The University of the State of New York

The State Education Department
State Review Officer
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No. 24-034

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:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Joseph Sulpizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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, in part, her request for relief for respondent's (the district's) failure to offer the student an appropriate educational program for the 2023-24 school year. The appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. The parties have been engaged in administrative litigation involving events that span several school years. Briefly, the CSE convened on October 11, 2022, determined the student was eligible for special education as a student with autism, and formulated the student's IEP with a projected implementation date of

October 25, 2022 and a projected date of annual review of October 11, 2023 (see generally Parent Ex. B).[1]

On October 14, 2022, the parent initiated a due process proceeding challenging the student's preceding November 2021 IEP for the student but that IEP is not subject of the parties present dispute (Parent Ex. L at p 3). On April 27, 2023, the IHO assigned to the prior proceeding regarding the 2022-23 school year found that the district denied the student a FAPE for the 2022-23 school year, ordered the district to fund the student's unilateral placement at the Atlas School (Atlas) during the 2022-23 school year, and ordered the district to "fund the cost of 10 hours per week of home-based ABA therapy services for the [s]tudent by a provider of the [p]arent's choosing at a market rate not to exceed $330 per hour for the 2022-2023 school year" (Parent Ex. L at pp. 13, 20).

The parent next disagreed with the CSE's recommendations contained in the October 2022 IEP, and complained at that point that the district had not identified a particular public school site to which the district assigned the student to attend for the 2023-24 school year and, as a result, in a June 16, 2023 email, notified the district of her intent to unilaterally place the student at the Atlas School (Atlas) and seek public funding for that placement (see Parent Ex. F). However, toward the conclusion of the 2022-23 school year while the student was attending Alas, the district sent the parent a prior written notice and school location letter dated June 23, 2023 which identified the particular public school to which the district had assigned the student to receive services for the beginning portion of 2023-24 school year (Dist. Exs. 3; 4). In a second due process complaint notice, dated July 6, 2023, the parent once again alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and, as relief, requested funding for the student's unilateral placement of the student at Atlas, reimbursement for transportation expenses, and funding for 10 hours per week of at-home applied behavior analysis (ABA) services (see Parent Ex. A).

On July 26, 2023, the district agreed that the program ordered by the IHO in the prior proceeding for the 2022-23 school year "should be implemented as pendency" in this proceeding as of July 6, 2023 (SRO Ex. A). According to the pendency implementation form, the Manhattan Psychology Group would provide the student's home-based ABA services at a rate of $330 per hour (id.).

A pre-hearing conference in this matter was held on August 11, 2023 (Tr. pp. 1-11). An impartial hearing then convened on September 14, 2023 and concluded on November 8, 2023 after three days of hearings (Tr. pp. 12-157). In a decision dated December 29, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that Atlas was an appropriate unilateral placement for the student for the 2023-24 school year, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement and transportation expenses (IHO Decision at pp. 5-7). However, the IHO determined that although the parent presented sufficient evidence to show that the home-based ABA services were appropriate, in assessing equitable considerations, the IHO found that the

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

parent had "not shown that she ha[d] incurred any expense or financial obligation" for the 10 hours per week of the student's home-based ABA instruction, noting that the hearing record did not include any contract, bills, or invoices (id. at pp. 6-7). Therefore, the IHO denied the parent's request for funding of the home-based ABA services (id. at pp. 6-7). As relief, the IHO ordered the district to directly fund the student's unilateral placement at Atlas for the 2023-24 school year and to reimburse the parent $203.68 for her transportation expenses (id. at p. 7).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail here. The essence of the parties' dispute on appeal is whether the IHO erred in finding that the parent had to present evidence of a financial obligation for the student's home-based ABA services that were being provided pursuant to a pendency order and whether the IHO erred in failing to order the district to fund the home-based ABA services for the student for the 2023-24 school year.

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. 386, 399 [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., 580 U.S. at 404). 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., 580 U.S. at 403 [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]).[2]

[2] 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., 580 U.S. at 402).

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

The district has not appealed from the IHO's determinations that it failed to offer the student a FAPE for the 2023-24 school year, that Atlas was an appropriate unilateral placement for the student, and that the student's home-based ABA services were appropriate, nor has it appealed from the IHO's order that the district reimburse the parent for her incurred transportation expenses of $203.68. Therefore, 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]).[3]

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 argues 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.

The IHO determined that the parent was not entitled to funding for the student's home-based ABA services on equitable grounds (IHO Decision at p. 7). 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

[3] 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 2023-24 school year.

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 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).

With respect to the request for payment of the home-based ABA services, the parent asserts that at no point during the impartial hearing did the IHO discuss or address concerns regarding funding an award for the student's home-based ABA services (Req. for Rev. ¶ 16). On December 19, 2023, after the hearing concluded, the IHO directed the parties "to brief the issue of whether [home-based ABA services] funding c[ould] be awarded in the absence of a contract between the [parent] and the ABA service provider" (December 19, 2023 IHO Interim Decision). The parent's counsel submitted a brief on the issue to the IHO on December 26, 2023 (SRO Ex. C). The district did not submit a brief (Req. for Rev. ¶ 16). In his decision, after finding that the home-based ABA services were appropriate, the IHO went on to find that the district "committed the initial wrongdoing by failing to provide the [s]tudent with appropriate services; however, without sufficient proof of a financial injury suffered by the [parent] an order directing the [district] to pay a non-party provider [wa]s unwarranted" because the parent "presented no contract, no bills, and no invoices with respect to the at-home 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 p. 7, citing Application of a Student with a Disability, Appeal No. 21-028). I understand the concerns of the IHO and they are similar to the concerns presented by the district to the Second Circuit Court of

Appeals in E.M. v. New York City Dep't of Educ. (758 F.3d 442).[4] The IHO was correct not to dismiss such concerns lightly. However, for the reasons set forth below, in this instance, I differ from the IHO's resolution of the matter because I believe a middle ground was available that the IHO may have overlooked, albeit it is not an avenue of relief that is well developed in administrative or judicial cases in this State.

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. Because 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 circumstances are slightly different. This 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 2022-23 school year, an order that the district fund the student's tuition at her unilateral placement—the student having been placed at Atlas since July 2021 and, notably, an order for the district to fund 10 hours per week of home-based ABA services for the 2022-23 extended school year—the student having received home-based ABA services from a private ABA provider after completion of an ABA skills assessment and a functional behavioral assessment (FBA) in February 2021 (see Tr. pp. 96-97; C at p. 1; D at p. 1; L at pp. 20-21).

As noted above, the district agreed that the student's program during the pendency of this proceeding, beginning with the commencement of this proceeding on July 6, 2023, is based on the April 27, 2023 IHO decision regarding the 2022-23 school year, which includes a 12-month program at Atlas along with 10 hours per week of ABA services provided by the Manhattan Psychology Group at a rate of $330 an hour (SRO Ex. C). Accordingly, up to this point during the 2023-24 school year, the district has been responsible for paying for the costs of the student's at-home ABA services. To that end, direct testimony by the student's ABA provider indicated that he has been proving the student with home-based ABA services for over two years (Tr. pp. 96-97,

[4] In E.M. the IHO and the district were concerned about an alleged lack of financial injury regarding private services unilaterally selected by the parent. The Second Circuit discussed much of the case in terms of the Article III case and controversy provisions in the Constitution that affect the jurisdiction of the courts, which is certainly paramount at the judicial action stage of litigation, is arguably not the same precise concern that was identified at the administrative level. However, the E.M. Court also found that the administrative officers erred as a factual matter because the parent did have a contract that was sufficient to find actual financial injury and thus did not need to decide the broader question of whether or not the IHO was correct in holding that the parents should, as a general matter, be prepared to show some degree of financial obligation or risk in the administrative forum when unilaterally obtaining services without a school district's consent. In this case everyone agrees there is no contract, but there was an obligation on the part of the district pursuant to pendency, which only lasts as long as the proceedings endure and ceases thereafter. The question for the administrative hearing officers has not gone away and is more a question under IDEA of whether a parent may use the administrative forum to pursue relief for a third party that precluded by the statute from using the due process procedures is itself and by the same token whether the third party should use a different forum to recover costs that should have been borne by the district.

100-01), and further confirmed that the student was in fact receiving 10 hours per week of ABA services through pendency (Tr. p. 101).

As noted 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. 22-177 [parent did not have to provide proof of a financial obligation to support request for funding of ABA services for remainder of school year at issue when those services had been delivered to student through pendency for a portion of the school year]; 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]). Thus up until this point, the parent was not required to incur any financial responsibility because the district was required to bear costs under the provisions of the IDEA.

As the parent was not required to enter into a contract for the home-based ABA services up to this point in time, it does not follow that the parent, as an equitable matter, should be denied all relief with respect to the student's receipt of those services, and instead the student should continue to receive them in a similar manner as the student has previously received them, through the end of the 2023-24 school year. But how and by whom they should be provided does not have to be only on the parent's terms.

Ultimately, putting aside pendency, the parent's request for relief in the form of 10 hours per week of home-based ABA services may be more addressed by requiring the district to prospectively deliver 10 hours per week of home-based ABA services to the student for the remainder of the 2023-24 school year. The parent's failure to submit a contract for the ABA services delivered to the student during the 2023-24 school year is not a bar to relief including delivery or funding for those services for the remainder of the school year. Accordingly, I will order the district to provide the student with 10 hours per week of home-based ABA services for the remainder of the 2023-24 school year, unless the parties agree otherwise.

VII. Conclusion

Having determined that neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year and that the unilateral program at Atlas, including the home-based ABA services program the student has received through pendency, were an appropriate unilateral placement for the student, and having reached a different conclusion than the IHO in terms of whether equitable considerations weigh in favor of the parent's request for relief, including the 10 hours per week of home-based ABA services, 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 TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 29, 2023 is modified by reversing that portion which denied the parent's request for the district to fund ABA services for the student for the 2023-24 school year because no expense or financial obligation was incurred by the parent; and

IT IS FURTHER ORDERED that the district shall provide the student with 10 hours per week of home-based ABA services for the remainder of the 2023-24 school year, unless the parties otherwise agree.

Dated: **Albany, New York**
March 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER