



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-600

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

Appearances:

The Law Office of Elisa Hyman, PC, attorneys for petitioner, by Erin O'Connor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which ordered respondent (the district), in part, to develop an individualized education services program (IESP) for his son. The district cross-appeals from the IHO's determination that the parent's unilateral placement of his son at Saint Paul's Autism Research & Training Academy, Inc. (SPARTA) for the 2023-24 school year was appropriate. The appeal must be sustained. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

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

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, who is eligible to receive special education as a student with autism, attended a nonpublic school during the 2017-18 and the 2018-19 school years; however, due to increased maladaptive behaviors, the student was not offered a seat in the nonpublic school

for the 2019-20 school year (see Parent Ex. A ¶¶ 26-27, 33-35, 37-38, 41-42).^{1, 2} In spring 2019, the parent privately obtained a neuropsychological evaluation of the student (April 2019 neuropsychological evaluation); as a result of the testing results, the evaluator recommended that the student attend a "full day 1:1 A[ppl]ied B[ehavior] A[nalysis] [ABA] program in school and afterschool in combination with related services" (id. ¶¶ 40-41, 43). In or around October 2019, the student began receiving a "full day 1:1 ABA" home-based program pursuant to an order on pendency, having allegedly been without any special education program or related services from July through early October 2019 (id. ¶¶ 49-50). Thereafter, as a result of an IHO decision, dated July 20, 2020, the student received an award of compensatory educational services consisting of the following: 35 hours per week of 1:1, home-based and/or center-based or push-in school-based services, not to exceed 800 hours; 10 hours per week of 1:1 home-based tutoring, not to exceed 250 hours; five 30-minute sessions per week of 1:1 speech-language therapy (up to 105 hours); two 30-minute sessions per week of individual occupational therapy (OT) (50 hours); two 30-minute sessions per week of 1:1 physical therapy (PT) (up to 50 hours); and special education transportation (id. ¶ 53[b]).

According to the parents, for the 2020-21 school year, a CSE convened in May 2020 to develop an IEP for the student, which, among other things, included a recommendation for the student to attend a State-approved, nonpublic day school and receive related services; the services of a full-time, individual behavior paraprofessional; assistive technology; and special transportation (see Parent Ex. A ¶ 55). After the district allegedly failed to identify an assigned nonpublic school site for the student, the parent initiated an administrative proceeding, which resulted in the parties entering into a pendency agreement for the student to receive the following as pendency services: 35 hours per week of 1:1 ABA services, 10 hours per week of 1:1 ABA services, five 30-minute sessions per week of 1:1 speech-language therapy, two 30-minute sessions per week of 1:1 OT, two 30-minute sessions per week of 1:1 PT, and special education transportation (all on a 12-month basis) (id. ¶¶ 72-73, 75). As a result of the administration proceeding, an IHO issued a decision, dated October 3, 2022 (October 2022 IHO decision), which ordered the district to convene a CSE meeting to create an IEP for the student that included the following special education program and related services: "35 hours of individual (1:1) intervention through the provision of push-in and/or center-based ABA or similar data-driven behavior therapy under the supervision of a Board Certified Behavior Analyst/Licensed Behavior Analyst ('BCBA/LBA'), both providers must be of the [p]arents' choosing"; "10 hours of 1:1 afterschool and/or center-based ABA or similar data-driven behavior therapy"; two hours per week of BCBA or BCBA-D supervision at a "full day program and/or center-based program"; two hours per week of parent training by a BCBA or BCBA-D"; four hours per month of BCBA supervision

¹ The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). Evidence in the hearing record indicates that, at some point in 2019, the student attended an 8:1+2 special class placement at the nonpublic school, where he also had the services of a "paraprofessional aide" (Parent Ex. D at p. 1).

² The hearing record does not include copies of the student's IEPs from previous school years—other than a September 2023 IEP entered into evidence as an IHO exhibit—or any previous IHO decisions referenced in the facts and procedural history (see generally Tr. pp. 1-284; Parent Exs. A-I; IHO Ex. I). Instead, the information has been primarily gleaned from the parent's due process complaint notice and his 10-day notice of unilateral placement (see generally Parent Exs. A-B).

for the afterschool program; one hour per month of BCBA program development; five 60-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual OT; an independent assistive technology evaluation and district funding of assistive technology supports and services; implementation of a bank of compensatory educational services (230 hours of speech-language therapy, 46 hours of OT, 28 hours of PT); special transportation with limited travel time and a 1:1 transportation paraprofessional; and 12-month programming (over breaks and vacations to prevent regression) (Parent Ex. B ¶ 74[i]-[xx]).³

During the 2021-22 school year, the parent unilaterally placed the student at SPARTA, and the student remained at SPARTA for the 2022-23 school year (see Parent Ex. A ¶¶ 82, 87). More specifically, a CSE convened to develop an IEP for the student in January 2022, and thereafter, the student began attending SPARTA in or around January 2022, after having received approximately two years of home-based ABA instruction delivered by Kidz Choice Services (Kidz Choice or agency), which, based on the evidence in the hearing record, had been the agency providing the student with home-based ABA services since 2016 (see Tr. pp. 54, 186).⁴

On March 27, and April 4, 2023, the parent privately obtained an "[u]pdated" neuropsychological evaluation of the student (April 2023 neuropsychological evaluation) (Parent Ex. D at p. 1).

In a letter dated June 20, 2023, the parent notified the district of his intentions to unilaterally place the student at SPARTA for the 2023-24 school year and to seek reimbursement or prospective funding of the costs of the student's special education program for the 2023-24 school year, including the costs of the student's tuition at SPARTA (see Parent Ex. B ¶¶ 1, 106, 121[a]-[m], 122, 124).

A. Due Process Complaint Notice

By due process complaint notice dated July 5, 2023, the parent alleged, in part and as relevant to this appeal, that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A ¶¶ 88, 90-93). As relief, the parent requested that the district fund the costs of the student's tuition at SPARTA for the 2023-24 school year and provide compensatory educational services for the failure to offer the student a FAPE for the 2023-24 school year, including for any pendency services not delivered to the student (id. ¶¶ 96, 113).

³ The parent's due process complaint notice included information similar to that presented in his 10-day notice of unilateral placement, but the due process complaint notice appears to have mistakenly noted that the IHO's October 2022 decision was dated as "October 23, 2024," rather than as "October 3, 2022" (compare Parent Ex. A ¶ 76[a]-[q], with Parent Ex. B ¶ 74[i]-[xx]). Of note, the IHO who presided over the instant administrative proceeding with respect to the parent's July 2023 due process complaint notice was the same IHO who issued the October 2022 IHO decision (compare Parent Ex. B ¶¶ 73-74, with Tr. p. 1, and IHO Decision at p. 1).

⁴ Neither SPARTA nor Kidz Choice has been approved by the Commissioner of Education as a school or as an agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

B. Events Post-Dating the Due Process Complaint Notice

On August 17, 2023, district personnel executed a "Pendency Implementation Form," which indicated that the unappealed, October 2022 IHO decision formed the basis for the student's pendency services in the instant administrative proceeding (Pend. Impl. Form at pp. 1-2). Based on the information presented in the form, the district agreed that the student's pendency services consisted of the following: "35 hours of individual (1:1) intervention through the provision of pushing (sic) and/or center-based ABA or similar data-driven behavior therapy under the supervision" of a BCBA or LBA, as selected by the parents and on a weekly basis; "10 hours of 1:1 afterschool and/or center-based ABA or similar datadriven (sic) behavior therapy" on a weekly basis; two hours per week of BCBA or BCBA-D supervision at a "full day program and/or center-based program"; two hours per week of parent training by a "DBCBA or BCBA-D"; four hours per month of BCBA supervision for the afterschool program; one hour per month of BCBA program development; five 60-minute sessions per week of individual speech-language therapy; two 30-minute sessions per week of individual PT; two 30-minute sessions per week of individual OT; with the services identified as part of a 12-month program (*id.*).

