hour session per month of parent counseling and training (Parent Ex. N ¶¶ 4, 20, 22; O ¶ 9; P ¶ 3; Q ¶ 7; S ¶ 5). During cross-examination conducted by the district, one of the student's BCBAs indicated that she had a formal written agreement with the parents for the services provided; however, such agreement was not offered into evidence (Tr. p. 53). Additionally, the student's mother testified that the parents sought reimbursement for the costs of services and usually paid the providers on a weekly basis (Tr. pp. 61, 62; Parent Ex. T ¶ 16).

The parents offer several documents as additional evidence with their request for review relevant to the question of their payment and their legal obligation to pay for the student's services for the 2022-23 school year. The district argues that the additional evidence should not be considered because the exhibits, or at least portions thereof, were available at the time of the impartial hearing, the parents had the opportunity during the impartial hearing to offer the evidence after the district raised the lack of evidence of a contractual obligation, and the statements in the affidavits are not subject to cross-examination.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

The additional evidence that the parents offer consists of documentation of payment to providers (Req. for Rev. Ex. U). The documents include a summary of dates of services delivered by the various providers with accompanying information about the hourly rate charged, the number of hours of services delivered, and total amount charged for each day, along with a monthly total amount of hours and amounts charged for July through October 2022, followed by copies of cancelled checks from the parents to the providers in the same amounts identified on the summary sheets (compare Req. for Rev. Ex. U at pp. 5-9, 14-18, 22-24, 28-32, 37-42, with Req. for Rev. Ex. U at pp. 1-4, 10-13, 19-21, 25-27, 33-36).[12] The parents also offer as additional evidence written contracts for ABA services with the student's two BCBAs executed by the BCBAs and the parents on June 29, 2022 and June 30, 2022, respectively (Req. for Rev. Ex. V).[13]

Here, during the impartial hearing and in its answer on appeal, the district has not alleged that the parents have not paid the providers of the student's services or that they have not become legally obligated to do so. Instead, the district's position is that the parents failed to meet an evidentiary burden to come forward with such evidence. Under the circumstances, where the district did not answer the parents' due process complaint notice, articulate any position about the parents' requested relief at the outset of the impartial hearing or fully participate in the impartial hearing process, and only raised the question of the parents' indebtedness on the last day of the impartial hearing, and where the IHO did not outline during the prehearing conference to the parties in advance that this type of evidence would be expected, it seems more like the issue was sprung upon the parents, rather than the other way around.[14] Under the circumstances, and in the interests of due process, I will consider the proof of the parents' payments and the contracts as evidence necessary to render a decision.

The additional evidence submitted by the parents establishes that the parents have funded the student's services out of their own pockets so far during the 2022-23 school year (Req. for Rev. Ex. U at pp. 1-4, 10-13, 19-21, 25-27, 33-36), and any implication that the parents were not, in fact, doing so has been put to rest. Accordingly, this is not an instance where the concerns about

[12] There is one check included in the hearing record dated July 1, 2022 that does not appear to line up with the associated summaries of charges for services delivered during the 2022-23 school year (see Req. for Rev. Ex. U at p. 14).

[13] The proffered evidence also includes affidavits from the student's related services providers (Req. for Rev. Ex. W) and a district settlement referral letter, which the parents offer as proof that the district does not request evidence of a contractual relationship with service providers before entering settlement negotiations (Req. for Rev. Ex. Z). These documents are not necessary in order to render a decision and, therefore, will not be further discussed.

[14] While it is not the IHO's obligation to identify each item of evidence anticipated pursuant to the parties' respective burdens of production and persuasion, one of the purposes of the prehearing conference is to simplify and clarify the issues to be resolved at the impartial hearing, and, as such, would be an opportunity to identify the type of relief sought by the parents, discuss the types of evidence that the IHO requires in order to make a determination, and inquire about the district's position, if any, about the parents' request (see 8 NYCRR 200.5[j][3][xi][a]). Some IHOs prefer that evidence regarding all amounts paid be presented as evidence in nearly all reimbursement cases, whereas other IHOs are more selective and only question the absence of a large quantum of evidence of proof of payment when there is a factual dispute between the parties over the amount a parent has paid.

the parents' financial injury define preclude the parent from seeking the remedy of district funding and the IHO's finding to the contrary must be reversed.

2. Appropriateness of Privately-Obtained Services

Here, the appropriateness of the ABA services and related services delivered to the student during the 2022-23 school year is not seriously in dispute in this matter. 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. v. Bd. of Educ. of Hyde Park, 459 F.3d 356,364 [2d Cir. 2006]; 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 IHO acknowledged that the parents "presented testimony and submitted documentary evidence in support of their position that the related services were appropriate and the Student was making progress with those services" (IHO Decision at p. 9). As evidence of the appropriateness of the ABA services and related services, the parents presented affidavit testimony of the student's BCBAs, her physical therapist, her occupational therapist, and her speech-language pathologist (Parent Exs. N-Q; S). The providers offered testimony about the student's needs, the skills targeted through the services, the student's progress thus far, and their recommendations that the student continue to receive the services at the same frequency and duration (Parent Exs. N ¶¶ 3-23; O ¶¶ 5-13; P ¶¶ 3, 5-17; Q ¶¶ 7-13; S ¶¶ 5-14). In addition, the parents offered the affidavit testimony of the pediatric neuropsychologist who evaluated the student in 2019 and 2021, along with his evaluation report, which detailed the student's needs and set forth the neuropsychologist's view that the unilateral placement and services addressed the student's needs (Parent Exs. C; R ¶¶ 28-33). The student's mother also testified as to the student's services and progress during the 2022-23 school year thus far (Parent Ex. T ¶¶ 14-15). The district conducted a very limited cross-examination of two of the parents' seven witnesses on the narrow question of the parents' financial obligation for the services, did not offer any testimonial or documentary evidence to rebut the parents' evidence, and did not otherwise argue during the impartial hearing that the special education services obtained by the parent were inappropriate (see Tr. pp. 40, 53-57, 61; IHO Ex. I).

Based on the foregoing, there is no basis for a finding that the unilateral placement was not reasonably calculated to enable the student to receive educational benefits.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and

reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

1. 10-Day Notice

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Here, contrary to the IHO's determination, the parents provided timely notice to the district on their intent to unilaterally place the student for the 2022-23 school year (see Parent Ex. B). The parents' letter was dated June 15, 2022, more than 10 business days prior to their removal of the student as of the beginning of the 12-month 2022-23 school year (id. at p. 1).[15] Congress deemed 10 business days sufficient time for a district to convene a CSE meeting in response to a parent's notice of unilateral placement (20 U.S.C. § 1412[a][10][C][iii][I]), and there is no legal or factual basis for the IHO's view that the parents' letter did not give the district sufficient time to convene a CSE in this instance (IHO Decision at p. 11). The IHO's finding is further contradicted by the parents' prior correspondence to the district on June 3, 2022, notifying it that it had not yet convened to conduct the student's annual review and to develop an IEP for the 2022-23 school year (Parent Ex. D). In response to the parents' June 2022 email, the district responded that a CSE

[15] In New York State, the school year is defined as the "period commencing on the first day of July in each year and ending on the thirtieth day of June next following" (N.Y. Educ. Law § 2[15]).

had convened on May 19, 2022; however, the parents informed the district that this was not accurate (Parent Ex. M at p. 1).[16] There is no further correspondence from the district in the hearing record, and as noted, the district did not present evidence that, either before or after the parents' 10-day notice, it attempted to or did convene a CSE meeting to engage in educational planning for the student for the 2022-23 school year. Under these circumstances, the evidence in the hearing record does not at all support the IHO's finding that the parents' notice to the district was untimely such that it would warrant a denial or reduction of reimbursement relief.

As to the content of the letter, the parents stated their intent to seek district funding for the costs of both the student's attendance at the parochial school and the costs of the student's ABA services and related services (Parent Ex. B at p. 1). In particular, the parents detailed that, in addition to the tuition costs, they would seek district funding of 30 hours per week of "ABA/1:1 direct teaching/SEIT," four 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of OT, two 30-minute sessions per week of PT, and two 60-minute sessions per month of parent counseling and training (id.). Accordingly, the IHO's finding that the letter sought "reimbursement for tuition for the Private School as the form of relief, despite it not being the relief sought at the due process hearing, which was for the Student to receive related services at the Private School" is not supported by review of the parents' letter (IHO Decision at p. 11). Rather, the parents' statutory notice provided the district with clear notice of their alternative educational plan in light of the district's shortcomings in developing its own plan as well as their intent to seek district funding of the costs of a unilateral placement and services for the student. The IHO's holding to the contrary is not supported by the evidence in the hearing record and must be reversed.

2. Due Process Complaint Notice Allegations

The IHO additionally rested her analysis of equitable considerations on her view that the parents stated contradictory allegations in their due process complaint notice (see IHO Decision at p. 11). I am aware of no authority that would support a reduction or denial of relief on such a basis and the IHO cites none. Instead, a question of the degree to which the district was on notice of claims in the due process complaint notice would more appropriately be considered as a question of sufficiency after a motion made by the district.[17] Here, the district did not make a motion to dismiss the parents' due process complaint notice or otherwise allege that it was not on notice of

[16] It appears that the year prior a CSE had convened on May 19, 2021, and that the district may have been referring to that date (see Parent Exs. C at p. 3; T ¶¶ 9, 12). The district produced no evidence of a CSE meeting or an IEP from May 2022.

[17] State regulations provide that a parent or district may file a due process complaint notice "with respect to any matter relating to the identification, evaluation or educational placement of a student with 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][7][A][ii]; 34 CFR 300.508[b]). A due process complaint notice must contain, at a minimum, (i) the name of the student; (ii) the address of the residence of the student; (iii) the name of the school the student is attending; (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and (v) a proposed resolution of the problem to the extent known and available to the party at the time (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). The other party may challenge the sufficiency of the due process complaint notice it if does not meet these requirement (8 NYCRR 200.5[i][3]).

the parents' allegations. Likewise, the hearing record does not include a response from the district to the due process complaint notice or a prior written notice.[18] Accordingly, rather than the district being blindsided, it would seem that it was the parents who were not put on notice that their due process complaint notice was considered lacking in some respect. Moreover, as the parents argue, a review of the due process complaint notice shows that they put the district on notice that they challenged the lack of an IEP for the student, which would also encompass a challenge to the lack of goals and services (see Parent Ex. A), and if it was accurate that the last IEP created for the student was from May 2021, it would stand to reason that any goals contained therein could be outdated in the absence of an annual review and therefore inappropriate. Accordingly, the IHO's concern about the degree to which the district was on notice of the parents' claims was misplaced and unsupported by the evidence in the hearing record. It was not a basis upon which to deny tuition reimbursement relief under these circumstances.

3. Dual Enrollment

A new issue raised sua sponte by the IHO as an equitable consideration, was whether the matter was indeed a "tuition reimbursement case" given that the parents did not seek tuition reimbursement for the costs of the private school tuition and whether, instead, the parents should have requested an IESP from the district (IHO Decision at pp. 10-11).

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

Education Law § 3602-c—commonly referred to as the dual-enrollment statute—requires parents who seek to obtain educational services for students with disabilities placed in nonpublic schools to file a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

[18] State and federal regulations provide that, if the school district has not sent a prior written notice to the parent regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] see 34 CFR 300.508[e]).

nonpublic schools located within the school district (id.). Additionally, unlike the provisions of the IDEA, section 3602-c provides that a parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

Here, there is no evidence whatsoever in the hearing record to demonstrate that the parents desired services from the district to be delivered in the student's parochial school. Rather, as discussed above, the parents reached out the district inquiring about an IEP and a district placement for the student (see Parent Ex. D), and, when none was developed, notified the district of their intent to unilaterally place the student and seek reimbursement from the district for the tuition and the costs of services delivered by their private providers (see Parent Exs. B; D).[19] That the parents later withdrew their request for tuition costs for the parochial school does not serve to retroactively convert the parents' intentions or the district's obligations to the student (see E.T. v Bd. of Educ. of the Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *15 [S.D.N.Y. Nov. 26, 2012] [noting that "the issue of parental intent vis-àvis the child's enrollment is not dispositive of whether a school district has a FAPE obligation to a disabled child"]).

Accordingly, the IHO's determination that the parents desired an IESP and that, therefore, the matter could not be properly considered a tuition reimbursement case was not supported by the law or the evidence in the hearing record. Perhaps the IHO was swayed by a belief that the parents intended or hoped to place the student in the parochial school all along, but as the Second Circuit has indicated, the parents' pursuit of a private placement would not be a basis for denying tuition reimbursement, even assuming they never intended to place the student in a public school (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]).

There being no evidence that the parents obstructed or were uncooperative in the district's efforts to meet its obligations under the IDEA and, to the contrary, given the parents' communications with the district and cooperation, including by sharing evaluations and notifying the district that a CSE had not convened, there are no equitable considerations that would warrant a reduction or denial of an award of reimbursement for the costs of the ABA services and related services that the parents unilaterally obtained for the student for the 2022-23 school year.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports a finding that the parents funded the ABA services and related services for which they seek reimbursement. Further, there is no evidence that supports the finding that the ABA services and related services delivered to the student during the 2022-23 school year were not appropriate. Finally, the IHO erred both factually and legally in finding that equitable considerations warranted a reduction or a denial of an award of reimbursement to the parents for the costs of the unilaterally-obtained services.

THE APPEAL IS SUSTAINED.

[19] The district is required by State law to locate and assign the student's publicly-provided teachers for a dually enrolled student (Educ Law § 3602-c[2][a]).

IT IS ORDERED that the IHO's decision dated October 5, 2022 is modified by reversing those portions which found that the parents did not have standing to seek relief in the form of district funding of the student's unilaterally-obtained services and that equitable considerations did not support the parents' request for relief;

IT IS FURTHER ORDERED that the district shall be required to reimburse the parents for the costs of up to 30 hours per week of ABA services, four 30-minute sessions per week of speech-language therapy, three 30-minute sessions per week of OT, two 30-minute sessions per week of PT, and two 60-minute sessions per month of parent counseling and training for the 2022-23 school year upon the parents' submission of proof of payment.

Dated: **Albany, New York**
December 19, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER