The University of the State of New York

The State Education Department
State Review Officer
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No. 22-177

Application of a STUDENT WITH A DISABILITY, by her 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:
Gutman Vasiliou, LLP, attorneys for petitioner, by Anthoula Vasiliou, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied his request for respondent (the district) to fund the costs of his daughter's home-based applied behavioral analysis (ABA) services for the 2022-23 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Due to the limited nature and disposition of the appeal, a detailed recitation of the student's educational history is unnecessary.

Briefly, the student began receiving 1:1 ABA services from a board-certified behavior analyst (BCBA) with the Manhattan Psychology Group in April 2021 and has attended the Rebecca School since July 2021 (Parent Exs. O at p. 1; Q ¶¶ 1, 4, 8; R ¶ 11). The student was the subject of a prior administrative proceeding which resulted in an unappealed IHO decision dated December 5, 2021 which included, among other things, a finding that the district failed to provide the student with a FAPE for the 2020-21 and 2021-22 school years, an order for the district to fund the cost of the student's tuition at the Rebecca School for the 2021-22 school year, and an order

for the district to fund 10 hours per week of home-based ABA services for the student for the 2021-22 extended school year (Parent Ex. B).

On January 10, 2022, a CSE convened to conduct the student's annual review and develop her IEP, which included the 2022-23 school year (Parent Ex. D at pp. 1, 23; Dist. Ex. 1 at pp. 1, 23).[1] Finding the student eligible for special education and related services as a student with autism, the CSE recommended a 12-month program in a district specialized school in an 8:1+1 special education class for academic subjects with the related services of occupational therapy (OT), physical therapy (PT), speech-language therapy and parent counseling and training (id. at pp. 17-18, 23).

The district sent a prior written notice and school location letter, each dated March 3, 2022, to the parent (Parent Ex. E). The parent contacted the school but was told that they did not have an available seat for the student (Parent Ex. R ¶ 22). The parents executed an enrollment contract dated May 20, 2022 with the Rebecca School for the student's attendance for the 2022-23 school year (Parent L). By letter dated June 16, 2022, the parents stated their "disagreement with the [district's] failure to develop an appropriate IEP" and "failure to provide an appropriate placement recommendation," and notified the district of their intent to unilaterally place the student at the Rebecca School "with 10 hours per week of home-based ABA services" and to seek public funding for the costs of tuition and other services (Parent Ex. G). The district sent the parent another prior written notice and school location letter, each dated June 27, 2022, as well as a notice of participation in the alternate assessment (Parent Ex. H). According to the parent, he contacted the school again but was told that they did not have a seat for the student (Parent Ex. R ¶ 25).

A. Due Process Complaint Notice

By due process complaint notice, dated July 5, 2022, the parent asserted that the district denied the student a free and appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). Initially, the parents requested pendency for the student based on the December 5, 2021 IHO decision (id. at p. 2). Turning to the parent's allegations related to the 2022-23, the parent argued that the district failed to develop appropriate annual goals that addressed all areas of the student's needs, failed to develop an appropriate program and provide a school location letter for the student, failed to provide appropriate related services to the student including ABA therapy, and failed to provide sufficient parent counseling and training (id. at pp. 3-4). The parent further argued that the Rebecca School was an appropriate placement for the student for the 2022-23 school year and equitable considerations weighed in favor of the parents (id. at p. 5). For relief, the parents requested that the district fund the cost of the student's tuition at the Rebecca School, including transportation, and 10 hours per week of home-based ABA services to be provided by the Manhattan Psychology Group for the 2022-23 school year (id. at pp. 5-6).

B. Impartial Hearing Officer Decision

The IHO conducted a prehearing conference on August 17, 2022, before the parties proceeded to an impartial hearing on the merits which convened on September 15, 2022 and

[1] As the hearing record includes duplicate exhibits, this decision will reference the parent's exhibits (Tr. p. 35; see Parent Exs. D; H; F; J; Dist. Exs. 1; 2; 3; 5; 6).

concluded on October 14, 2022 (Tr. pp. 1-77).[2] In a final decision, dated November 17, 2022, the IHO determined that the district failed to meet its burden of proving that it provided the student with a FAPE as it did not present any witnesses or any arguments contesting the parent's assertions regarding the denial of a FAPE, nor did it provide an explanation of why the student was not assigned to a school that could implement the IEP (IHO Decision at pp. 5, 7). The IHO found that the parent met her burden of proving that the Rebecca School was appropriate for the student, based on documentary and testimonial evidence, and showed that the student was placed in a "carefully designed program that [wa]s tailored to [the student's] needs,"; thus, district funding for the costs of the student's tuition was warranted (id. at pp. 5-6). The IHO also found that the parent met his burden of demonstrating that the home-based ABA services were appropriate; however, the IHO found that directing the district to fund those services would not be equitable because the parent "ha[d] not incurred an expense or financial obligation with respect to the said services" noting that the parent "presented no contract, no bills, and no invoices with respect to ABA services," but only an affidavit by the behavior analyst stating that her agency charges an hourly rate of $300 per hour and the district has paid this hourly rate (id. at pp. 6-7). As relief, the IHO ordered the district to pay the costs of the student's tuition at the Rebecca School for the 2022-23 school year and denied the parent's request for other relief including the parent's request for the district to fund ABA services (id. at p.7).

IV. Appeal for State-Level Review

The parent appeals and asserts that the IHO erred in finding that the parent had to present evidence of a financial obligation for the requested home-based ABA services and that the IHO further erred in failing to order the district to fund home-based ABA services for the student. Initially, the parent argues that neither the district nor the IHO raised any question or concern regarding the parent's financial obligation for the home-based services during the impartial hearing; however, the IHO unilaterally raised the issue as an equitable consideration. The parent further argues that the financial obligation to the private agency for the 10 hours per week of home-based ABA services delivered to the student as of the start of the 2022-23 school year lies with the district and not the parent, due to the pendency agreement between the parties. As relief, the parent requests that the IHO decision be reversed with respect to the denial of funding for the home-based ABA services and that the district be ordered to fund 10 hours per week of home-based ABA services for the student provided by the Manhattan Psychology Group at a rate of $300 for the 2022-23 school year.

In an answer, the district argues that the relief ordered by the IHO is sufficient to compensate the student for the deprivation of a FAPE and that the IHO properly denied ABA services due to the lack of an enforceable contract. The district requests that the IHO decision be affirmed and the request for review be dismissed with prejudice.

[2] An uncontested pendency form dated September 13, 2022 stated that the student's pendency program arose from the unappealed December 5, 2021 IHO decision and consisted of a 12-month program at 0the Rebecca School with 10 hours per week of ABA therapy services provided by the Manhattan Psychology Group (Uncontested Pendency Form dated September 13, 2022).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

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

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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).

[3] 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).

VI. Discussion

The sole issues presented on appeal are whether the IHO erred in finding that the parent was required to present evidence of a financial obligation for the requested home-based ABA services and whether the IHO erred in deciding not to order the district to fund the student's home-based ABA services. The district concedes that the IHO properly found the district failed to provide the student with a FAPE for the 2022-23 school year and ordered the district to fund the costs of the student's tuition at the Rebecca School; however, the district asserts that the relief awarded by the IHO was sufficient to compensate the student for the denial of a FAPE, and further that the IHO properly denied funding for home-based ABA services due to the lack of an enforceable contract and evidence of payment by the parent.[4]

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their

[4] As the district has not appealed from the IHO's determination that it failed to offer the student a FAPE for the 2022-23 school year, nor has it appealed from the IHO's determinations that the Rebecca School was an appropriate unilateral placement for the student for the 2022-23 school year or that the parent met his burden and demonstrated that the home-based ABA services were appropriate, these issues have become final and binding upon the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 279.8[c][4]). Additionally, it is worth noting that other IHO and SRO determinations have found that the Rebecca School—supplemented by the student's home program—was appropriate for the student in that it provided educational instruction designed to meet the student's unique needs, supported by such services necessary to permit the student to benefit from instruction (see e.g., SRO Appeal No. 20-132). Further, equitable considerations in relation to the parent's unilateral placement of the student at the Rebecca school was not explicitly addressed by the IHO; however, as this issue was raised in the due process complaint notice but was not raised on appeal, it is deemed abandoned (8 NYCRR 279.8[c][4]).

concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Initially, the district argues that the IHO's award should be upheld because the award of the cost of the student's tuition at the Rebecca School adequately compensated the student for the denial of FAPE must first be addressed. However, the district does not explain how the IHO's finding that the student's program and placement at Rebecca along with the 10 hours per week of home-based ABA services was appropriate for the student for the 2022-23 school year can be separated. As determined by the IHO, the parent presented evidence that the 10 hours per week of ABA services were appropriate for the student and, during the hearing, the district did not present any contrary evidence or counter argument to the parent's position (IHO Decision at p. 6; see Parent Ex. Q at ¶¶ 17-21). Although, an appropriate amount of reimbursement bears a relationship to the services the district would have been required to furnish and "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K., 674 Fed. App'x at 101), the district has not presented any evidence or argument that ABA services were not necessary for the student to receive a FAPE. Accordingly, there is no basis to deny payment for ABA services because they were not necessary for the student to receive an educational benefit during the 2022-23 school year.

With respect to the request for payment of the home-based ABA services, the parent asserts that while neither the district nor the IHO raised any question or concern regarding the parent's financial obligation for the home-based services during the impartial hearing, the IHO "unilaterally raised an issue of equities" in his decision. Here, after finding that the home-based ABA services were appropriate, the IHO went on to find that directing the district to pay for those services "would not be equitable" because the parent "has not incurred an expense or financial obligation with respect to the said services" because the parent "presented no contract, no bills, and no invoices with respect to ABA services," citing to a prior State level administrative opinion for the position "that the district was not obligated to fund a private provider where the parent presented inadequate proof of costs or a financial obligation" (IHO Decision at pp. 6-7, citing Application of a Student with a Disability, Appeal No. 21-028). For the reasons set forth below, in this instance, the IHO erred in determining that the parent was required to present evidence of a financial obligation for the requested home-based ABA services.

Initially, Application of a Student with a Disability, Appeal No. 21-028 is distinguishable because it dealt with a parent who privately obtained special education services for a student after the district in that matter failed to deliver the services identified in the student's educational program. As the parent, in Application of a Student with a Disability, Appeal No. 21-028, did not present sufficient evidence to demonstrate that she was financially responsible for the special

education services delivered to the student for which she sought direct payment from the district, she was denied relief (id.).

In the present matter, the student was the subject of a previous IHO decision which included a finding that the district failed to provide the student with a FAPE for the 2020-21 and 2021-22 school years, an order that the district fund the student's tuition at her unilateral placement—the student having been placed at Rebecca since July 2021, and an order for the district to fund 10 hours per week of home-based ABA services for the 2021-22 extended school year—the student having received ABA services since April 2021 from a BCBA working for a private provider (see Parent Exs. B; O at p. 1; Q ¶¶ 1, 4, 8; R ¶ 11).

As noted above, the district agreed that the student's program during the pendency of this proceeding is based on the December 5, 2021 IHO decision and consists of a 12-month program at the Rebecca School with 10 hours per week of ABA services provided by the Manhattan Psychology Group (Uncontested Pendency Form dated September 13, 2022). Accordingly, as of the commencement of this proceeding, the district has been responsible for paying for the costs of the student's at-home services. Direct testimony by affidavit of the student's ABA provider indicated that the district's implementation unit "regularly pays" the hourly rate of $300 per hour (Parent Ex. Q ¶ 6). She also testified that she has provided ABA therapy to the student based on a prior IHO order and began working with student in April 2021; further, as of the date of her affidavit, she provided 10 hours per week of at-home ABA services to the student and she recommended that the student continue to receive the 10 hours per week of at-home ABA services (Parent Ex. Q ¶¶ 1, 7-9, ¶ 19).

As argued by the parent, when a student is receiving services pursuant to pendency, the district is obligated to deliver or fund those services and a parent is not required to show a financial obligation for services the district was required to fund (see Application of a Student with a Disability, Appeal No. 21-245 [in discussing services delivered to the student under pendency, it was determined that there was no remaining dispute as to the provision of, or payment for the services already provided to the student under pendency]; Application of a Student with a Disability, Appeal No. 20-042 [discussion of rate for services only addressed services provided prior to the commencement of pendency, after which point district was obligated for payment]). Accordingly, the parent's failure to submit a contract for the ABA services delivered to the student during the 2022-23 school year is not a bar to funding for those services. Additionally, as the parent has not been financially obligated to deliver those services up to this point in time, it does not follow that a contract should be required for the student to receive those services, in the same manner as the student has previously received them, through the end of the 2022-23 school year. Therefore, the district will be directed to continue to fund the student's ABA services through the 2022-23 school year in the same manner as they have been funded during the pendency of this proceeding.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year and that the unilateral program at Rebecca and the home-based ABA services program were an

appropriate unilateral placement, and having reversed the IHO and found that equitable considerations weighed in favor of the parent's request for relief, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 17, 2022 is modified by reversing that portion which denied the parent's request for the district to fund ABA services for the student for the 2022-23 school year because no expense or financial obligation was incurred by the parent; and

IT IS FURTHER ORDERED that the district is required to fund the costs of the student's home-based ABA services program for the 2022-23 school year, as outlined in this decision, directly or pursuant to an agreement with the provider upon reasonable proof of delivery of services during the balance of the 12-month 2022-23 school year.

Dated: **Albany, New York**
March 2, 2023

STEVEN KROLAK
STATE REVIEW OFFICER