



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-403

**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 Ana Ramishvili, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 that portion of a decision of an impartial hearing officer (IHO) which denied her request for respondent (the district) to fund the costs of her daughter's home-based services for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that the district failed to recommend an appropriate educational program for the student and ordered it to fund the student's tuition costs at Manhattan Children's Center (MCC) for the 2023-24 school year. The appeal must be dismissed. The cross-appeal must be dismissed.

### **II. Overview—Administrative Procedures**

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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 in this case has continuously attended MCC since July 2021 (see Parent Ex. G at p. 1).<sup>1</sup> In March 2023, the district reevaluated the student, pursuant to a directive in a "Stipulation and Order," dated June 24, 2021 (June 2021 Stipulation) (Parent Ex. DD ¶ 21; see

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

generally Dist. Exs. 4-7). More specifically, the district was ordered to complete a social history, a psychoeducational evaluation, a bilingual speech-language evaluation, an occupational therapy (OT) evaluation, and a physical therapy (PT) evaluation of the student, "as well as any other evaluations deemed necessary by [a] CSE" (Parent Ex. DD ¶ 21). The June 2021 Stipulation also required the district to provide the parent's attorney with copies of the completed evaluations by "January 31, 2023, for the 2023-2024 school year IEP meeting" (*id.*).

By due process complaint notice dated April 23, 2023, the parent challenged the appropriateness of the district's evaluations of the student conducted in March 2023, and as relief, requested independent educational evaluations (IEEs) at public expense (*see* IHO Ex. VIII at pp. 2-4, 7-8). The district thereafter filed its own due process complaint notice, dated May 9, 2023, to demonstrate the appropriateness of the March 2023 evaluations of the student (*id.* at pp. 2, 8). The IHO assigned to the parent's due process complaint notice issued an order, dated May 11, 2023, consolidating the two due process complaint notices (*id.* at p. 2).<sup>2</sup>

On May 31, 2023, a CSE convened to conduct the student's annual review and develop an IEP for the 2023-24 school year (*see* Dist. Ex. 1 at pp. 1, 39). To develop the student's IEP, the May 2021 CSE relied on the district's evaluations completed in March 2023 (i.e., March 2023 psychoeducational, March 2023 social history update, March 2023 OT, and March 2023 speech-language), as well as evaluative information obtained from MCC (i.e., OT progress report, speech-language therapy progress report, classroom progress report, a functional behavior assessment [FBA] report, a behavior intervention plan [BIP], and a classroom goals report) (*id.* at p. 1; *see also* Dist. Ex. 2 at p. 2; *see generally* Parent Exs. G-I; K-M; Dist. Exs. 4-7). Finding that the student remained eligible for special education as a student with autism, the May 2023 CSE recommended 12-month programming, consisting of a 6:1+1 special class placement and the following related services (all school-based and all delivered in English): two 30-minute sessions per week of individual counseling, two 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a group, one 30-minute session per week of individual PT, three 30-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of speech-language therapy in a group, and one 60-minute session per month of parent counseling and training therapy (group) (*see* Dist. Ex. 1 at pp. 32-33).<sup>3</sup> In addition, the May 2023 CSE recommended the services of a full-time, individual paraprofessional and, as supports for school personnel on behalf of the student, recommended four 60-minute sessions per month of supervision services by a Board Certified Behavior Analyst (BCBA) (*id.* at p. 33).

By letter dated June 21, 2023, the parent notified the district of her intentions to unilaterally place the student at MCC for the 2023-24 school year (12-month program) and to seek reimbursement for the costs of the student's tuition at MCC (*see* Parent Ex. C at p. 1). The parent further indicated that, in addition to attending MCC for the 2023-24 school year, the student would continue to receive home-based services consisting of individual applied behavioral analysis

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<sup>2</sup> The same IHO presided over the parties' prior matter related to the parent's request for IEEs and the instant administrative proceeding (*compare* IHO Ex. VIII at p. 1, *with* IHO Decision at p. 1).

<sup>3</sup> The student's eligibility for special education programs and related services as a student with autism is not in dispute (*see* 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

(ABA) services (seven and one-half hours per week), bilingual speech-language therapy (three hours per week), and BCBA supervision services (four hours per month) (*id.*).

On June 27, 2023, the parent executed a "School and Tuition Management Agreements" ("Summer 2023-Spring 2024 School Year") with MCC for the student's attendance during the 2023-24 school year (12-month program), which began in July 2023 and concluded in June 2024 (Parent Ex. S at pp. 1, 4-5).<sup>4</sup> The evidence in the hearing record reflects that the student began attending MCC on July 10, 2023 for the 2023-24 school year (*see* Parent Ex. T).

In a decision dated September 1, 2023 (September 2023 IHO decision), the IHO determined that the district's March 2023 psychoeducational evaluation was insufficient, noting specifically that the evaluation "did not address significant areas of [the s]tudent's known areas of disability, let alone leave room for the discernment of additional areas of suspected disability" (IHO Ex. VIII at pp. 10-11). The IHO also found that the district's March 2023 speech-language evaluation was also insufficient, noting that it "was not truly a bilingual evaluation" (*id.* at p. 13). As relief, the IHO ordered the district to fund the costs of the parent's neuropsychological IEE and bilingual speech-language IEE, and for the parent to provide the district with copies of the IEE evaluation reports (*id.* at p. 16). In addition, the IHO ordered the district to "reconvene a CSE within ten (10) school days after receipt of the [IEE] evaluation reports and reconsider [the s]tudent's IEP in light of such reports" (*id.*).<sup>5</sup>

On October 24, 2023, the parent executed a "Parental Guarantee of Payment" with a private speech-language provider to deliver three hours per week of home-based, bilingual speech-language therapy services to the student for the 2023-24 school year (12-month program) (*see* Parent Ex. U at pp. 1-2). According to the agreement, the provider charged \$180.00 per hour for services, which would be delivered to the student from "July 1, 2023 to June 30, 2024" (*id.* at p. 1 [emphasis in original]).

Evidence in the hearing record reflects that, by email to the district dated December 13, 2023, the parent's attorney forwarded copies of the student's neuropsychological IEE report (completed on July 3, 2023) and bilingual speech-language IEE report (completed on December 12, 2023) to the district (*see* Parent Ex. E at p. 1; *see generally* Parent Exs. F; EE).

On January 10, 2024, the parent executed a "Parental Guarantee of Payment" with "MichelleRG Speech Services, Inc.," (MichelleRG agency) to deliver the student's home-based bilingual speech-language therapy services for the 2023-24 school year (three hours per week) from "December 1, 2023 to June 30, 2024" due to the unavailability of the student's initial speech-language therapy provider (Parent Ex. V at pp. 1, 3 [emphasis in original]). According to the agreement, the new provider charged \$180.00 per hour for services (*id.* at p. 1).

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<sup>4</sup> Given the student's date of birth, it appears that she would have been considered, chronologically, as a fourth grade student during the 2023-24 school year (*see* Parent Ex. A at p. 1; *see also* Dist. Exs. 5 at p. 1; 6 at p. 1).

<sup>5</sup> Neither party appealed the September 2023 IHO decision.

## A. Due Process Complaint Notice and Subsequent Events

By due process complaint notice dated February 23, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural and substantive violations (see Parent Ex. A at pp. 1, 3-7). Initially, the parent requested an order directing the district to provide the student with pendency services based on a "Stipulation and Order," dated June 24, 2021 (June 2021 Stipulation), wherein the district "agreed to fund three weekly hours of bilingual speech and language [] therapy, seven-and-half (sic) weekly hours of individual at-home ABA services, and four monthly hours of supervision by a BCBA" (id. at p. 2).<sup>6</sup> According to the parent, the district also agreed within the June 2021 Stipulation to "fund [the student's] tuition at MCC," and to "provide specialized transportation with one-to-one (1:1) aide and if necessary, fund an alternative transportation service for [the student] up to \$1,000.00 each school year" (id.).<sup>7</sup> As relevant to this appeal, the parent asserted that the district failed to "appropriately and comprehensively" evaluate the student and relatedly, failed to use the evaluative information to develop the student's IEP (id. at pp. 3-4). With regard to the student's unilateral placement, the parent requested, as part of her relief, a determination that MCC, together with home-based services consisting of bilingual speech-language therapy (three hours per week), ABA (seven and one-half hours per week), and BCBA supervision of the student's home-based ABA services (four hours per month), constituted an appropriate unilateral placement for the student for the 2023-24 school year (id. at p. 8). The parent also sought to be reimbursed for the costs of providing the student with "school-time foods" (id.).

On March 7, 2024, the parent executed a "Parental Guarantee of Payment" with "Kid Success, Inc." to deliver the student's home-based ABA services (seven and one-half hours per week) and home-based BCBA supervision services (four hours per month) for the 2023-24 school year from "July 1, 2023 to June 30, 2024" (Parent Ex. W at pp. 1-2 [emphasis in original]). According to the agreement, the agency charged \$150.00 per hour for ABA services and \$200.00 per hour for the BCBA supervision services (id. at p. 1).

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<sup>6</sup> On March 14, 2024, a "[district] Reviewer" executed a "Pendency Implementation Form," thereby agreeing to provide the student with the following as pendency services, based on the June 2021 Stipulation: payment of tuition at MCC (12-month program), three hours per week of bilingual speech-language therapy (12-month program, at a rate of \$180.00 per hour to a specified private provider/agency), seven and one-half hours per week of ABA services (12-month program, at a rate of \$126.00 per hour to a specified private provider/agency), and four hours per month of BCBA supervision services (12-month program, at a rate of \$150.00 per hour to a specified private provider/agency) (Pendency Impl. Form). The district indicated on the form that the student's pendency services began as of the date of the parent's due process complaint notice, February 23, 2024 (id.).

<sup>7</sup> The June 2021 Stipulation was entered into the hearing record as evidence (see generally Parent Ex. DD). According to the June 2021 Stipulation, the parties agreed that, for purposes of pendency, the "agreed-upon recommended program for [the student] consist[ed] of MCC and related services (i.e., 7.5 weekly hours of ABA, four monthly hours of BCBA, and three weekly hours of bilingual speech-language therapy) as set forth in paragraphs '3,' '4,' and '5' for the 2021-2022 and 2022-23 School Years" (id. ¶¶ 3-5, 22).

## B. Impartial Hearing Officer Decision

On March 27, 2024, the parties proceeded to an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Mar. 27, 2024 Tr. p. 1). The impartial hearing concluded on June 13, 2024, after five total days of proceedings (see June 13, 2024 Tr. p. 146). In a decision dated August 16, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year (see IHO Decision at pp. 6-8). In support of this determination, the IHO noted that, in the development of the May 2023 IEP, the CSE "relied to a significant extent on the Classroom progress report, FBA, BIP, OT progress report, [speech-language therapy] progress report and Classroom Goals report" from MCC, as well as input from the parent and MCC providers who attended the meeting (id. at p. 8). Although the IHO found that the district "provided extensive documentary evidence" and a "cogent explanation for the decisions" made in developing the May 2023 IEP, the IHO nonetheless concluded that, "for the same reasons I ruled in the [September 2023 IHO decision] that the [d]istrict failed to conduct sufficient evaluations," the IHO was now "constrained" to conclude that the May 2023 IEP did not offer the student a FAPE (id.). The IHO indicated that a district "must consider, but [wa]s not required to adopt the recommendations of [p]arent's private evaluators," and that it was "possible that the CSE would have recommended the same program and placement after considering the results of the additional evaluations" that had been ordered in the September 2023 IHO decision (id.). However, the IHO further noted that the district's sole witness—the school psychologist who participated in the May 2023 CSE meeting—testified that "he was not aware of any subsequent evaluations and was not involved in any subsequent IEP meeting" (id.). Consequently, the IHO concluded that the district failed to offer the student a FAPE for the 2023-24 school year (id.).

Next, the IHO turned to examine the appropriateness of the parent's unilateral placement of the student at MCC, together with home-based speech-language therapy and home-based ABA services (see IHO Decision at pp. 8-13). First, the IHO addressed the student's placement at MCC (id. at pp. 9-10). The IHO found that MCC provided the student with a "full-day program of ABA-based instruction using a 'transdisciplinary model' that incorporate[d] ABA, special education, speech-language and occupational therapies, and family collaboration to provide an individualized program for each student" (id. at p. 9). The IHO noted that the student attended a 7:1+2 special class placement and received OT, speech-language therapy, and ABA services, which targeted the student's "academic skills," "social and communication skills," and her "activities of daily living" skills (id. at pp. 9-10). According to the IHO, MCC also provided the student with a "meaningful opportunity to engage with non-disabled peers" through pairings with a "non-disabled high school 'peer buddy'" (id. at p. 10). Under the "totality of circumstances," the IHO found that although a parent was not required to establish that the student made progress, the hearing record included "persuasive evidence" that the student made progress "across all domains" during the 2023-24 school year (id.). As a result, the IHO found that MCC was an appropriate unilateral placement for the student (id.).

Next, the IHO examined the home-based services the student received as part of the unilateral placement (see IHO Decision at p. 10). Initially, the IHO noted that home-based services were a "necessary component of an educational program when they [we]re necessary to enable the student to access education at school" (id.). With respect to the home-based ABA services—as well as the home-based BCBA supervision services—the IHO found that the student had been receiving seven and one-half hours per week of ABA services and four hours per month of BCBA

supervision services since "February 2021 pursuant to 'a compensatory service bank from a previous impartial hearing'" (*id.*, citing Parent Ex. AA ¶¶ 6, 11). Next, the IHO noted that although the home-based ABA provider had completed a "40-hour training under the behavioral analyst credentialing board for behavioral technicians," this fell "short of attesting that this person ha[d] actually been licensed" (IHO Decision at p. 10). As found by the IHO, the home-based BCBA testified that the student's home-based ABA services had been reduced from seven and one-half hours per week to three hours per week in June 2023 "because pendency ended and they did not want to 'exhaust that bank' of compensatory hours" (*id.* at p. 11). In addition, the IHO noted that the home-based BCBA further testified that, with the reduced hours of ABA, the student's "'problem behaviors' increased and there was a 'decline in the emittance of appropriate behaviors'" (*id.*). For example, the home-based BCBA pointed to the student's interfering behaviors, such as "face-pressing" and "accepting 'no' and tolerating delay of gratification," as increasing in frequency due to the reduction in home-based ABA services (*id.*). However, when pendency services were instituted in or around April 2024 and the student's ABA services were restored to seven and one-half hours per week, the home-based, ABA agency director (director) testified that the student's interfering behaviors then began to decrease around mid-May 2024 (*id.*).

Next, the IHO noted that, generally, one goal of ABA services was to "systematically fade the services as the child buil[t] independent skills" (IHO Decision at p. 11). However, according to the director's testimony, the student was "not ready for services to fade" (*id.*). The IHO indicated that the director "recognized that the reduced program was not appropriate" for the student (*id.*).

In light of the foregoing, the IHO concluded that the home-based ABA services and related home-based BCBA supervision services were not appropriate "as delivered" from July 2023 through April 2024 (IHO Decision at pp. 11-12). In addition, the IHO indicated that, "[a]s discussed above, the day program at [MCC] provide[d] ABA support," and MCC's reports demonstrated that the student was "able to engage at school and [wa]s making progress" (*id.* at p. 11). Thus, the IHO found "no basis in the record to conclude that the [s]tudent's progress at school [wa]s dependent on her receipt of home-based services," and moreover, the evidence in the hearing record demonstrated that the student "made progress at school across domains" and there was no evidence that "any change in [the s]tudent's in-school performance correspond[ed] to either the reduction or increase in home-based services" (*id.*).

Additionally, the IHO noted that it was "significant that the home ABA services were being provided from a bank of compensatory hours awarded in prior litigation," and as such, were not "really a component of a unilateral placement" (IHO Decision at p. 12). However, the IHO further noted that, to the extent that the district was obligated to fund such services, the district's obligation remained in place and "[w]hatever past deprivation was to be remedied by these services [wa]s not before [the IHO]" (*id.*). According to the IHO, it appeared that the "home-based services being provided by [the] ABA Agency [we]re not accomplishing the goal of that remedial award" (*id.*). As a final point, the IHO indicated that while the district was obligated to fund seven and one-half hours per week of home-based ABA services pursuant to pendency, the district was not required to pay for services the student did not receive, referencing the fact that the agency had reduced the home-based ABA services to three hours per week "months before this action was filed" in February 2024 (*id.*).

Next, the IHO addressed the appropriateness of the student's home-based, bilingual speech-language therapy services (see IHO Decision at pp. 12-13). Noting that these services were delivered to the student by two different providers during the 2023-24 school year, the IHO indicated that the first speech-language provider—who had worked with the student since 2019—had been initially providing services to the student as compensatory educational services and thereafter, provided bilingual speech-language services to the student until November 2023 (*id.* at p. 12). The IHO found that, according to the evidence in the hearing record, the second home-based, bilingual speech-language provider began delivering services to the student on February 6, 2024 "remotely, via Zoom" (*id.*). The IHO noted that, according to the testimony from the second speech-language provider, when she delivered services, the student would sometimes become "non-compliant and w[ould] either shut down and not say anything, or w[ould] cry, or w[ould] say things that [we]re scripted and off-topic" (*id.*). The second speech-language provider testified that she worked on "'reading comprehension, just getting [the student] to participate and read' as well as work[ing] on taking other people's perspectives, thinking about something before she sa[id] it, and working on how to cope with different social situations" (*id.*). According to the second speech-language provider, it was challenging, at times, to work on skills with the student due to her 'non-compliant behaviors,' and therefore, they got more done on some days than on others (*id.*). The IHO noted that the home-based ABA provider was not present during the home-based speech-language therapy services, and the second speech-language provider was not trained in ABA and she did not "confer or collaborate with any of [the s]tudent's other providers" (*id.* at pp. 12-13). The IHO further noted that the second speech-language provider "would not consider working" with the student in-person, "because they live[d] too far from each other" (*id.* at p. 13). Significantly, the IHO found that, "in the [four] months [that the second speech-language provider] ha[d] been working with [the s]tudent, [the provider] ha[d] had significant difficulty engaging with [the s]tudent and ha[d] not developed any plan for remediating that situation" (*id.*).

Next, the IHO found that, when providing services to the student, the second speech-language provider worked with her in "English and in Spanish" (IHO Decision at p. 13). The IHO noted that, when reciting "scripted things," the evidence reflected that the student "typically" used English, but would "sometimes" translate them into Spanish (*id.*). The IHO further noted that the student could type in "both English and Spanish, and her typing [wa]s 'quick'" (*id.*).

In light of the foregoing, the IHO concluded that the home-based, bilingual speech-language therapy services were "not a necessary part of an appropriate unilateral placement" (IHO Decision at p. 13). The IHO indicated that the student was receiving "comprehensive and appropriate services in the day program at [MCC]," and the hearing record lacked any evidence that the "home-based services [we]re necessary to enable [the s]tudent to access education at school" (*id.*). As noted by the IHO, the hearing record demonstrated that the student "may [have] be[en] having difficulty accessing the home-based services because they [we]re not provided in tandem with appropriate ABA support" (*id.*). Moreover, the IHO determined that the first speech-language provider's services were delivered as part of a compensatory educational services award, and the second speech-language provider's services were obtained by the parent in order to maximize the student's progress (*id.*). As a result, the IHO concluded that the district was not required to fund such services, "except to the extent that the [d]istrict undertook that obligation by agreeing that this was a component of [the s]tudent's pendency" (*id.*).



Turning to equitable considerations, the IHO reviewed the evidence in the hearing record and found that the parent timely provided the district with a 10-day notice of unilateral placement and that there were no other concerns that weighed against the parent's requested relief (see IHO Decision at pp. 13-14).

Next, the IHO addressed the parent's transportation claim (see IHO Decision at pp. 14-15). Here, the IHO indicated that, based on the evidence in the hearing record, the district provided the student with round-trip transportation services to MCC during the 2023-24 school year (id. at p. 14). According to the IHO, when the district bus did not arrive for the student, the evidence in the hearing record reflected that the parent did not make any "alternative arrangements" or incur any "expenses" for transportation, and moreover, the parent testified that she generally just kept the student home on those days (id. at p. 15). Therefore, the IHO found that the hearing record was devoid of evidence upon which to order relief, and the IHO denied the parent's request for reimbursement for transportation costs (id.).

Finally, the IHO addressed the parent's request to be reimbursed for the costs of the student's meals at school during the 2023-24 school year pursuant to section 504 of the Rehabilitation Act of 1973 (see IHO Decision at pp. 15-16). The IHO noted that the district provided "free breakfast and lunch to all students, regardless of financial eligibility" (id. at p. 15). The IHO further noted that, pursuant to section 504, the district "must also provide these meals free of charge to a student placed in a private school due to disability," regardless of whether the student was placed in a State-approved nonpublic school or "an appropriate unilateral placement" (id.).

According to the evidence in the hearing record, the IHO found that the parent paid "approximately \$250 per month" for the student's breakfast and lunch on school days during the 2023-24 school year (12-month program), as MCC did not provide meals (IHO Decision at p. 15). In reviewing the parent's due process complaint notice, the IHO noted that while the parent "generally" cited to section 504, the parent did not "specify any claim under that provision, and sp[oke] only with reference to FAPE, making no references to meals" (id., citing Parent Ex. A at p. 3). In addition, the IHO noted that there was "no mention" of section 504 "or of any claim concerning meals" at the prehearing conference or at the status conference (IHO Decision at pp. 15-16). As a result, the IHO determined that the "boilerplate reference and the requests in the [due process complaint notice] and at opening for 'any further relief that the IHO may deem just and proper to ensure the provision of a [FAPE]' to [the s]tudent . . . were not sufficient to place the [d]istrict on notice of a claim for meals reimbursement" (id. at p. 16). Thus, the IHO denied the parent's requested reimbursement for the student's meals (id.).

As relief, the IHO ordered the district to fund the costs of the student's tuition at MCC during the 12-month, 2023-24 school year, which the IHO noted could be satisfied in part by any payments made pursuant to pendency (see IHO Decision at p. 16).

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

The parent appeals, arguing initially that the IHO erred by failing to rule on the parent's motion to strike portions of the district's closing brief. The parent further argues that the IHO erred by denying the parent's requests for home-based services consisting of ABA services with BCBA

supervision and bilingual speech-language therapy. In addition, the parent contends that the IHO erred by denying her request to be reimbursed for the costs of the student's meals at school. As relief, the parent seeks an order striking specific arguments set forth in the district's closing brief, and directing the district to fund the costs of the student's home-based services, consisting of ABA services (seven and one-half hours per week) with BCBA supervision (four hours per month) and bilingual speech-language therapy services (three hours per week). The parent also seeks an order directing the district to "authorize any services, evaluations, or tuition payments within 14 days of the date of the SRO decision and issue payment within 30 days of receipt of the respective invoice and/or proof of payment."

In an answer and cross-appeal, the district responds to the parent's allegations and generally argues to uphold the IHO's determinations that the parent was not entitled to reimbursement for the costs of the student's home-based services. In its cross-appeal, the district asserts that the IHO erred by finding that the district failed to offer the student a FAPE for the 2023-24 school year. Additionally, the district contends that the IHO erred by finding that equitable considerations weighed in favor of the parent's request to be reimbursed for the costs of the student's tuition at MCC. The district further asserts that the parent failed to establish that she was financially obligated to pay for the student's home-based services for the 2023-24 school year. Next, the district contends that based on the parent's failure to challenge the IHO's finding with respect to transportation, the IHO's determination is final and binding.<sup>8</sup> With respect to the parent's request to be reimbursed for the student's meals, the district concedes that the parent is entitled to an award of \$250.00 per month under section 504, "conditioned upon an affidavit of daily attendance." Finally, with regard to the parent's motion to strike claims, the district contends that the IHO "clearly denied" the parent's motion and "addressed all necessary claims" in the decision. The district also notes that the parent's final request for relief identified as paragraph number six in the request for review must be dismissed as it was improperly raised.

In a reply and answer to the district's cross-appeal, the parent responds to the district's assertions. More specifically, the parent argues that the IHO properly concluded that the district failed to offer the student a FAPE for the 2023-24 school year and that equitable considerations weighed in favor of her requested relief. The parent continues to argue to overturn the IHO's findings with respect to the home-based services. With respect to the district's concession allowing for a monthly \$250.00 allowance for the student's meals, the parent contends that the district cannot now condition such allowance for meals on the student's attendance, as the district failed to raise this issue.<sup>9</sup> The parent refutes the district's arguments that the IHO denied the motion to strike and that the relief requested in the request for review in paragraph six was improperly raised.

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<sup>8</sup> The parent does not challenge the district's assertion; therefore, the IHO's decision denying the relief sought by the parent for transportation has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

<sup>9</sup> To the extent that the parent argues in her memorandum of law submitted in support of the request for review that she is entitled to reimbursement from the district for the provision of school-time meals pursuant to section 504, it is well settled that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's decision regarding section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of

## 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).

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the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at \*11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parent's claims regarding section 504, and accordingly such claims will not be further addressed.

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]).<sup>10</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

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<sup>10</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., 580 U.S. at 402).

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. May 2023 CSE Process—Sufficiency of Evaluative Information**

In concluding that the district failed to offer the student a FAPE for the 2023-24 school year, the IHO found that the May 2023 CSE relied on evaluative information—which had been found to be insufficient in the September 2023 IHO decision—to develop the student's IEP (see IHO Decision at p. 8). The district contends that the IHO erred, and argues that the May 2023 IEP was developed by a duly constituted CSE and the student's needs were appropriately represented, as reflective of the evaluative information available to the May 2023 CSE. Additionally, the district generally argues that the CSE considered several sources of evaluative information—including the district's psychoeducational evaluation and speech-language evaluation found to be insufficient in the September 2023 IHO decision—and drafted a comprehensive IEP. The district further asserts that the IHO improperly attempted to enforce the September 2023 IHO decision by concluding that district failed to consider two additional evaluations in the development of the student's IEP that post-dated the May 2023 CSE meeting.

Regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at \*12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR

300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Contrary to the district's assertions, the IHO properly concluded that the district failed to offer the student a FAPE for the 2023-24 school year. Initially, it is undisputed that the May 2023 CSE relied, in part, on the district's March 2023 psychoeducational evaluation and the district's March 2023 speech-language evaluation to develop the student's May 2023 IEP for the 2023-24 school year. It is also undisputed that both district evaluations were found to be insufficient in a September 2023 IHO decision, which neither party appealed. As a result, the findings in September 2023 IHO decision become final and binding on both parties and will not be disturbed in this proceeding, yet that is the practical effect of what the district is asking the undersigned to do. Therefore, rather than enforcing a prior IHO decision, the IHO was required to adhere to the finality requirements and require the district to abide by those unappealed determinations—namely, that both district evaluations relied upon by the May 2023 CSE to develop the student's IEP were insufficient. As a reminder to the district, collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at \*6 [N.D.N.Y. Dec. 19. 2006]). Collateral estoppel, requires that:

- (1) the identical issue was raised in a previous proceeding;
- (2) the issue was actually litigated and decided in the previous proceeding;
- (3) the party had a full and fair opportunity to litigate the issue; and
- (4) the resolution of the issue was necessary to support a valid and final judgment on the merits

(Grenon, 2006 WL 3751450, at \*6 [internal quotations omitted]; see Perez, 347 F.3d at 426; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).<sup>11</sup>

The doctrine applies in this case because the district's arguments on appeal continue to press that the May 2023 CSE relied on sufficient evaluative information to develop the student's IEP—including its own psychoeducational and speech-language evaluations—wholly ignoring or failing to account for the unappealed findings in the September 2023 IHO decision. For example, the district could have set forth an argument or evidence explaining how the May 2023 CSE's reliance on the remaining evaluative information resulted in the development of an appropriate IEP for the student. However, the district has not done so, and it is not the SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at \*3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry

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<sup>11</sup> Without using the words collateral estoppel, the parent has repeatedly pointed out the fact that the matter was already decided in the September 2023 IHO decision. Even if not raised by name by the parent, the Second Circuit has explained that there is no absolute bar in raising the issue, and as noted above, it is important to do so here were violating the finality provisions of the IDEA would otherwise result (see Doe v. Pfrommer, 148 F.3d 73, 80 ([2d Cir. 1998])).

Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at \*2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at \*4 n.3 [S.D.Ala. Aug. 23, 2007]). Thus, while the entire hearing record has been carefully reviewed to consider those claims that the district has specifically identified in the answer and cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.8[c]; 12[a]), I will not sift through the district's pleadings, the hearing record, and the IHO's decision for the purpose of trying to create an argument that the district has not taken the time to assert on its own behalf.

In light of the foregoing, there is no reason to disturb the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year.

## **B. Unilateral Placement**

Having found that the district failed to offer the student a FAPE, the inquiry now turns to whether the parent sustained her burden to establish the appropriateness of the student's unilateral placement, which in this matter, is comprised of both school-based and home-based components. More specifically, the unilateral placement consists of the student's attendance at MCC together with home-based services of ABA services and the related BCBA supervision, as well as bilingual speech-language therapy services.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

### **1. Student's Needs**

Although the student's needs are not at issue in this matter, a brief description thereof facilitates the discussion of the issue to be resolved—namely, whether the student required home-based services to enable the student to make progress appropriate in light of her circumstances, and relatedly, whether the parent is entitled to funding for the costs of the student's home-based services.<sup>12</sup>

Evidence in the hearing record indicates that the student was diagnosed as having autism "by a psychologist in early intervention" and received ABA services, PT, OT, and "speech therapy with feeding" (Dist. Ex. 5 at p. 2). In addition, the student was diagnosed as having a language disorder (receptive and expressive language delays), a specific learning disorder with impairment in reading (decoding and word attack skills) and reading comprehension, a specific learning disorder with impairment in written expression (spelling, grammar and punctuation, and clarity or organization of written expression), a specific learning disorder with impairment in mathematics (accuracy and fluency in calculation and accuracy in mathematics reasoning), a developmental coordination disorder, and an attention deficit hyperactivity disorder (ADHD) combined presentation (Parent Ex. EE at p. 37). As reported by the parent during the March 2023 social history, the student was a "picky eater," but had a "normal diet with no restrictions" (*id.* at p. 1). The parent reported no concerns with the student's hearing, but indicated that the student was

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<sup>12</sup> To be clear, since neither party appealed the IHO's finding that MCC—as the school-based component of the unilateral placement—was appropriate for the student for the 2023-24 school year, as well as the IHO's order directing the district to fund the costs of the student's tuition for a 12-month program during the 2023-24 school year at MCC, this determination and order of funding have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dept of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).



prescribed the use of glasses (id.). According to parent report, the student took "medication daily to address hyperactivity and focus," and saw a "psychiatrist consistently" (id.).<sup>13</sup> Evidence in the hearing record also reveals that the student had "difficulty paying attention, difficulty sitting still, and [wa]s easily distracted" (Parent Ex. EE at p. 2).

According to the district's March 2023 OT evaluation, the student attended MCC and received two 30-minute sessions per week of individual OT to address her needs in the areas of "sensory motor processing, fine motor, motor planning and visual motor and visual perceptual skills" (Dist. Ex. 6 at p. 2). Based on the evaluation, the student demonstrated "adequate" frustration tolerance but her "self-regulation was poor" (id. at p. 3). The March 2023 OT evaluation reflected that the student was "constantly moving and touching things within her reach," "exhibited difficulty following multi-step directions," and required repeated directions with, at times, physical cues (id.). An administration of the Test of Visual Motor Integration (TVMI) to the student yielded a standard score of 81, which fell within the below average range (id. at p. 4). Overall, the OT evaluation of the student revealed that she exhibited "areas of weakness" in her "learning [and] behavior, hand, life, movement and sensory motor skills" (id. at p. 5). As a result, it was determined that the student should continue to receive two 30-minute sessions per week of individual OT services (id. at pp. 5-6).

In a June 2023 MCC OT progress report, it was noted that the student demonstrated difficulties with self-regulation, arousal levels, sustained attention skills, and organization and sequencing skills throughout the school day (see Parent Ex. H at pp. 1-3). In addition, the student's OT at MCC focused on improving her daily living skills, including her functional hygiene skills (i.e., oral hygiene, handwashing) and functional dressing skills (id. at p. 3). According to the MCC OT progress report, the student exhibited difficulties with her gross motor coordination, motor planning, motor coordination, and endurance (id. at p. 4). Finally, it was noted that the student worked on improving her fine motor, visual motor, and visual perceptual skills, including her handwriting and written communication skills, as well as her keyboarding skills (id. at pp. 4-5). As reflected in the OT progress report, it was recommended that the student continue to receive two 30-minute sessions per week of individual OT, as well as one 30-minute session per week of OT in a group and a lunch consultation to support the student's "developmental skill acquisition" (id. at p. 5).

The hearing record also included a July 2023 MCC speech-language therapy progress report (see Parent Ex. I at p. 1). According to the report, the student demonstrated difficulties in receptive language (inferences, similarities and differences, comparisons, and fact versus opinion), expressive language (able to communicate using phrases and complete sentences, but used scripted language at times), and pragmatic language (able to use variety of communicative functions, but sometimes asked off-topic questions in social situations) (id. at pp. 1-4). It was also noted that the student continued to work on developing her interactive play skills (id. at p. 4). According to the report, the student received two 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of speech-language therapy in a group of two students,

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<sup>13</sup> According to the March 2023 social history update, the parent indicated that the student and her sibling had a "home attendant" who assisted them with "all everyday self-care activities" (Dist. Ex. 5 at p. 2). The parent also indicated that the student received "ABA, [OT], speech/language therapy and [PT] at home weekly" through "Medicaid" (id.).

and she participated in one 30-minute session per week of group speech-language therapy in the classroom (id. at p. 1). The MCC speech-language progress report reflected that the student continued to make progress on her goals, and it was recommended that the student continue to receive the same frequency and duration of services (id. at pp. 1-4).

Next, an administration of the Wechsler Intelligence Scale for Children—Fifth Edition (WISC-V) to the student in June 2023 revealed that she presented with scattered skills, with cognitive testing yielding a full-scale intelligence quotient (IQ) of 60, which fell within the extremely low range; a nonverbal summary score of 85, which fell within the low average range; and a general ability index score of 67, which fell within the extremely low range (see Parent Ex. EE at p. 26). Academically, an administration of the Woodcock Johnson IV Tests of Achievement (WJ IV ACH) to the student yielded scores that fell within the extremely low to average range (id. at p. 27).<sup>14</sup> In the areas of letter-word identification, spelling, and word attack, the student achieved standard scores of 96, 100, and 100, respectively, which all fell within the average range (id.). In the areas of reading comprehension and writing samples, the student achieved standard scores of 89 and 84, which fell within the low average range (id.). As related to mathematics calculation and applied problems, the student achieved standard scores of 61 and 65, which fell within the extremely low range (id.). Overall, the evaluator described the student as presenting with "markedly problematic symptoms" of autism, while simultaneously presenting with "considerable cognitive and academic strengths" (id. at p. 40). The evaluator cautioned, however, that in order for the student to "access these strengths, she need[ed] not only intensive ABA services, but a school and classroom setting with the expertise and resources to implement these services" (id.). In addition, the evaluator indicated that the student's school "must also provide counseling, a [BIP], and other related services consistently and reliably" (id. at p. 41). The evaluator recommended additional evaluations of the student, including a speech-language evaluation given that the student's receptive and expressive language delays were a "central component" of her difficulties (id.). The evaluator also recommended that the student receive counseling to address the student's "attention and internalization difficulties," and if the student remained at her current school, the student should attend a 12:1+1 special class placement (id. at p. 42). According to the evaluator, the student also needed to continue to receive her "current home and school ABA services, as well as one to one paraprofessional support," because without these services, "regression and loss of skills [wa]s almost certain" (id.). As support for this recommendation, the evaluator pointed to a "July 2023 Teacher Report," which indicated that "'ABA [wa]s an integral part of her educational success" and was "necessary for her to learn, acquire and maintain her skills"' (id.).<sup>15</sup> The evaluator further noted that, based on the teacher report, the student required "'1:1 instruction to acquire skills and engage in classroom activities"' (id.).

At the impartial hearing, the director of education at MCC (director) testified that, for the 2023-24 school year, the student presented with "delays across several domains, including

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<sup>14</sup> The July 2023 included results of academic testing in Spanish with scores lower in all areas tested as compared to testing on the WJ IV ACH in English (see Parent Ex. EE at p. 27).

<sup>15</sup> The teacher report referenced by the evaluator was actually identified as a May 2023 report within the evaluation report (see Parent Ex. EE at pp. 3-4). Notably, the teacher report was completed by the student's classroom teacher at MCC (id.). At the time the evaluator completed the report in July 2023, the student's home-based ABA services had been reduced to three hours per week (see Parent Ex. AA ¶ 11).

academic skills, self-management, communication, social skills, [and] self-care skills" (Tr. p. 91; see Parent Ex. X ¶ 4).

## **2. Specially-Designed Instruction—MCC Program**

Similar to the description of the student's needs above, although neither party challenges the IHO's finding that MCC—as the school-based component of the parent's unilateral placement was appropriate to meet the student's needs—a description of the program provided to the student by MCC provides context for determining whether the student required home-based services and whether the parent is entitled to funding for those home-based services.

Evidence in the hearing record reflects that, at MCC, the student attended school five days per week from approximately 8:45 a.m. through 2:45 p.m. (see Parent Ex. J). According to the evidence, the student received "[five] hours per day of 1:1, individualized instruction" using ABA, as well as "[one] hour of a 2:1 ratio during instructional lunch and leisure skills for a total of [six] hours per day" (Parent Exs. N at p. 1; X ¶ 21). The student's classroom consisted of seven students and five adults, which included a lead teacher, a head ABA instructor, and three ABA instructors (Parent Ex. X ¶ 20). The director explained that the periods on the student's schedule designated as individualized instruction provided opportunities to deliver academic instruction to the student (see Tr. pp. 98-99; see also Parent Ex. J). During the 2023-24 school year, the student received academic instruction in reading, mathematics, writing, science, and social studies (see Tr. p. 99). The director also testified that any of the adults in the student's classroom could provide academic instruction to the student (see Tr. pp. 105-06). To further support the student behaviorally at MCC, her classroom teacher, classroom supervisor, and the director collaborated to create a functional behavior assessment (FBA) with a corresponding BIP, which targeted behaviors of non-compliance and face pressing, with a goal of increasing functional communication and appropriate classroom behavior while decreasing non-compliance (see Parent Ex. G at pp. 6-7; N at p. 6; see generally Parent Ex. Q).

According to an MCC educational progress report, the student made progress academically at MCC during the 2022-23 school year, as well as during the 2023-24 school year. Initially, the hearing record reflects the student's progress and mastery of goals at MCC from January to June 2023 with respect to the following: addition, subtraction, money skills, telling time, daily schedule, spelling, handwriting, reading instruction, inferencing, context clues, fact and opinion, science and social studies, gaining attention, conversational skills with adults and peers, following an activity schedule, following directions from a group leader and during small group instruction with a peer, remaining on task for 10 minutes when completing worksheets, transitioning, following arrival routine, lunch routine, toothbrushing, and line up routine (see Parent Ex. G at pp. 2-6). In addition, by June 2023, the MCC educational progress report noted addressing the student's understanding of place value, more or less, and written communication through editing and typing (id. at pp. 2-3).

Similarly, from July 2023 through December 2023, an MCC educational progress report reflects the student's continued progress and mastery of goals in the following areas: addition, subtraction, money skills, telling time, editing related to capitalization and spacing, responding as a listener during reading instruction to identify the main idea, inferencing, gaining an adult's attention, identifying emotions, conversational skills such as initiating conversation with a starter

phrase and responding with prompts, engaging in conversations with peers provided prompts, following a visual schedule, remaining on task for 10 minutes of worksheet work without redirection needed, transitioning to speech class, and independently cleaning up after lunch (see Parent Ex. N at pp. 2-6). In addition, the MCC educational progress reported recorded progress and mastery in areas that addressed solving word problems, editing written communication, and functional communication training, as well as progress related to counting place value and in the area of handwriting (id.).

As noted above, the student also received related services at MCC, including both OT and speech-language therapy services (see Parent Ex. X ¶¶ 31, 33). With respect to speech-language therapy at MCC, the director testified that the student was not receiving bilingual speech-language therapy (see Tr. p. 98). According to the director, the student's speech-language provider at MCC had a "bilingual extension," however, MCC did not offer bilingual speech-language therapy because "MCC c[ould not] guarantee the availability of bilingual speech and language therapists to provide services to students" (Parent Ex. X ¶ 33). Therefore, the student received her speech-language therapy services at MCC in English and made progress on her receptive, expressive, and pragmatic language skills (id. ¶¶ 33-34).

The hearing record contains evidence of the student's progress in speech-language therapy that she received at MCC during both the 2022-23 and the 2023-24 school years (see generally Parent Exs. I; P). From January 2023 through July 2023, the MCC speech-language therapy progress report reflects that the student's goals targeted her receptive, expressive, pragmatic, and play and leisure skills (see Parent Ex. I at pp. 1-4). More specifically, the student's receptive language goals addressed her ability to identify similarities and differences in paired items, understand comparative and superlative adjectives, and understand fact statements versus opinions (id. at pp. 1-2). According to the progress report, the student made progress with respect to identifying similarities and differences, and showed mastery of her remaining goals (id.). With respect to her expressive language, the student's goals targeted her ability to state associations between paired items, state facts relating to an identified item, and state the cause and effect in social scenarios (id. at pp. 2-3). The student made progress on the second goal, while demonstrating mastery on the two remaining goals (id.). Turning to pragmatic language, the student worked on goals targeting her ability to generate comments related to a key word, use a comment related to a key word during conversation, generate questions to ask during a conversation, ask one question during a conversation with an adult or peer, and use an appropriate conversation starter or stopper (id. at pp. 3-4). According to the progress report, the student demonstrated mastery of her first and third goals, while demonstrating continued progress on the remaining goals (id.). Finally, in the area of play and leisure skills, the student worked on goals targeting her ability to perform two-step sequenced events and to use two to three phrases or sentences to comment to an adult or peer (id. at p. 4). Overall, the student demonstrated mastery on both goals (id.).

Given the student's progress during the 2022-23 school year as reflected in the report, the student's MCC speech-language provider recommended that the student continue to receive the same duration and frequency of speech-language services for the upcoming school year (see Parent Ex. I at pp. 4-5).

During the 2023-24 school year and consistent with the order in the September 2023 IHO decision, the student's bilingual speech-language IEE was completed on November 13, 2023, with an evaluation report generated on December 12, 2023 (December 2023 speech-language IEE) (see Parent Ex. F at p. 1; IHO Ex. VIII at p. 16). As reflected in the December 2023 speech-language IEE report, the evaluator obtained information about the student from various sources, including the parent, the student's MCC classroom teacher and MCC speech-language provider, and the student's home-based speech-language provider (see Parent Ex. F at pp. 1-9). According to the report, the student's home-based speech-language provider observed that, academically, the student had a "dominance in English" (id. at p. 8). The evaluator also reported that, although the student's mother and sibling could both speak English and Spanish and the student's father and brother primarily spoke Spanish, Spanish was spoken in the home "100 [percent] of the time" (id. at p. 9; see Parent Ex. BB ¶ 48). The evaluator also noted that the student was "currently educated in English" (Parent Ex. F at p. 9). During the evaluation, the student spoke in both English and Spanish, but when addressed in English she responded in English, and similarly, when addressed in Spanish the student responded in Spanish (id. at pp. 9-10). Overall, the evaluator "judged [the student] to be an essentially balanced bilingual child" (id. at p. 10). The evaluator further noted that the student could read and write in both English and Spanish, however, the student demonstrated "greater proficiency in English for literacy tasks" (id.).

As part of the evaluation process, the evaluator administered selected subtests from both the Clinical Evaluation of Language Fundamentals—4 Spanish (CELF-4 Spanish) and the Clinical evaluation of Language Fundamentals—5 English (CELF-5 English) to the student (see Parent Ex. F at p. 1). On the CELF—5 English, the student's core language score, receptive language index, and expressive language index scores all fell within the "low-very low range of performance for her chronological age" (id. at p. 32 [emphasis in original]). On the CELF—4 Spanish, the student's core language score, receptive language index, and expressive language index scores all fell within the "very low-severe range of performance for her chronological age" (id. [emphasis in original]). In the area of pragmatic language, the student's score on the CELF—5 English fell within the "below average range of performance while in the classroom and within school based and home based speech/language therapy" (id. at p. 33).

To address the student's needs as determined by the December 2023 speech-language IEE, the evaluator recommended the following: maintaining the current level of speech-language therapy services, to wit, "three times on an individualized basis three times weekly, a [one 30-minute] lunch consult, and [one 30-minute] speech/language services in a group with 1:1 instructional support" (Parent Ex. F at p. 34). In addition, the evaluator recommended that the student's speech-language services be delivered by a "bilingual Spanish/English clinician" (id.).<sup>16</sup>

Next, the hearing record includes an MCC speech-language progress report related to the 2023-24 school year, as well as a document identifying the student's goals in speech-language for

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<sup>16</sup> To be clear, the evaluator's recommendations mirrored the frequency and duration of the student's school-based speech-language therapy services delivered by MCC, and the evaluator did not recommend home-based speech-language therapy services for the student (compare Parent Ex. F at p. 34, with Parent Ex. I at p. 1). The evaluator also noted that "[b]est practice [wa]s to provide instruction in both languages the child [wa]s exposed to as there m[ight] be negative consequences, both social and emotional, if the native language [wa]s not supported" (Parent Ex. F at pp. 33-34).

the 2023-24 school year (see generally Parent Exs. M; P). Turning to the MCC progress report, from July 2023 through December 2023, the report reflects that the student's goals targeted her receptive, expressive, and pragmatic language skills, along with her play and leisure skills (see Parent Ex. P at pp. 1-4). The annual goals targeting the student's receptive language for the 2023-24 school year focused on sequencing events of a short story and discriminating between a main idea and a detail (*id.* at p. 1). According to the progress report, the student was making progress on both goals (*id.*). To address the student's expressive language needs, her goals focused on her ability to retell a story using time-order words, stating social consequences, and responding to inferential questions (*id.* at p. 2). The progress report reflected that the student mastered all three annual goals (*id.*). With respect to the student's pragmatic language needs, her goals for the 2023-24 school year focused on maintaining a topic of conversation, using a sentence to comment on key words during a conversation, and asking follow-up questions within a conversation; according to the report, the student made progress towards all three goals with supports (*id.* at pp. 3-4). Finally, with respect to the student's play and leisure skills, her goals addressed the student's ability to explain how to play a game to an adult and asking a peer a question prior to playing the game; according to the report, the student made progress on both goals when provided prompting or modeling (*id.* at p. 4).

As previously noted, neither party has challenged the IHO's finding that MCC was appropriate to meet the student's needs during the 2023-24 school year. In reaching that determination, the IHO noted that MCC provided the student with a "full-time day program of ABA-based instruction" that incorporated the student's "ABA, special education, speech-language and [OT]," as well as "family collaboration to provide an individualized program" (IHO Decision at p. 9). The IHO also found that the transdisciplinary model of instruction used at MCC provided for the delivery of 1:1 instruction and "carry-over of the therapeutic goals to the classroom setting" (*id.*). As found by the IHO, MCC addressed the student's behavior needs through the development of a BIP, which targeted the student's interfering "behaviors of non-compliance and face pressing" (*id.* at pp. 9-10). The IHO further concluded that MCC addressed the student's social and communication needs, as well as her ADL skills, and provided her with an opportunity to interact with nondisabled peers (*id.* at p. 10). Therefore, given the totality of circumstances, the IHO determined that the parent had presented "persuasive evidence that [the s]tudent ha[d] demonstrated progress across domains during the 2023-24 school year" and consequently, that MCC was an appropriate unilateral placement (*id.*).<sup>17</sup>

### **3. Home-Based Services: ABA and BCBA Supervision, Bilingual Speech-Language Therapy**

Having found that the student made progress across all domains at MCC during the 2023-24 school year, the IHO turned to examine the home-based services the parent obtained as part of the student's unilateral placement. As to the home-based ABA and BCBA supervision services, the IHO determined that the student received ABA at MCC, she could "engage at school," and evidence demonstrated that she made progress across all domains at MCC (IHO Decision at p. 11). Therefore, the IHO found no evidence in the hearing record indicating that the student's progress

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<sup>17</sup> The director testified that "[t]eaching at MCC [wa]s rooted in the principles of ABA and cover[ed] five instructional domains: academic, verbal behavior, social skills, community of reinforcers, and self-management" (Parent Ex. X ¶ 4).

at MCC was "dependent on her receipt of home-based services," and moreover, the hearing record did not contain any evidence that the student's school performance corresponded to either a reduction or an increase in home-based services (id.).

However, while finding that the home-based ABA and BCBA supervision services were not necessary for the student to receive educational benefit, the IHO's determination does not address the relevant inquiry, which is whether the home-based ABA and BCBA supervision services were appropriate.

#### **a. Home-Based ABA and BCBA Supervision Services**

With respect to home-based ABA services and BCBA supervision services, the hearing record reflects that for the 2023-24 school year, the parent executed a payment agreement with Kids Success on March 7, 2024, to deliver seven and one-half hours per week of individual, home-based ABA services to the student and four hours per month of BCBA supervision services (see Parent Ex. W at pp. 1-2). At the impartial hearing, the director of Kids Success (ABA director) testified that the student began receiving ABA services (averaging seven and one-half hours per week) and BCBA supervision services (four times per month) from Kids Success in 2021 (see Parent Ex. AA ¶¶ 7-8). The ABA director also testified that, in "the beginning of services [the student] displayed aggressive behaviors towards her provider and her home care attendants," and staff worked on "decreasing inappropriate behaviors" in order to make the student available for learning by "differentially reinforcing alternate behavior, while simultaneously promoting functional communication training" (id. ¶¶ 9-10).

Turning to the 2023-24 school year, the ABA director explained that, since June 2023, the agency began delivering reduced home-based ABA services—i.e., three hours per week—to the student because there was no pendency agreement or order in place and the agency had been "drawing from a compensatory service bank from a previous impartial hearing" (Parent Ex. AA ¶ 11).<sup>18</sup> She noted that the student's "behaviors ha[d] fluctuated more frequently," and since the delivery of reduced services, the parent had "reported an increase in behavioral outbursts outside of session times" (id.).<sup>19</sup> According to the ABA director, the student "require[d seven and one-

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<sup>18</sup> The June 2021 Stipulation reflects that the student was awarded 750 hours of ABA services and 75 hours of BCBA supervision services as part of an unappealed IHO decision, dated February 17, 2020 (see Parent Ex. DD at p. 3). At the impartial hearing, the ABA director testified that she had evaluated the student "years ago" to determine that the student required services at "a minimum of one-and-a-half hours per day, across five days per week" (May 16, 2024 Tr. pp. 130-31).

<sup>19</sup> To be clear, the hearing record is devoid of any progress report, treatment plans, ABA data, or other records compiled by the home-based ABA providers, Kids Success agency, or the BCBA supervisor with respect to any of the home-based ABA services delivered to the student related to behavioral outbursts or maladaptive behaviors as addressed or recorded during home-based ABA services during the 2023-24 school year, or with regard to any programming delivered to the student during home-based ABA or BCBA supervision services (see generally Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX). As noted in the MCC director's testimony, data collection and analysis formed the basis for determining the "use of effective teaching tactics to address student learning, behavior, communication and participation in the larger community" (Parent Ex. X ¶ 11). She further noted that data was "collected and graphed to guide our decision making as well as to empirically demonstrate that those teaching tactics were responsible for the behavior change" (id.).

half] hours of [home-based] ABA in addition to her school day in order to reduce her maladaptive behaviors" (id.).

Next, the ABA director testified that the student had "previously engaged in the self-stimulatory behavior of face pressing," but this behavior had "steadily decreased through the use of response interruption and re-direction" (Parent Ex. AA ¶ 12). The ABA director described the areas addressed through home-based ABA services, which included the following: identifying safe and unsafe situations to improve the student's safety awareness and community integration, as the student enjoyed meeting new people and ran up to strangers and attempted to hug and have conversations with them; and activities of daily living (ADL) skills, such as brushing teeth, showering, toileting, washing dishes, washing hands, and making her bed (id. ¶¶ 13-15). Further, the ABA director reported that the student "significantly decreased protesting behaviors," such as shrugging her shoulders, stating she did not know the answer, crying, crossing arms and frowning when presented with challenging tasks (id. ¶ 16). The ABA director additionally reported that the student needed reminders to stay on task, and she defined off-task behavior as not related to the task at hand such as diverting attention to speak about other topics (id. ¶¶ 18-19). The ABA director did not, however, identify whether the areas described above were addressed since the initiation of services in 2021, or whether the areas were specifically addressed during the 2023-24 school year (see generally Parent Ex. AA ¶¶ 12-20).

Next, the ABA director's testimony identified the targets the student mastered related to counting, tying shoes, identifying coins, character and setting, emotions, reading levels, subtracting single digit and double-digit numbers independently, writing three sentences, telling time, and spelling (see Parent Ex. AA ¶¶ 22, 24, 31, 33, 36-38). However, as previously noted, the hearing record did not include any data or reports with respect to the areas targeted by the home-based ABA services and as described by the ABA director; similarly, the ABA director did not specify when these areas were addressed (i.e., since 2021 or during the 2023-24 school year) or which ABA provider worked with the student on these targets (see generally Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX). The ABA director minimally noted that the student worked on looking at the screen and typing using all of her fingers since September 2022; listening to a short story and pointing to the story elements since March 2023; comparing facts from a passage since June 2023; and listening to a passage and recalling four facts from a story since July 2023 (see Parent Ex. AA ¶¶ 27-30).

Upon review of the evidence in the hearing record, it appears that the home-based ABA and BCBA supervision services targeted areas similar to those addressed at MCC during the school day (compare Parent Ex. AA ¶¶ 22, 24, 27-31, 33, 36-38, with Parent Ex. N at pp. 2-6, and Parent Ex. O at pp. 2-3, and Parent Ex. K, and Parent Ex. L). Additionally, the evidence in the hearing record establishes that the home-based ABA director reported on targets as mastered or currently addressed through home-based services that were also identified as goals with documented progress and/or mastery at MCC (compare Parent Ex. AA ¶¶ 22, 24, 27-31, 33, 36-38, with Parent Ex. N at pp. 2-6).<sup>20</sup>

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<sup>20</sup> Notably, the December 2023 MCC educational progress report did not report on shoe-tying or typing using all



Next, the parent testified at impartial hearing that the student received seven and one-half hours of home-based ABA services, as well as "BCBA training" (June 13, 2024 Tr. p. 174).<sup>21</sup> According to the parent, the home-based ABA services addressed the student's behaviors, the ABA provider "help[ed] her with the school things," and the student worked with "sand, dough, all based on behavior" and "stuff like that for sensitive things, so to relax [the student]" (June 13, 2024 Tr. pp. 174-75). When asked to describe the difference between the home-based ABA services and the school-based ABA services, the parent explained that they "work[ed] together" and "they g[o]t in touch and touch[ed] bases with each other to be able to work with what [the student] need[ed]," but she was unsure whether the home-based and school-based services worked on the same skills or on different skills (June 13, 2024 Tr. pp. 175-76). The parent also testified that the student's behaviors improved "[m]ore or less" during the 2023-24 school year (see June 13, 2024 Tr. p. 176). Upon further questioning, the parent testified that the student demonstrated new behaviors this year and there were "a lot of changes in her behavior," such as hitting and biting herself, sticking her tongue in and out, and licking things (June 13, 2024 Tr. p. 182; see Parent Ex. BB ¶ 42). However, the parent explained that these behaviors occurred more at home than at school (see June 13, 2024 Tr. pp. 182-83). The parent testified that the school had reported, at times, that the student did stick her tongue in and out and pressed her face, but they did not see the other behaviors (see June 13, 2024 Tr. pp. 182-83). According to the parent, the home-based ABA services were aware of the behaviors and were working with the student on these behaviors (see June 13, 2024 Tr. p. 183).

Although not addressed by the IHO, the hearing record included evidence that MCC programmatically provided for collaboration between a student's home-based and school-based services. For example, in the MCC program offerings description, it was noted that—as part of its family education and support—"one of the key components for developing positive home-school collaboration include[d] [MCC's] opportunity for community-based professionals (therapists, teachers, babysitters, etc.) to observe twice a month within the classroom" at MCC, as well as an opportunity thereafter to "speak to the teacher" (Parent Ex. R at pp. 6-7). According to the program description, "collaborative observations allow[ed] [MCC] to promote generalization of skills in the two most vital support environments available" to students (id. at p. 7).

At the impartial hearing, the director of MCC testified that "[i]n an effort to support and include families and ensure carry-over and consistency between home and school, MCC provide[d], at a minimum, a clinical team meeting every 8 (eight) weeks, one (1) hour per week for parent observation time in the classroom, a home visit twice per year, and a parent education workshop series once per month" (Parent Ex. X ¶ 16). She further noted that MCC provided

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fingers, however, it was noted within the neuropsychological IEE that a review of the student's June 2022 IEP reported on documented progress in the area of shoe-tying as addressed through annual goals in OT and during OT sessions, and as identified as an annual goal in the student's May 2023 IEP (see Parent Ex. EE at p. 6; Dist. Ex. 1 at p. 28). The student's December 2023 MCC OT progress report reflected that, during OT sessions, the student engaged in using typing or speech-to-text functions for a variety of activities and had mastered the typing-to-text function to look up videos (see Parent Ex. O at p. 3).

<sup>21</sup> The afternoon portion of the transcript dated May 16, 2024 and the entire transcript from the next hearing date—June 13, 2024—were not consecutively paginated, and instead, repeated the same page numbers 146 through 214; therefore, for ease of reference, citations to duplicative pages in both transcripts will be identified by the date of the transcript and page number (see May 16, 2024 Tr. p. 140).

"opportunities for home-based ABA providers to observe every other week for one (1) hour" (*id.*). In addition, the director testified that "[s]chool staff sen[t] home daily notes, and they communicate[d] via email or phone call as needed for any support that [wa]s required in the home to address [the student's] learning and behavior" (*id.* ¶ 23). With respect to this student, the director testified that her "school team also communicate[d] and collaborate[d] with the home-based ABA providers and [the student's] speech therapist communicate[d] with her home-based speech and language providers to ensure consistency across the skills [the student] need[ed] to acquire across settings and people and to reinforce and maintain skills learned at school" (*id.* ¶ 35).<sup>22</sup>

### **b. Home-Based, Bilingual Speech-Language Therapy Services**

Here, the IHO found that the home-based speech-language therapy services were not a necessary part of the student's unilateral placement and that the student was receiving comprehensive speech-language therapy services at MCC (*see* IHO Decision at p. 13). The IHO also found that therapist 1's services had been delivered as part of a compensatory educational services award and that therapist 2's services were obtained to maximize the student's progress; as a result, the IHO denied the funding for such services (*id.*).

With regard to the student's home-based speech-language therapy services for the 2023-24 school year, the evidence in the hearing record demonstrates that the parent initially signed a payment agreement with one speech-language provider on October 24, 2023 to deliver home-based services; the evidence further reflects that this first home-based speech-language provider (therapist 1) had been providing home-based speech-language therapy services to the student beginning in 2019 (*see* Parent Exs. U at pp. 1-2; Y ¶ 3).<sup>23</sup> Therapist 1 delivered three hours per week of home-based bilingual speech-language therapy to the student from July 2023 through November 2023 during the 2023-24 school year (*id.* ¶¶ 3, 14).

At the impartial hearing, therapist 1 testified that she reassessed the student's every 30 days in order to track the student's progress and make "any changes on her current goals" or adjustments for the next 30 days of services (May 16, 2024 Tr. p. 214). According to therapist 1, she would share the reassessment with the parent to show the student's progress, where the student may be struggling with homework, or regarding questions the parent may have had about the past month's work with the student (*id.*). Therapist 1 also testified that she would have the parent sign off on the reassessment in case there were "any issues or anything that may be [the parent] wanted [her] to continue to work on, or maybe [the parent] saw something different that [the therapist] didn't

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<sup>22</sup> Notwithstanding the director's testimony, the hearing record is devoid of evidence demonstrating that the student's school-based team contacted or communicated with any of the student's home-based providers during the 2023-24 school year (*see generally* Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX). Instead, the evidence reflects that neither the student's home-based speech-language providers or ABA or BCBA supervisor spoke with the student's school-based providers—or significantly, that the student's home-based providers communicated with each other—during the 2023-24 school year (*see* Tr. pp. 91-120, 125-42; May 16, 2024 Tr. pp. 212-16; June 13, 2024 Tr. pp. 186-204; *see generally* Parent Exs. X-Z; AA).

<sup>23</sup> Upon further questioning at the impartial hearing, the same speech-language provider testified that she began working with the student in 2021 by providing "compensatory hours" and then "started as her bilingual speech therapist" (May 16, 2024 Tr. pp. 212-13).

see based on homework or the activities around the house that [the parent] would want [the therapist] to try to do a little bit more" work on with the student (May 16, 2024 Tr. pp. 214-15).

With respect to the 2023-24 school year, therapist 1 testified that she worked on a lot of "different things," and she either changed the student's goals or adjusted her goals every 30 days to either make it easier or more challenging for the student (May 16, 2024 Tr. p. 215). She noted, for example, that the student worked on "sequencing, five steps, trying to tell [the therapist] either verbally or using pictures what would go in order, how it would go in order, [and] why," and she addressed a lot of pragmatic skills related to social skills, conversation, and staying on topic with the student (May 16, 2024 Tr. pp. 215-16).<sup>24, 25</sup>

Therapist 1 also testified that the student's "communication skills increased post COVID-19 and since attending" MCC (Parent Ex. Y ¶ 12). Therapist 1 indicated that, "[d]uring remote learning, [the student] was not expressing herself as much and was not able to interact with peers" (*id.*). According to therapist 1, the student became "more frustrated, less focused, and attentive during learning," but that the student appeared "happier" during in-person sessions (*id.*).

As related to the 2023-24 school year, therapist 1 testified about the progress the student made in inferencing and answering questions from text in July 2023, labeling the main idea and sequencing in September 2023, and improved spelling in October 2023 (*see* Parent Ex. Y ¶ 14).<sup>26</sup> With respect to the student's progress on goals bilingually, therapist 1 reported as follows: in both English and Spanish, the student made progress in problem-solving questions in two out of three trials in August 2023; in October 2023, the student made progress in following commands in four out of ten trials in Spanish and five out of ten trials in English; and by November 2023, the student could retell a story in English and Spanish in two out of three tries (*id.*).

Next, the hearing record reflects that the parent signed a payment agreement with the MichelleRG agency on January 10, 2024 for a second home-based speech-language provider (therapist 2) to deliver bilingual speech-language therapy services to the student during the 2023-24 school year (*see* Parent Ex. V at pp. 1, 3). Evidence in the hearing record demonstrates that

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<sup>24</sup> The student's speech-language therapy at MCC also addressed sequencing and pragmatic skills related to social skills, conversation, and topic maintenance, among other goals within the school setting (*compare* May 16, 2024 Tr. pp. 215-16, *with* Dist. Ex. 5 at pp. 1-4).

<sup>25</sup> Therapist 1's testimony included information about goals mastered by the student, however, she did not specify when or whether this occurred during, or prior to, the 2023-24 school year (*see* Parent Ex. Y ¶ 13). More specifically, therapist 1 indicated that the student mastered goals in reading, decoding, and reading comprehension tasks, but the hearing record did not include any progress reports reflecting this information notwithstanding therapist 1's testimony that, based on her understanding, the parent was submitting progress reports as exhibits in this matter (*id.* ¶¶ 4, 13). To be clear, the progress reports entered into the hearing record as evidence are from MCC, not the home-based providers (*see generally* Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX).

<sup>26</sup> Notably, the areas of the student's progress in home-based speech-language therapy paralleled the same areas addressed at MCC, and the parent testified that the student made "significant academic progress" since attending MCC, noting in particular that the student had difficulty reading in the past and was now able to read and comprehended more of what she read (*see* Parent Ex. BB ¶ 41). Additionally, the evidence in the hearing record detailed the student's progress toward her educational goals (*see* Parent Ex. N at pp. 2-6).

therapist 2 delivered services to the student beginning on February 6, 2024 (see Parent Ex. Z ¶ 3). According to the evidence, therapist 2 only delivered services to the student remotely via "Zoom" and never delivered in-person services to the student or conversed with therapist 1 about the services being delivered to the student (June 13, 2024 Tr. pp. 190-91, 193). In addition, therapist 2 testified that she did not converse with MCC about the student's services (see June 13, 2024 Tr. pp. 192).

When discussing what skills she worked on with the student, therapist 2 testified that the student had "difficulty completing a lot of the tasks" due to her behavior management needs, and so the student needed to get "to a place where she [wa]s communicating her needs or wants instead of getting frustrated on camera" (June 13, 2024 Tr. p. 190).<sup>27</sup> According to therapist 2, when the student exhibited these behaviors, she was "[s]ometimes" able to work on the student's skills and was able to get more done on some days than on others (June 13, 2024 Tr. p. 195). Therapist 2 explained that the student had pragmatic and social communication needs, and she often said inappropriate things (June 13, 2024 Tr. p. 191). Therapist 2 addressed areas including reading comprehension, taking other people's perspective, filtering spoken language, social skills, and coping with different situations (see June 13, 2024 Tr. pp. 194-95). Therapist 2 testified that she spoke both English and Spanish with the student during sessions, and the student could recite scripted language in both English and Spanish (see June 13, 2024 Tr. pp. 195-96). At times when the student engaged in "shut-down" behaviors, she would "revert to typing" in the "chat box" (June 13, 2024 Tr. pp. 196-97, 198). Overall, therapist 2 reported that the student made "some progress," although slower than anticipated due to behaviors (see June 13, 2024 Tr. pp. 197-98). In addition, therapist 2 stated that since the student lived in a "Spanish-speaking household," it was "necessary for her to be able to communicate in Spanish as well" (see June 13, 2024 Tr. p. 198).<sup>28</sup> In her professional opinion, the student required bilingual speech-language therapy to "more efficiently grasp information received at school, to learn how to appropriately engage in social interactions, with staff at school and with family members at home, and to learn how to better explain her needs" (Parent Ex. Z ¶ 19).

### C. Equitable Considerations

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

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<sup>27</sup> When asked by the IHO to explain the statement about the student getting frustrated on camera, therapist 2 stated that the student became "noncompliant where she show[ed] frustration and not wanting to complete a task, either just shutting down and completely not saying anything," crying at times, and saying inappropriate things (June 13, 2024 Tr. p. 193). It was at that point in her testimony that therapist 2 revealed that she delivered the student's bilingual, home-based speech-language therapy via Zoom (id.). Therapist 2 also testified that she never considered providing in-person services to the student because they lived too far apart (see June 13, 2024 Tr. p. 195).

<sup>28</sup> According to therapist 2's testimony, she used the annual goals in the student's IEP for the 2023-24 school year as "guidance and as a starting point in [their] sessions," as well as information contained within the student's bilingual speech-language IEE (Parent Ex. Z ¶ 6).

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

### **1. Excessive Services**

Although framing it as an issue underlying the appropriateness of the unilateral placement, the district's argument in its cross-appeal that the student's home-based ABA and BCBA supervision, as well as the speech-language therapy services constituted duplicative services and maximization is an issue that must be examined as an equitable consideration. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at \*7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

The district argues that the home-based ABA services were for the purpose of generalizing the student's skills to the home setting, and focused not only on language and academics, but also on generalized daily living skills such as tooth brushing, dishwashing, bed-making, and other household chores. With respect to the home-based, bilingual speech-language therapy services, the district asserts that the home-based providers did not communicate with school-based providers or with each other. And although the student is bilingual, the district contends that she demonstrated stronger skills in English for the purpose of academics. Finally, the district asserts that the purpose of speech-language therapy is to assist the student in accessing her education, and not for the purpose of maximizing or generalizing her ability to speak Spanish at home.

In discussing generalization of skills, courts have indicated that school districts are not required, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (see, e.g., F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at \*11 [S.D.N.Y. June 8, 2016]; L.K. v. New York City Dep't of Educ., 2016 WL 899321, at \*8-\*10 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]).

In this instance, the hearing record contains evidence that MCC programmatically had supports available to encourage continuity and carry-over for the purpose of generalization of a student's skills between a school-based and a home-based environment (see Parent Exs. R at p. 5; X ¶¶ 16, 23, 35). However, the hearing record is devoid of evidence establishing that MCC providers or teachers collaborated or communicated with the student's home-based providers in any manner or for any purpose (see generally Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX). Similarly, the hearing record is devoid of evidence to establish that MCC or its providers recommended or required the student in this matter to receive home-based ABA or BCBA supervision services, or home-based bilingual speech-language therapy services to make progress (see generally Tr. pp. 1-145; May 16, 2024 Tr. pp. 146-221; June 13, 2024 Tr. pp. 146-214; Parent Exs. A; C-Z; AA-EE; Dist. Exs. 1-9; IHO Exhibits I-IX). As a result, the parent is not entitled to funding for the costs of the student's home-based ABA services, BCBA supervision services, and speech-language therapy services because the evidence supports a conclusion that the home-based services were either for the purpose of generalization of the student's skills or were otherwise excessive and beyond what the district was required to deliver to enable the student to make progress.

## **VII. Conclusion**

Having found that the district denied the student a FAPE and thus the IHO correctly ordered the costs of the student's tuition at MCC, but that the evidence in the hearing record supported the IHO's determination that the district was not required to fund the costs of the student's home-based ABA services, BCBA supervision services, and bilingual speech-language therapy services, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that I need not reach them in light of the determinations made.

**THE APPEAL IS DISMISSED.**

**THE CROSS-APPEAL IS DISMISSED.**

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

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**