



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-149

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

### **Appearances:**

Mobilization for Justice, Inc., attorneys for petitioner, by Matthew Bedrick, Esq. of counsel to Tiffany Liston, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2021-22 school year was appropriate.<sup>1</sup> 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 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

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<sup>1</sup> The Commissioner of Education has not approved the Rebecca School as a school with which school districts may contract to instruct students with disabilities (*see* 8 NYCRR 200.1 [d], 200.7).

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 presents with a history of severe language delays as well as delays in cognition, communication, motor skills, and social-emotional functioning (Parent Ex. D at pp. 1-3). At the age of 18 months, he received a diagnosis of autism spectrum disorder (ASD) (id. at p. 2). The student received home-based speech-language therapy, occupational therapy (OT) and applied behavioral analysis (ABA) services through Early Intervention (id. at p. 3).

For the student's 2017-18 school year (preschool), the student attended an 8:1+2 special class and received related services including speech-language therapy and OT (Parent Ex. D at p. 3). A Committee on Preschool Special Education (CPSE) convened in spring 2018 and, after finding that the student continued to be eligible for special education as a preschool student with a disability, recommended that he be placed in an 8:1+2 special class and receive related services consisting of two 30-minute sessions of individual speech-language therapy per week and two 30-minute sessions of individual OT per week (Parent Ex. N at pp. 1, 2, 10).<sup>2</sup>

Thereafter, a CSE convened on March 6, 2019 to conduct the student's "turning five" review for the student's 2019-20 school year (kindergarten) and found the student eligible for special education and related services as a student with autism (Parent Ex. K at p. 19). The March 2019 CSE recommended that the student attend an 8:1+1 special class for English language arts (ELA), math, social studies and science for a 12-month school year (id. at pp. 15-16). The CSE also recommended that the student receive related services consisting of two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group (2:1) speech-language therapy per week, two 30-minute sessions of individual OT per week, and one 30-minute session of parent counseling and training per month (id. at p. 15).<sup>3</sup>

On February 5, 2020, the CSE reconvened for an annual review and continued to find the student eligible for special education and related services as a student with autism (Parent Ex. G at pp. 1, 18). The February 2020 IEP indicated that the parent was concerned that the student continued to struggle with expressive language and would like to see him communicate more (id. at p. 3). The February 2020 CSE continued to recommend 12-month services for the student and placement in an 8:1+1 special class for English language arts (ELA), math, social studies, and science (id. at p. 15). The CSE recommended the same related services as recommended in the March 6, 2019 IEP except for a change in parent counseling and training (compare Parent Ex. G at p. 14, with Parent Ex. K at p. 15). The February 2020 CSE recommended two 30-minute sessions of individual parent counseling and training per year and two 60-minute sessions of group parent counseling and training per year (Parent Ex. G at p. 14).

On March 20, 2020, the district provided the parent with a special education remote learning plan for the student to be implemented during school building closure related to the COVID-19 pandemic (Parent Ex. F at p. 1). The remote learning plan provided that the student would receive two 30-minute sessions of individual OT per week and two 30-minute sessions of individual speech-language therapy per week (id.). On April 3, 2020, the district provided the parents with an updated special education remote learning plan for the student (Parent Ex. E at p. 1). The updated plan provided that the student would receive 50 minutes of instruction per day in ELA, math, science, and social studies (id.). The updated remote learning plan also provided that

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<sup>2</sup> The date of the CSE meeting is unclear. The information summary sheet for the spring 2018 IEP indicates that the CSE meeting took place on March 22, 2018; however, the IEP indicates that the CSE meeting took place on May 29, 2018, and the IEP has projected implementation dates of both May 23, 2018 and May 30, 2018 (compare Parent Ex. N at p. 1, with Parent Ex. N at pp. 2, 10, 14).

<sup>3</sup> The student's March 2019 IEP was amended without a CSE meeting on November 14, 2019, to reflect the addition of special transportation accommodations and assistive technology consisting of a static display speech generating device (Parent Ex. H at pp. 16, 19, 20; see Tr. pp. 80-81).

the student would receive two 30-minute sessions of individual speech-language therapy per week, one 30-minute session of group (2:1) speech-language therapy per week, two 30-minute sessions of individual OT per week, two 45-minute sessions of individual parent counseling and training per year and two 60-minute sessions of group parent counseling and training per year (id.).

For the student's 2020-21 school year (first grade), the student attended a district school in a hybrid program consisting of remote and in-person learning (Parent Ex. D at p. 3). The student transitioned to full-time in-person learning in January 2021 (id.; see Tr. p. 60).

In a prior written notice dated January 24, 2021, the district proposed to conduct a reevaluation of the student consisting of a social history update, neuropsychological evaluation, and classroom observation based on the parent's request for a reevaluation dated January 20, 2021 (Dist. Ex. 4 at pp. 1-2). The social history update, neuropsychological evaluation, and classroom observation were conducted on March 2, March 6, and March 10, 2021, respectively (Parent Ex. D; Dist. Exs. 8; 9).

A CSE convened on April 19, 2021, to consider the student's reevaluation, conduct an annual review and develop an IEP for the student (Parent Ex. C at pp. 1, 12-13). The CSE continued to find the student eligible for special education and related services as a student with autism and developed an IEP with an implementation date of April 26, 2021 (id. at pp. 1, 17). The April 2021 CSE also recommended the same related services as recommended in the February 2020 IEP and the same 8:1+1 special class in ELA, math, social studies, and sciences (with one less period per week for math) (compare Parent Ex. C at p. 13, with Parent Ex. G at p. 14).

On August 12, 2021, the parent signed an enrollment contract with the Rebecca School for the student's attendance at the Rebecca School from September 13, 2021 through June 23, 2022 (Parent Ex. P).

By letter dated August 24, 2021, the parent expressed her disagreement with the April 2021 IEP and notified the district of her intent to unilaterally place the student at the Rebecca School for the 2021-22 school year, beginning on September 13, 2021, and pursue funding from the district for the costs of the student's tuition (Parent Ex. Q).

#### **A. Due Process Complaint Notice**

In a due process complaint notice, dated April 29, 2022, the parent requested an impartial hearing asserting that the district denied the student a FAPE for the 2021-22 school year (see Parent Ex. A). With respect to the April 2021 IEP, the parent asserted that the annual goals were inadequate because the IEP did not include a reading goal and there was only one goal for math (id. at p. 6). Additionally, the parent asserted that the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student (id.). More specifically, the parent asserted that the district ignored information in the April 2021 IEP which indicated that the student had aggressive behaviors which affected him academically and socially (id.). The parent further indicated that the neuropsychological evaluation recommended that the district conduct an FBA of the student (id.). In addition, the parent asserted that the IEP did not address the student's needs in the area of toilet training (id. at p. 6). Turning to the placement recommendation, the parent argued that the district's recommended placement for the

student was not appropriate because the student failed to make appropriate progress for multiple years in a similar placement (*id.* at p. 5). The parent argued that the April 2021 IEP indicated that the student continued to struggle academically and was only able to maintain focus in the class for one or two minutes which showed major regression from previous years (*id.* at pp. 5-6). Moreover, the parent argued that the April 2021 CSE disregarded the neuropsychological evaluation's recommendation for a specialized non-public school or private school program (*id.* at p. 6). In addition, the parent alleged that the district failed to recommend appropriate related services, including, speech-language, counseling, and social skills training (*id.*). With respect to speech-language services, the parent alleged that the IEP failed to include speech-language services that would enable the student to make appropriate progress, particularly in light of his non-verbal status (*id.*). The parent alleged that the CSE only offered three sessions of individual speech-language services per week, despite the recommendation in the neuropsychological evaluation for speech-language services four times per week (*id.*). The parent also alleged that the CSE failed to recommend counseling or a social skills program (*id.*). The parent asserted that the student's IEP noted the student's deficits in social functioning, yet failed to recommend counseling or social skills training despite the neuropsychological evaluation report indicating that the student required a social skills program (*id.*).

With respect to the unilateral placement, the parent asserted that the Rebecca School was an appropriate placement for the student because the student made progress and the program was designed to meet the student's needs (Parent Ex. A at pp. 7-8). The parent also asserted that equitable considerations weighed in her favor because she cooperated and communicated with the district (*id.* at p. 9). Moreover, the parent asserted that she actively participated in the April 2021 CSE meeting and provided timely 10-day notice (*id.*).

For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2021-22 school year; a finding that the Rebecca School was an appropriate unilateral placement for the student for the 2021-22 school year; a finding that equitable considerations weighed in the parent's favor; and an order directing the district to fund the costs of the student's tuition at the Rebecca School for the 2021-22 school year (Parent Ex. A at p. 9).

## **B. Impartial Hearing Officer Decision**

The parties convened for a prehearing conference on May 26, 2022 and a status conference on June 10, 2022 (Tr. pp. 1-47). The evidentiary phase of the impartial hearing before the Office of Administrative Trials and Hearings (OATH), began on July 11, 2022 and concluded on August 31, 2022 after three days of hearings (Tr. pp. 48-275). In a decision dated October 1, 2022, the IHO determined that the district offered the student a FAPE for the 2021-22 school year (IHO Decision at p. 2). After reviewing the student's educational history, the IHO found that the April 2021 IEP "did not merely repeat the prior IEP" and that information from all assessments and observations were included in the IEP (*id.* at p. 17). Specifically, the IHO found that the April 2021 CSE considered the neuropsychological evaluation report and the IEP included substantial portions of the report (*id.*). With respect to annual goals, the IHO found that "[r]egardless of how they are categorized," the annual goals in the April 2021 IEP were phrased in specific and measurable terms and created targets to reduce the number of verbal or tactile cues, increase the student's independence, and measure his ability to maintain focus and stay on task (*id.* at pp. 17-18). The IHO noted that the annual goals directly addressed the parent's concerns about improving

the student's ability to focus and his ability to perform writing tasks without hand-over-hand assistance (*id.* at p. 18). Additionally, the IHO found that the change in the student's speech-language services combined with the addition of an assistive technology device, was calculated to enable the student to make progress in light of his needs (*id.*). The IHO also noted that the same class and placement were continued because the student was making "typical progress" (*id.*). With respect to the parent's contention that the CSE did not consider placing the student in a non-public school as was recommended by the neuropsychologist, the IHO found that the CSE did consider both larger and smaller specialized class sizes of 12:1+1 and 6:1+1 and that having rejected a 6:1+1 special class as overly restrictive, the CSE was not required to consider the still more restrictive possibility of a non-public school (*id.*). With regard to the student's classification, the IHO found that the student's classification as a student with autism was not determinative of the educational program in his IEP (*id.* at pp. 18-19). Next, the IHO found that the fact that the student was not at "grade level" did not establish that the student was denied a FAPE and noted that she was not concerned with the student's performance during the two prior school years in the district because those school years were not at issue (*id.*). With respect to the parent's claim that the student was not receiving sufficient toilet-training, the IHO noted that toilet training was addressed by the classroom as a "programmatically skill" (*id.*).

Notwithstanding the IHO's finding that the district offered the student a FAPE for the 2021-22 school year, the IHO made determinations regarding the appropriateness of the student's unilateral placement and equitable considerations "for completeness of the record" (IHO Decision at pp. 20-24). Specifically, the IHO found that the Rebecca School was an appropriate unilateral placement for the student because the program at the school provided the student with educational instruction that addressed his needs and the student made progress in "small and incremental improvements" (*id.* at pp. 21-22).

With respect to equitable considerations, the IHO found that there was no evidence in the hearing record that the parent refused or failed to cooperate with the district (IHO Decision at p. 22). The IHO noted that the hearing record included unsigned forms for consent for evaluations; however, the IHO found that because the evaluations that required consent were performed and the parent participated in interviews, it appeared that the parent was cooperative (*id.*). Additionally, the IHO found that the parent provided the district with timely 10-day notice of her intent to enroll the student at the Rebecca School for the 2021-22 school year (*id.*).

As relief, the IHO found that had the district not offered the student a FAPE, it would have been required to pay tuition whether as reimbursement upon proof of payment made by the parent or direct funding in the amount of \$7,500, based on the contract between the parent and the Rebecca School (IHO Decision at p. 24).

#### **IV. Appeal for State-Level Review**

The parent appeals, asserting that the IHO erred in finding that the district offered the student a FAPE for the 2021-22 school year. Initially, the parent argues that the IHO erred in relying on the assistant principal's testimony that the student was making typical progress and that the student was meeting his annual goals. The parent asserts that although the IHO cited to the assistant principal's testimony regarding the student making "typical progress" to support her findings, the parent asserts that the use of the term "typical progress" does not mean that the student

was making progress appropriate for him and, therefore, the testimony was not in line with the legal standard that the student make progress in light of his circumstances.

With respect to the annual goals, the parent argues that the assistant principal's testimony that the student was meeting the annual goals is contradicted by the other evidence in the hearing record. For instance, the parent argues that the April 2021 IEP's repetition of annual goals indicated that the student did not meet his prior annual goals. Next, the parent contends that the IHO erred in finding that the student did not need an FBA or BIP for the 2021-22 school year, despite evidence in the hearing record that indicated the student's behaviors impeded his learning, specifically referencing a statement in the IEP indicating the student's "aggressive behaviors [we]re affecting him academically as well as socially." The parent asserts that the April 2021 IEP did not address the student's sensory needs. In addition, the parent alleges that the IHO erred in finding that the change in speech-language therapy and assistive technology was reasonably calculated to enable the student to make progress. According to the parent, the elimination of group speech-language therapy was not reasonably calculated to enable the student to grow in social communication and the IHO's conclusion that the assistive technology device would have been a key component at the district school just as it was at the Rebecca School, is contradicted by the hearing record. Moreover, the parent contends that the April 2021 IEP contained the same OT mandate as the February 2020 IEP which was not reasonably calculated for the student to make progress. Additionally, the parent argues that the 8:1+1 special class recommendation had not enabled the student to make appropriate academic progress.

For relief, the parent argues that the IHO erred in finding that the district would have been obligated to fund tuition in the amount of \$7,550 had the district denied the student a FAPE. The parent alleges that the IHO misconstrued the Rebecca School enrollment contract terms by finding that the district would only be responsible for the portion of tuition owed to the parent as reimbursement. The parent claims that she was obligated to pay Rebecca up to \$7,550 as outlined by the IHO; however, she was responsible for the tuition for the 2021-22 school year in the amount of \$124,417 regardless of the payments she made.

In an answer, the district asserts that the IHO's finding that the district offered the student a FAPE for the 2021-22 school year should be affirmed and the parent's request for review should be dismissed. With respect to the annual goals, the district seeks to uphold the IHO's findings; however, the district argues that the OT goals for the student, while fewer in number than in previous IEPs, were less ambitious in one respect and more in another. The district also argues that contrary to the parent's arguments on appeal, an FBA was not necessary to address the student's behaviors. The district asserts that the April 2021 IEP recommended strategies to address the student's sensory needs.

## **V. Applicable Standards**

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v.

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress-+s, 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]).<sup>4</sup>

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

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

## **VI. Discussion**

### **A. Scope of Review**

As an initial matter, it is necessary to identify which issues are properly before me on appeal. State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set

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<sup>4</sup> 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).

forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In this instance, neither party has appealed the IHO's determination that the Rebecca School was an appropriate unilateral placement for the student's 2021-22 school year. In addition, neither party has appealed the IHO's determination that equitable considerations weigh in favor of granting the parent's request for relief, albeit the parent has challenged the dollar amount in the IHO's alternative findings. Furthermore, the parent did not challenge the IHO's adverse finding rejecting the parents concerns about the student's toileting needs. As such, those determinations have become final and binding on both parties and they 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]).

Additionally, the due process complaint notice raised issues that have not been advanced by the parent on appeal; for example, the parent has not asserted on appeal that the April 2021 CSE failed to recommend counseling or a social skills program for the student. State regulations require that parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*4 [S.D.N.Y. Feb. 24, 2017] [agreeing with an SRO that the parents' "failure to advance specific arguments in support of their conclusory challenge constituted waiver of those issues"]). My role in conducting an independent review does not include putting forward arguments on behalf of a party on issues in which the party has opted to remain silent. Accordingly, the parent's claims raised in the due process complaint notice that have not been raised on appeal are deemed abandoned and will not be discussed further, especially when the IHO already ruled against the parent on the issue of whether the district offered the student a FAPE.

## **B. April 2021 IEP**

### **1. Student's needs**

While not among the disputed issues in this case, a review of the student's needs and current functioning will provide the background necessary to evaluate the appropriateness of the April 2021 IEP. The April 2021 CSE had the following evaluative information available: a February 2021 teacher report; a social history update, an assistive technology evaluation report, and a classroom observation, all completed in March 2021, along with the April 2021 neuropsychological evaluation report; and input from the parent (Parent Exs. C at p. 1; D; Dist. Exs. 2 at p. 2; 5; 6; 8; 9; see Tr. pp. 146-47).

Review of the April 2021 IEP shows that it included results and findings from the April 2021 neuropsychological evaluation (compare Parent Ex. D, with Parent Ex. C at pp. 2-3). The resultant evaluation report indicated that the student was primarily non-verbal, had notable attention problems and self-directed behaviors, and several of the assessment activities had been discontinued due to poor task engagement (Parent Ex. D at pp. 2, 12). The IEP reflected the neuropsychologist's warning that although the results of the evaluation appeared to be an accurate assessment of the student's functioning, the numerical scores should be viewed with caution as they may have been an underestimate of the student's true potential due to his self-stimulatory behaviors, language-impairment, and attentional difficulties (Parent Exs. C at p. 2; D at pp. 9, 12). According to the IEP, the results of the neuropsychological evaluation indicated that the student continued to meet the criteria for a diagnosis of autism spectrum disorder (ASD), with accompanying language and intellectual impairment (Parent Ex. C at p. 2). More specifically, the student presented with notable deficits in social functioning, including poor social-emotional reciprocity and significant restricted and repetitive patterns of behavior and interests with difficulty with transitions, stereotyped motor movements, repetitive play, and sensory sensitivities (id.). The student's assessment performance on nonverbal cognitive tasks fell within the extremely low range and his nonverbal adaptive behavior skills fell within the low range at the first percentile (id.). In the area of academics, the IEP stated that the student performed well below age and grade level expectations on standardized measures (id.). Specifically, through pointing tasks, the student identified primary and secondary colors, two uppercase letters, and three numbers (under five) (id.). The student did not identify most shapes, numbers above five, or lower-case letters (id.). The IEP indicated that the student was unable to count objects, identify letter sounds, or produce meaningful written work (id.). Mirroring the findings of the neuropsychological evaluation report, the IEP further indicated that due to the student's symptoms of autism, and significant learning and behavioral needs, he was at risk for falling further behind expectations; therefore, increased individualized supports and the appropriate school setting was needed to ensure that the student made "meaningful academic progress and reach[ed] his potential" (id. at p. 3; see Parent Ex. D at p. 12-13).

According to the April 2021 IEP, per teacher report, in the area of academics, the student had difficulty with writing and required hand-over-hand writing assistance (Parent Ex. C at p. 3). The student struggled to identify letters of the alphabet but was able to match letters if shown pictures (id.). The IEP stated that the student identified numbers one to 20 but needed to work on one-to-one correspondence and counting up to five (id.). On the Student Annual Needs Determination Inventory (SANDI) assessment, the student struggled and received his lowest score in math, and his second lowest score in writing (id.).<sup>5</sup> Per teacher observation, the student needed increased time to process information, breaks, frequent repetition, opportunities to practice skills, and 1:1 and small group instruction with a teacher to learn and comprehend concepts (id.).

In the area of daily living skills, the April 2021 IEP indicated that, as reported by the student's teacher, the student was not toilet trained but had started pointing to a bathroom symbol on his desk and using his device to indicate bathroom needs (Parent Ex. C at p. 3). The student responded to his name but was still learning to identify his peers (id.). The student used direct eye contact when spoken to, had minimal verbal output but would often show he was happy by smiling

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<sup>5</sup> The assessment was not entered into the hearing record as an exhibit.

and laughing (id.). Per teacher report, the IEP noted that the student "often tr[ie]d to mouth words and reproduce[d] single-syllable sounds" (id.). The student was reported to feed himself independently but needed some help to open items (id.). The student donned clothing items by himself but required assistance to zipper his coat and tie his shoes (id.).

Regarding adaptive behavior, the April 2021 IEP reported that the student maintained focus in the classroom for one to two minutes, was unable to sit down for extended time periods, and needed "breaks" to complete work (Parent Ex. C at p. 3). The student was not able to complete tasks without adult supervision and he required continuous redirection and physical prompting throughout the school day (id.). According to the IEP, the student was a visual learner, needed modeling and assistance, and learned well through hands on activities, technology, and repetition to learn new skills (id.).

In the area of speech-language skills, the April 2021 IEP indicated that the student followed one to two step familiar directions such as "look away and sit down" but needed modeling to follow less familiar directions such as "close the door" (Parent Ex. C at pp. 3-4). In the classroom, the student communicated through gesture, use of his communication device to request "bathroom," and "want," and used the American Sign Language (ASL) sign for "more" (id. at p. 4). The IEP stated that during speech-language sessions the student "consistently request[ed] items, , and "more" using core words (e.g., want, go, more)" (id.). The student was provided a new speech generating device with a language acquisition through motor planning (LAMP) communication application and was in the process of learning to use the application during speech-language sessions and within the classroom (id.). The student was observed to affirm "yes" with support and gestural modeling (id.). The student benefitted from increased assistance and modeling to direct actions to access "open" and "no" on the device (id.). According to the IEP, based on teacher observation, the student demonstrated strengths in matching symbols and pictures together and enjoyed hands on activities including puzzles, the smartboard, cutting and gluing small pieces of paper, gross motor activities, music class, placing stickers on paper, and multi-step activities making slime or playdough (id.). He "often request[ed] to play with playdough" and enjoyed helping the teacher hand out materials such as worksheets, pencils, and trays (id.). The student needed reduced visual and auditory distractions to help him focus, seating close to the teacher and chunking assignments into parts, with feedback following part completion (id.). As noted in the IEP, the parent reported that she had difficulty getting the student to focus on a task and he would often look away when she was assisting him with writing or run off when it was time to do work (id.). The parent stated the student did not use his device enough within the home environment (id.).

The April 2021 IEP present levels of social development described the student as inconsistently demonstrating affection through hugging, holding hands or resting his head on an adult (Parent Ex. C at p. 5). The student reportedly was still learning classmates' names, but he grabbed students' hands to run around together and chase each other (id.). The IEP noted that the student made improvements participating during instructional times with use of a "first-then" board and that he understood that he had to first complete an activity or task before receiving a reward such as a book, puzzle, or coloring (id.). According to the IEP, the teacher reported that

[the student] often tantrum[ed] and ha[d] outbursts when he d[id] not get his way. He ha[d] a difficult time transitioning. He w[ould] often have outbursts when he

d[id] not want to transition to a different environment, or when he d[id] not want to complete teacher structured, directed tasks and lessons. His outbursts c[ould] range from crying, pushing, spitting, and aggressiveness such as hitting others around him

(Parent Ex. C at p. 5).

According to the IEP, the teacher indicated that the student was good at turn-taking and liked to help the teacher hand out materials to his classmates; however, he needed explicit instructions and modeling to practice self-management to relate to peers and needed social skills visuals/charts with strategies posted to refer to when needed (Parent Ex. C at p. 5). The student's parent reported that the student did not know how to engage with peers and because he did not know his own strength, he would push and pull peers too hard (id.).

The April 2021 IEP present levels of physical development stated that the student held a pencil using a palmer grasp and liked hands-on activities including playdough, slime, and bean bags (Parent Ex. C at p. 6). The student was observed to have high energy levels and he reportedly jumped around, juggled items, and ran around the classroom (id.). During gym, the student engaged in all activities (id.).

With regard to motor skills, the April 2021 IEP stated that the student snipped using adaptive scissors and held a crayon to create repeated strokes, but he had difficulty cutting near lines or coloring within the lines (Parent Ex. C at p. 6). The IEP indicated that the student alternated between an immature and mature grasp when holding a pencil and his ability to independently imitate pre-writing strokes such as circles and vertical and horizontal lines was emerging, but the IEP also noted that he required hand-over-hand assistance to form all letters of the alphabet (id.). The student was reported to match simple shapes by name, and he put his arms through the sleeves of a shirt and coat but needed assistance to zip and button his coat (id.). The student had difficulty attending to non-preferred tabletop activities for more than one minute and required verbal cues to redirect to task (id.). The student would "seek out increased pressure to the bottom of his chin and use[d] his knuckles or an adult's hand to provide that input" (id.). The IEP noted that assistive devices such as pencil grips and various sized writing instruments should be used as tools to improve the student's fine motor skills (id.).

Regarding the student's management needs, the April 2021 IEP stated that the student needed an environment that provided a "calming/cooling down location" and posted, clear and descriptive classroom rules on expectations of appropriate behaviors (Parent Ex. C at p. 7). Additional strategies for addressing the student's management needs included positively reinforcing and rewarding appropriate behaviors and "track[ing] behaviors to determine triggers" (id.). The IEP included supports of additional time and supervised breaks and stated that sitting activities should be alternated with active classroom tasks (id.). The IEP also indicated that the student should be provided with assistive devices, as needed, to support his sensory needs such as small blocks, a stress ball, crayons, stickers, paper, puzzles, and play dough (id.). As part of the student's management needs, the IEP indicated that he should use an augmentative alternative communication (AAC) device daily at school and at home (id.).

With respect to the effect of the student's needs on his ability to be involved in and make progress in the general education curriculum, the April 2021 IEP stated that the student's lack of

communication, attention, awareness, self-stimulatory behaviors, and aggressive behaviors affected him academically and socially and prohibited him from being successful in a general education setting or a "least" restrictive setting (Parent Ex. C at p. 7). Due to these factors and the student's significant delays in communication, social relatedness, fine motor, sensory processing, and social-emotional skills, the CSE recommended the student attend a structured 8:1+1 special class and receive related services (id. at pp. 7, 12-13).

## 2. Annual Goals

On appeal, the parent argues that the IHO erred in finding that the April 2021 IEP annual goals were appropriate because the student achieved the annual goals under his most recent IEP and made progress. According to the parent, the annual goals included in the April 2021 IEP were repeated from the previous year's IEP, which indicated that the student did not meet the annual goals from the previous school year.

An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

However, even where deficiencies are identified in the annual goals contained in an IEP, inadequate goals in and of themselves are often unlikely to rise to the level of a denial of FAPE. Courts have explained that an IEP need not identify annual goals as the only vehicle for addressing each and every need in order to conclude that the IEP offered the student a FAPE (see J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 199 [E.D.N.Y. 2017]). In addition, courts generally have been reluctant to find a denial of a FAPE on the basis of an IEP failing to sufficiently specify how a student's progress toward his or her annual goals will be measured when the goals address the student's areas of need (D.A.B. v. New York City Dep't of Educ., 973 F. Supp. 2d 344, 359-61 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at \*10-\*11 [S.D.N.Y. Mar. 19, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at \*13 [S.D.N.Y. Feb. 20, 2013]; P.K. v. New York City Dep't of Educ. (Region 4), 819 F. Supp. 2d 90, 109 [S.D.N.Y. 2011], aff'd, 526 Fed. App'x 135 [2d Cir. May 21, 2013]). Relatedly, the carryover of annual goals from a student's IEP in the prior school year to the next school year's IEP has been found to be appropriate "[w]here a student's needs and objectives remain substantially the same; '[i]t is especially sensible that [an IEP] would reflect continuity with [a student's] needs and objectives as of [previous years,]'" (P.C. v. Rye City Sch. Dist., 232 F. Supp. 3d 394, 413-15 [S.D.N.Y. 2017], quoting L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at \*11 [S.D.N.Y. Sept. 27, 2016]; see M.B. v. City Sch. Dist. of New Rochelle, 2018 WL 1609266, at \*15 [S.D.N.Y. Mar. 29, 2018] [finding that, despite "some carry-over" between goals for the years at issue, "each of the disputed IEPs contained a number of new goals and objectives that appropriately reflected [the student's] progress and updated evaluative information"]).

Nevertheless, a student's progress under a prior IEP is a relevant area of inquiry for purposes of determining whether an IEP has been appropriately developed, particularly if the parents express concern with respect to the student's rate of progress (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 66-67 [2d Cir. 2013]; Adrienne D. v. Lakeland Cent. Sch. Dist., 686 F.Supp.2d 361, 368 [S.D.N.Y. 2010]; M.C. v. Rye Neck Union Free Sch. Dist., 2008 WL 4449338, \*14-\*16 [S.D.N.Y. Sept. 29, 2008]; see also "Guide to Quality Individualized Education Program (IEP) Development and Implementation," at p. 18, Office of Special Educ. Mem. [Dec. 2010], available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). The fact that a student has not made progress under a particular IEP does not automatically render that IEP inappropriate, nor does the fact that an IEP offered in a subsequent school year which is the same or similar to a prior IEP render it inappropriate, provided it is based upon consideration of the student's current needs at the time the IEP is formulated (see Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1153-54 [10th Cir.2008]; Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520, 530 [3d Cir. 1995]; S.H. v. Eastchester Union Free Sch. Dist., 2011 WL 6108523, at \*10 [S.D.N.Y. Dec. 8, 2011]; D. D-S. v. Southold Union Free Sch. Dist., 2011 WL 3919040, at \*12 [E.D.N.Y. Sept. 2, 2011], *aff'd*, 506 Fed. App'x 80 [2d Cir. 2012]; J.G. v. Kiryas Joel Union Free Sch. Dist., 777 F. Supp. 2d 606, 650 [S.D.N.Y. 2011]). Conversely, "if a student had failed to make any progress under an IEP in one year courts have been "hard pressed" to understand how the subsequent year's IEP could be appropriate if it was simply a copy of the IEP which failed to produce any gains in a prior year (Carlisle Area Sch. Dist., 62 F.3d at 534 [noting, however, that the two IEPs at issue in the case were not identical]; N.G. v. E.L. Haynes Pub. Charter Sch., 2021 WL 3507557, at \*9 [D.D.C. July 30, 2021]; James D. v. Bd. of Educ. of Aptakasic-Tripp Cmty. Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 827 [N.D. Ill. 2009]).

In the instant case, the IHO cited to the testimony of the district assistant principal in determining that the annual goals included in the April 2021 IEP were based on the SANDI, that there were new annual goals included in the April 2021 IEP, that the annual goals included a behavioral goal, and that the annual goals addressed the parent's concerns regarding the student's ability to focus on a task and his ability to perform writing tasks (IHO Decision at pp. 17-18). Reviewing the testimony, the assistant principal testified that the student's progress towards his annual goals was monitored and recorded twice per month (Tr. p. 96). The assistant principal testified that the student was making progress and that "he attained his goals that were in the [February 2020] IEP" (Tr. p. 108). Moreover, the assistant principal testified that the student's goals were based on the SANDI and described this assessment as a district wide assessment that students with autism take; however, the hearing record is unclear regarding the skills gained or the skills that remained the same when comparing the results of the SANDI administered to the student in 2020 with the SANDI administered to the student in 2021, as these assessments were not included as a part of the hearing record (Tr. p. 128; compare Parent Ex. C at p. 1, with Parent Ex. G at p. 1).

Although the assistant principal testified that the student was making progress, there is scant documentary evidence in the hearing record to support this view and there is contradictory evidence that the IHO did not address. To the extent the student's progress is reported on the February 2020 IEP, on all three of the student's OT goals, the third and final report of the student's progress entered in the IEP indicated the reporter "d[id] not anticipate meeting goal" with the

reason noted as "more time needed" (Parent Ex. G at pp. 9-11).<sup>6</sup> The other academic and related service goals had progress updates that indicated, "progress made," "little progress made," "goal not yet met," and "anticipate meeting goal" (*id.* at pp. 7-13). However, all the entries for reporting the student's progress appeared incomplete as they were undated, and although many of the student's annual goals indicated the student's progress would be measured once per quarter, those goals had, at-most, three progress updates completed (*see id.* at pp. 7-11). More strikingly, the student's annual goals in the areas of writing, math, and English Language Arts (ELA) indicated the student's progress would be measured two times per month; however, the IEP only included one entry reporting the student's progress towards those goals (*id.* at pp. 11-13). Moreover, as discussed below, a comparison of the annual goals included in the April 2021 IEP with the annual goals in the February 2020 IEP shows that the student did not achieve the February 2020 IEP annual goals.

For math, the April 2021 CSE recommended an annual goal that targeted the student's ability to order five of the same objects, differing in size only, from longest to shortest with corresponding benchmarks that the student would order three objects by August 2021, four objects by December 2021, and five objects by April 2022; this goal was different from the prior year's math goal that required the student to demonstrate one to one correspondence for up to five items using his preferred communication method (*compare* Parent Ex. C at p. 9, *with* Parent Ex. G at p. 12). However, a review of the April 2021 present levels of performance shows that at that time the 2020 IEP math goal had not yet been achieved, as listed in the academic functioning section, the student "still need[ed] to work on [one] to [one] correspondence counting up to [five]" (*see* Parent Ex. C at p. 3).

In the area of ELA, the April 2021 CSE recommended an annual goal related to the student's ability to participate in a structured activity for up to five minutes with corresponding benchmarks that the student would participate in an activity for two minutes by August 2021, three to four minutes by December 2021, and five minutes by January 2022; this goal was similar to the 2020 IEP ELA goal, although the benchmark included in the April 2021 IEP of maintaining attention for two minutes was less ambitious than the 2020 IEP overall goal of maintaining

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<sup>6</sup> With regard to annual goals, State regulation, consistent with federal regulation, states that "[t]he IEP shall identify when periodic reports on the progress the student is making toward the annual goals (such as through the use of quarterly or other periodic reports that are concurrent with the issuance of report cards) will be provided to the student's parents" (8 NYCRR 200.4[d][2][iii][c]; *see* 34 CFR 300.320[a][3]). The IHO and the parties are reminded that the IHO can require the district to produce the student's educational records, such as progress reports on the student's IEP annual goals from his teachers and related services' providers while the student attended programming offered by the district through its CSEs and CPSEs. Such reports—specifically called for by Congress—are one of the primary focal points that Congress identified for conducting an annual review and revision of a student's IEP and are required by federal law (20 USC § 1415[d][1][A][i][III], [4][A][i]-[ii]). Yet these type of reports are rarely produced in administrative proceedings and are a severely underutilized area of inquiry in substantiating other evidence of a student's progress. In this matter, the February 2020 IEP indicated that periodic reports of the student's progress would be sent to the parents at the same time report cards were issued (Parent Ex. G at p. 13). However, the student's report cards were not included in the hearing record, and it is not clear when or if reports of the student's progress were sent to the parent. Additionally, even if the student received three report cards per school year, only three of the eight annual goals included three reports of the student's progress. Accordingly, the hearing record lacks vital information, that should have been easily available to the district at the time of the hearing, regarding the student's progress towards his annual goals.



attention for three minutes (compare Parent Ex. C at p. 9, with Parent Ex. G at p. 12). Additionally, as reflected in the April 2021 IEP present levels of performance, the student reportedly "maintain[ed] focus in the classroom for [one] to [two] minutes" (Parent Ex. C at p. 3). Therefore, the 2020 IEP goal to maintain attention for three minutes was not achieved as of the April 2021 CSE meeting and the development of the new IEP (Parent Ex. G at p. 12).

For writing, the April 2021 IEP included an annual goal that targeted the student's ability to trace the letters of his name independently with corresponding benchmarks to trace three letters of his name with assistance by August 2021, to trace the first three letters in his name independently by December 2021, and to trace all letters in his name independently by April 2022; this goal was novel in comparison to the prior February 2020 IEP which included a writing goal that the student would follow left to right sequence to connect dots in order to make 10 lines (compare Parent Ex. C at p. 9, with Parent Ex. G. at p. 11). The April 2021 present levels of performance did not reflect specific information about the February 2020 IEP writing goal but reported that the student "struggled with writing" and "required hand over hand assistance to complete a task that involve[d] writing" (Parent Ex. C at p. 3).

With respect to OT, the April 2021 CSE recommended three annual goals for the student, the first related to the student independently tracing six pre-writing shapes (Parent Ex. C at p. 10). The annual goal included corresponding short-term objectives related to independently tracing vertical lines, horizontal lines, circles, and a cross (id.). The objectives were similar to the prior February 2020 IEP OT annual goal that targeted the student's ability to use an appropriate grasp to imitate (rather than trace) horizontal, vertical, and diagonal lines and circular strokes, and form closed circles (compare Parent Ex. C. at p. 10, with Parent Ex. G at p. 9). The April 2021 IEP present levels of performance indicated that the student alternated between an immature and mature grasp when holding a writing utensil and his ability to imitate pre-writing strokes such as circles and vertical and horizontal lines was emerging (Parent Ex. C at p. 6). The same description of the student's pre-writing skills appeared in the February 2020 IEP, suggesting that the student did not make progress or meet his IEP goal in this area (compare Parent Ex. C at p. 6, with Parent Ex. G at p. 4). The second OT annual goal targeted the student's need to "correctly, and safely and independently" use adaptive scissors to cut three simple shapes (Parent Ex. C at p. 10). The corresponding short-term objectives provided that the therapist would help stabilize the paper and provide a varying level of verbal cues to cut lines and one simple shape (id.). The previous February 2020 IEP contained an annual goal that addressed the student using scissors to cut on or near vertical and/or horizontal lines (Parent Ex. G at p. 8). The April 2021 IEP reported that the student was able to "hold and manipulate adaptive scissors to snip but ha[d] difficulty cutting near the lines," thus, in the absence of additional evidence, it appears that the student's February 2020 IEP annual goal to cut on or near lines was not achieved as of the April 2021 CSE meeting (Parent Ex. C at p. 6). The third OT annual goal recommended by the April 2021 CSE targeted the student's ability to attend to a non-preferred tabletop/ADL activity for at least five minutes with no more than three verbal cues with corresponding benchmarks calling for a varying level of breaks and verbal cues (id. at p. 11). Likewise, the February 2020 IEP contained an OT annual goal focused on "maintain[ing] attention to task for at least [two] minutes during [a] tabletop activity following proprioceptive input" (compare District Ex. C at p. 11, with District Ex. G at p. 10). As the April 2021 present levels of performance reported that the student "ha[d] difficulty attending to non-preferred tabletop activities for more than [one] minute," the student's February 2020 CSE

annual goal of "maintain[ing] attention" was not achieved as of the April 2021 CSE meeting (Parent Ex. C at p. 6).

In the area of speech-language development, the April 2021 CSE recommended two annual goals for the student (Parent Ex. C at pp. 11-12). The first annual goal was new compared to the prior IEP and reflected that the student, through use of multimodal means of communication (speech generating device, picture symbols, American Sign Language), would direct the actions "open" and "close" (id. at p. 11). The second annual goal recommended by the April 2021 CSE consisted of rejecting "no" with visual cues, and was similar, although less ambitious, than the student's prior February 2020 IEP annual goal regarding speech-language therapy (id.). Whereas the April 2021 IEP annual goal targeted only one response, rejecting "no" with visual cues, the February 2020 IEP annual goal targeted two responses, affirming "yes" and rejecting "no" with a verbal cue and visual support (compare Parent Ex. C at p. 12, with Parent Ex. G at p. 7). Moreover, as a portion of the annual goal was carried over to the April 2021 IEP, the February 2020 speech-language annual goal targeting "yes" and "no" was not achieved, in part, contrary to the assistant principal's testimony that the student attained the annual goals included in his February 2020 IEP (Tr. p. 108). The April 2021 present levels of performance indicated that the student recently received a speech generating device with a LAMP application and was learning to access the device (parent Ex. C at p. 4). The student was "observed to affirm [y]es with continued support, gestural modeling," "w[ould] access open with modeling," and "continued to benefit from modeling to reject items by accessing no" (Parent Ex. C at p. 5). According to the April 2021 present levels of performance, the student was accessing "open" and "no" and although the hearing record indicated that the student already accessed these two communication responses with modeling, the projected speech and language goals for the 2021-22 IEP were limited to three communication responses (open, close, no) with the provision of varying levels of modeling (Parent Ex. C at pp. 4, 11-12).

Accordingly, based on the above, the evidence in the hearing record indicates that contrary to the assistant principal's testimony, the student did not achieve the annual goals in the 2020 IEP.<sup>7</sup>

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<sup>7</sup> To be clear, the parent did not raise a specific curriculum argument in this matter and therefore it is not, and cannot be, a basis for this decision. Accordingly, the following observations regarding evidence in the record are only for the benefit of the parent and district as they continue to engage in the educational planning process going forward. With respect to the 8:1+1 special class, the parent indicated that throughout remote learning she noticed that the student was provided work that was not at his level. The parent provided examples of assignments that included questions such as "what's an amphibian? [w]hat's a reptile? [w]hat's a farm animal?" even though the student was unable to point out colors or letters (Tr. p. 142). The parent also described a simple art class project that included watching a video and drawing a character; however, at the time, the student was unable to form a circle on his own (Tr. p. 142). The hearing record provided a classroom observation in an ELA class, in which the student lined up the months of the year incorrectly on a smart board activity, without assistance, and incorrectly pointed to the day of the week when asked what day it would be tomorrow (Dist. Ex. 9 at p. 2). It is unclear whether this was a daily calendar activity or whether the activity was ever adapted to accommodate the student's level of functioning. As set forth above, an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (Endrew F., 137 S. Ct. at 999, 1001; see Rowley, 458 U.S. at 206-07). The United State Supreme Court in Endrew F. discussed the standards for provision of a FAPE to students with disabilities and noted that, for a student "fully integrated in the regular classroom, as the Act prefers, what that typically means is providing a level of instruction reasonably calculated to permit advancement through the regular curriculum" (Endrew F., 137 S. Ct. at 1000). However, for a student "not fully integrated in the regular classroom" and "not able to achieve on grade level," the IEP must be "appropriately ambitious in light

Additionally, a comparison of the annual goals included in the February 2020 IEP with the student's present levels of performance as identified in the April 2021 IEP and the April 2021 IEP annual goals shows that the student made at most small gains in the areas targeted by the February 2021 IEP annual goal, with the bulk of the student's annual goals not being attained in math, ELA, OT, and speech-language therapy. The IHO's sole reliance on the broad statements of the assistant principal with regard to the student's rate of progress and achievement was not convincing. Instead of a more thorough examination the detailed evidence regarding the student's progress with specific skills contained in his educational records leads me to conclude that the student was making significantly less progress than found by the IHO.

### 3. Special Factors—Interfering Behaviors

Next, the parent argues that the IHO erred in finding that an alleged decrease in the student's behaviors meant that the district was not required to conduct an FBA or develop a BIP for the student.<sup>8</sup> In support of this contention, the parent argues that both the April 2021 neuropsychological evaluation and documentation within the April 2021 IEP indicated that the student's aggressive behaviors were affecting him academically as well as socially and therefore the district should have conducted an FBA and developed a BIP for the student.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627,

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of his circumstances," and set forth "challenging objectives" (*id.*). Relatedly, annual goals and recommended supports and services included in the IEP must be aligned with the student's strengths, needs, and present levels of performance (see "The Role of the Committee on Special Education in Relation to the Common Core Learning Standards," at pp. 1-2, Office of Special Educ. Field Advisory [June 2014]; see also 34 CFR 300.320[a][1], [2], [4]; 8 NYCRR 200.4[d][2][i], [iii], [v]). To that end, alignment of the IEP with State academic content standards "must guide, and not replace, the individualized decision-making required in the IEP process" (Questions and Answers on Andrew F. v. Douglas County Sch. Dist. Re-1, 71 IDELR 68 [OSEP Dec. 2017]; Dear Colleague Letter, 66 IDELR 227). It may benefit the student for the CSE to review information regarding whether the student's classroom activities are being conducted at his instructional level. Again, these are merely observations, rather than findings regarding the disputed FAPE claims in this proceeding.

<sup>8</sup> In the parent's request for review, in addition to the argument regarding the lack of an FBA and a BIP, the parent argues that the April 2021 IEP failed to address the student's sensory needs (Req. for Rev. at p. 8). In the parent's due process complaint notice, the parent asserted that the neuropsychologist observed that the student "had trouble remaining seated, attempted to leave the testing room several times, and slammed his body into the wall for sensory input" (Parent Ex. A at p. 4). The due process complaint notice further indicated that the neuropsychological evaluation report included a recommendation that the student required "a school with a sensory gym that [the student] c[ould] access throughout the day to manage his behavior" (*id.*). Although the parent did not explicitly make a claim in the due process complaint notice that the student's sensory needs were not addressed in the April 2021 IEP, the parent's allegations related to sensory seeking behavior fit within the parent's argument that the district failed to conduct an FBA for the student, as an FBA would determine the extent to which the student's sensory seeking behavior needed to be addressed in the April 2021 IEP. As noted by the Second Circuit Court of Appeals, "the entire purpose of an FBA is to ensure that the IEP's drafters have sufficient information about the student's behaviors to craft a plan that will appropriately address those behaviors" (R.E., 694 F.3d at 190).

at \*3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at \*8; W.S., 454 F. Supp. 2d at 149-50). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at \*30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

State regulation defines an FBA as the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (id.).

In the April 2021 neuropsychological evaluation report, the neuropsychologist who evaluated the student recommended that the district conduct an FBA (Parent Ex. D at p. 14). Review of the evaluation report shows that within the one-on-one testing environment, the student's behavior was self-directed and he participated in frequent repetitive behaviors that included vocalizations of moaning and humming, hand flapping, flipping objects in his hands, slamming of his body into the wall for sensory input, and stomping his feet while pacing (Parent Ex. D at p. 6). In addition, the report indicated that the student screamed and covered his ears when upset, but was able to calm down after redirection (id.). The student often had difficulty remaining seated and attempted to leave the testing room on several occasions so that he could run in the hallway (id.). In addition, the student perseverated on different items in the testing room (id.). The evaluation report noted that due to these behaviors standardized assessment was discontinued early on and a play-based assessment was administered to obtain additional information on the student's functioning (id. at pp. 6, 12). Given the student's self-directed and repetitive behaviors, the neuropsychologist who evaluated the student recommended that an FBA

be completed in order to develop a BIP (id. at p. 14). The neuropsychologist also recommended that the student's positive behavior be connected to meaningful rewards that were changed frequently (id.). The neuropsychologist further recommended that the student's progress be monitored carefully and his BIP updated regularly by the student's behavior specialist (id.).

Additionally, the April 2021 IEP's description of the student's behavior contained nearly the same language as used in the February 2020 IEP, indicating a lack of behavioral progress and behaviors that continued to impede the student's learning; for example, the April 2021 IEP noted:

[the student] often tantrum[ed] and ha[d] outbursts when he d[id] not get his way. He ha[d] a difficult time transitioning. He w[ould] often have outbursts when he d[id] not want to transition to a different environment, or when he d[id] not want to complete teacher structured, directed tasks and lessons. His outbursts c[ould] range from crying, pushing, spitting, and aggressiveness such as hitting others around him

(Parent Ex. C at p. 5).

The assistant principal testified that the April 2021 CSE saw a decrease in the student's negative behaviors "when there was a routine and consistency" and further testified during cross-examination that an FBA was not conducted for the student because the CSE did not believe that the student met the requirements for an FBA (Tr. pp. 102, 109, 124). The assistant principal opined that use of "positive behavior reinforcement techniques" such as a first/then board and a token board "typically work[ed]" for the student (Tr. p. 125). She also testified that the student "didn't typically display behaviors" and that if he was given a token board "we [] immediately saw a decrease in behavior" (Tr. p. 133). In addition, the social development section of the April 2021 IEP indicated that the student responded well to these techniques, as well as to choice boards, visual schedules, and a cooldown location for the student to look at books; albeit, even with these supports in place, the IEP indicated outbursts and tantrums continued to occur during transitions and during teacher structured directed tasks and lessons (Parent Ex. C. at p. 5). Nevertheless, despite references to the use of positive behavioral reinforcement techniques such as the first/then board, token board, and management needs of positively reinforcing/rewarding appropriate behavior, even small steps, and tracking behaviors to determine triggers (Tr. p. 125; Parent Ex. C at p. 7), the district did not develop the hearing record in relation to the frequency and severity of the identified behaviors, and both the February 2020 IEP and the April 2021 IEP reported that the student had tantrums and outbursts and "his aggressive behaviors [we]re affecting him academically as well as socially" (Parent Exs. C at pp. 5, 7; D at pp. 2, 5).

Additionally, where the documentary evidence in the hearing record does indicate a frequency for the student's behaviors, the documentary evidence directly contradicts the assistant principal's testimony that the student did not typically display behaviors, as the February 2021 teacher report stated that the student "often had tantrums and outbursts" when he did not get his way and the April 2021 IEP noted the student "often ha[d] outbursts" when he did not want to transition or complete teacher structured directed tasks and lessons (Parent Ex. C at p. 5; Dist. Ex. 5 at p. 2). His outbursts as described previously within the April 2021 IEP present levels of performance included crying, pushing, spitting, and aggressiveness such as hitting others (Parent Ex. C at p. 5; Dist. Ex. 5 at p. 2). Moreover, management needs indicated the student's need for an environment providing a calming/cooling down location, positive reinforcing and rewarding of

appropriate behavior, and tracking of behaviors to determine triggers, which is essentially an admission by the CSE in this case that an FBA was needed (Parent Ex. C at p. 7). Additionally, the IEP reported that the student's "aggressive behaviors [we]re affecting him academically as well as socially" (id.). However, the "student needs relating to special factors section" of the April 2021 IEP was checked "no," indicating that the student did not need strategies that included positive behavioral interventions, supports, or other strategies to address behaviors that impeded the student's learning or that of others and that the student did not need a BIP (id.).

Based on the above, the evidence in the hearing record does not support the IHO's decision to rely on the assistant principal's testimony and instead I find that the parent's contention that the district should have conducted an FBA and developed a BIP for the student for the 2021-22 school year is correct.

It is not necessary in this instance to determine whether either one of the two issues above would have singularly risen to the level of a denial of FAPE, upon consideration of all of items analyzed above, I am convinced that the April 2021 IEP did not offer the student a FAPE. In particular, the information in the hearing record demonstrates that the April 2021 CSE continued to carry-over the student's goals from the February 2020 IEP, which exhibited a insufficient progress in achieving many of the student's annual goals. As the student was not making insufficient progress towards his annual goals, the CSE was required to revise the student's IEP to address the lack of progress (see 20 USC ¶1414[d][4][A][ii][I]). Instead of addressing this lack of progress, the hearing record shows that the April 2021 CSE failed to conduct an FBA or develop a BIP while the information in the hearing record available to the April 2021 CSE shows that the CSE was aware of the student's behavioral needs, including the student's tantrums, outbursts, crying, pushing, spitting and aggressive behaviors such as hitting. Under these circumstances, the hearing record supports finding that the April 2021 IEP did not offer the student a FAPE.<sup>9</sup>

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<sup>9</sup> In light of my determination that the district failed to offer the student a FAPE for the 2021-22 school year, it is not necessary to make a detailed determination regarding the appropriateness of the student's related services recommendations. Nonetheless, briefly, with respect to speech-language needs, the student was known to the 2021 CSE as primarily non-verbal, with severe needs in the areas of receptive, expressive, and social communication. The April 2021 IEP reported that the student "trie[d] to mouth words and reproduce[d] single-syllable sounds (Parent Ex. C at p. 3). He was provided a new assistive technology device that provided for increased vocabulary of 84 core words; whereas his previous assistive technology device provided 23 core word cells (see Parent Ex. C at p. 4; see Dist. Ex. 6 at p. 4). The April 2021 IEP reported that the student "benefited from faded support to access familiar vocabulary on his new device," "[the student] need[ed] verbal and visual prompts," and "relied on repetition to learn new skills" (Parent Ex. C at p. 4). Furthermore, the IEP reported within the speech-language section that the student "work[ed] best with constant repetition 1:1 or in a small group setting" (id.). The April 2021 CSE knew the student's speech-language needs, yet the CSE provided the same frequency of three sessions per week of speech-language therapy to address the student's use of a new assistive technology device, to further develop his expressive communication using multimodal communication, and to address his severe impairments across receptive, expressive, and social communication domains. Additionally, with respect to OT, the student had sensory seeking needs and sensory behaviors as described in the April 2021 IEP that indicated the student was very active, liked to run around the classroom, and "s[ought] out increased pressure to the bottom of his chin and use[d] his knuckles or an adult's hand to provide that input"(Parent Ex. C at pp. 3, 6). The neuropsychological evaluation included information on the student's "frequent repetitive behaviors, including vocalizations (e.g., humming, moaning), hand flapping, slamming his body into the wall for sensory input, repeatedly flipping objects in his hands, and stomping his feet while pacing" and "scream[ing] and

### C. Relief

The district has not appealed from the IHO's determinations related to the appropriateness of the Rebecca School or equitable considerations as they relate to the parent's cooperation. Having found that the district failed to offer the student a FAPE for the 2021-22 school year, the inquiry now turns to the remaining issue related to relief—specifically, the amount of tuition reimbursement for the student's attendance at the Rebecca School for the 2021-22 school year.

On appeal, the parent argues that the IHO erred in making a determination that, had the district failed to offer the student a FAPE for the 2021-22 school year, she would be entitled to reimbursement of \$7,550, which is what the parent was obligated to pay to the Rebecca School according to the payment schedule outlined for the period of August 21, 2021 to November 15, 2022.

Here, the IHO noted that the parent was requesting "\$124,417" which is the amount that that she sought to have paid to the Rebecca School (IHO Decision at p. 23). The IHO noted that the payment was subject to the schedule attached as "Addendum A" (*id.*). The IHO further noted that "Addendum A" required the parent to pay the following amounts: a \$50 deposit upon signing of the contract on August 12, 2021, \$25 of which was non-refundable; a payment of \$1,500 due on March 15, 2022, and three payments of \$2,000 due June 1, August 15, and November 15, 2022 (*id.*). Thus, the IHO found that had the district not offered the student a FAPE, the contract between the parent and the Rebecca School obligated the parent to pay \$7,500, which was the amount the district would have been required to pay for tuition, whether as reimbursement upon proof of payment made by the parent or direct funding of the \$2,000 still outstanding under the payment schedule (*id.* at p. 24).

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial

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cover[ing] his ears when upset" (Parent Ex. D at p. 6). Although the April 2021 CSE recommended that the student receive two 30-minute sessions per week of OT, the hearing record was not clear on whether the student's identified needs would be addressed solely by OT services or whether his needs would have also been addressed within the classroom; however, supports for these need areas were not provided within the goal or management need sections of the IEP.

resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at \*11 [S.D.N.Y. Sept. 23, 2013]).

As further described below, the IHO appropriately began to make specific factual findings as to the amount of relief, but left out important aspects of the evidence. With respect to the parent's financial obligation, the hearing record includes an enrollment contract signed by the student's parents in August 2021 for the student's attendance at the Rebecca School for the 2021-22 school year (Parent Ex. P). The IHO failed to discuss that the contract provided that the parents would be responsible for tuition costs for the "full academic year" (id. at p. 2). According to the contract, the cost of the student's tuition for the 2021-22 school year was \$124,417.00 (id. at p. 1). Additionally, while the addendum included a payment schedule totaling \$7,550.00 between August and November 2021, the addendum similarly identified the amount of the student's tuition as \$124,417.00 (id. at p. 5). Additionally, according to the addendum, the parents represented that their financial status qualified them for direct payment of the student's tuition by the district (id. at p. 5). Further, the addendum provided that the parents would seek funding from the district and that if the parents did not qualify for payment of tuition by the district, the parents would remain responsible for costs of the student's tuition per the enrollment contract and the balance of the student's tuition may be due immediately (id. at p. 6). In consideration of all of the terms of the contract and the addendum, it appears the IHO's decision was in error and the parents were financially responsible for the student's full tuition for the student's attendance at the Rebecca School for the 2021-22 school year.

With regard to the parent's ability to pay, since the parents selected the Rebecca School as the unilateral placement and their financial status is at issue, it was the parents' burden of production and persuasion with respect to whether they had the financial resources to "front" the costs of the services (Application of the Dep't of Educ., Appeal No. 21-163; Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). The parent testified at the impartial hearing that she had not made any of the payments under the tuition contract that she executed with the Rebecca School (Tr. pp. 153-154). The parent further testified that she was unable to pay the tuition at the Rebecca School but knew that she was responsible for the costs (Tr. pp. 154-156). However, there is no evidence in the hearing record regarding the parents' financial resources, examples of which are items such as a copy of a recent tax return, convincing evidence of eligibility for low income government programs for families such as food assistance or SSI, or other convincing evidence regarding the parent's assets, liabilities, income, or expenses. In any case, the parent's financial obligation to pay for the Rebecca School for the



entirety of the tuition was not discussed by the IHO and has been established in the evidentiary record, even if the parent failed to establish her lack of financial resources for direct funding.

Based on the above, the IHO erred by limiting relief to ordering the district to reimburse the parent in the amount of \$7,550 which is what the parent was obligated to pay to the Rebecca School as outlined in a payment schedule from August 21, 2021 to November 15, 2022. Accordingly, the IHO's order will be modified to order the district to reimburse the parent for the full cost of the student's tuition at the Rebecca School for the 2021-22 school year upon proof of payment.

## **VII. Conclusion**

Having determined that the district did not offer the student a FAPE for 2021-22 school year, and that neither party appealed from the IHO's determinations that the Rebecca School was an appropriate placement for the student and that equitable considerations supported the parents' request for relief, the necessary inquiry is at an end.

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

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated October 1, 2022, is modified by reversing those portions which found that the district offered the student a FAPE for the 2021-22 school year; and,

**IT IS FURTHER ORDERED** that, upon proof of payment shown the district shall be required to reimburse the parent for the cost of the student's tuition at the Rebecca School for the 2021-22 school year in the amount of \$124,417.00.

**Dated:**            **Albany, New York**  
                         **December 14, 2022**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**