On August 31, 2023, a CSE convened and developed an IEP for the student for the 2023-24 school year (*see* IHO Ex. I at pp. 1, 43).⁵ Finding that the student remained eligible for special education as a student with autism, the August 2023 CSE recommended 12-month programming consisting of a 6:1+1 special class placement in a district specialized school, three 30-minute sessions per week of individual OT, one 30-minute session per week of OT in a small group, two 30-minute sessions per week of individual PT, five 30-minute sessions per week of individual speech-language therapy, and four 60-minute sessions per year of parent counseling and training in a group (*see* IHO Ex. I at pp. 1, 37-39, 43). Additionally, the August 2023 CSE recommended that the student participate in adapted physical education (three periods per week) and as assistive

⁵ Within the August 2023 IEP, it was noted that the CSE advised the parent to "submit requests for PT, [s]peech, OT and [assistive technology] evaluations"; the CSE would "send over [an assistive technology] . . . referral packet"; and the parent should "send the team, in writing, requests for re-evaluations" (IHO Ex. I at p. 8). It was also noted in the IEP that the student had not been privately evaluated "since April 2019," and it appears that the August 2023 CSE relied on testing results from an April 2019 neuropsychological evaluation of the student, as well as a December 2021 special education teacher support services (SETSS)/ABA progress report, and a June 2021 PT report to develop the student's August 2023 IEP (*id.* at pp. 1-2). As a reminder to the district, federal and State 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]). Therefore, while not relevant to determining the issues in this appeal, it is solely the district's obligation to reevaluate the student at least once every three years and it is not the parent's obligation to request reevaluations of the student. Moreover, the parent testified at the impartial hearing that, after receiving notice from the district on June 6, 2023 about the student's three-year reevaluation process, he had "provided signed consent for all evaluations and observations" as requested by the district (Parent Ex. I ¶ 6). According to the parent, the district conducted a classroom observation of the student at SPARTA in summer 2023, but he "never received a copy of the observation conducted" (*id.* ¶ 11). The parent further testified that although he thought the district was going to evaluate the student, "no evaluations were ever discussed" at the August 2023 CSE meeting and he never received "any updated evaluations" of the student (*id.* ¶¶ 13-14). According to the parent's testimony, he informed the August 2023 CSE about the student's April 2023 neuropsychological evaluation (*id.* ¶¶ 15-16).

technology and devices, recommended that the student have access to the use of a "[d]ynamic display speech generating device with associated app[lication]s and accessories (tablet with Speak for Yourself, adapter and case)" (*id.* at pp. 37-38). Finally, the August 2023 CSE recommended that the student receive door-to-door special transportation (*id.* at p. 42).

On September 1, 2023, the parent executed an "Enrollment Contract" with SPARTA to deliver the following services to the student from July 1, 2023 through June 30, 2024: 35 hours per week of center-based ABA services (\$155.00 per hour), 10 hours per week of home-based ABA services (\$155.00 per hour), two hours per week of BCBA supervision at the center (\$245.00 per hour), four hours per month of BCBA supervision for the "afterschool program" (\$245.00 per hour), one hour per month of BCBA "program development" (\$245.00 per hour), two hours per week of parent training by a BCBA (\$225.00 per hour), five 60-minute sessions of speech-language therapy (\$250.00 per hour), four 45-minute sessions of OT (\$250.00 per hour), two 30-minute sessions of PT (\$250.00 per hour), and door-to-door transportation (\$80.00 per day) (Parent Ex. C at pp. 1-2, 4).

C. Impartial Hearing Officer Decision

On September 1, 2023, the parties proceeded to an impartial hearing, which concluded on October 11, 2024, after 10 total days of proceedings (*see* Tr. pp. 1-284). In a decision dated October 24, 2024, the IHO concluded that the district failed to offer the student a FAPE for the 2023-24 school year, SPARTA was an appropriate unilateral placement for the student, and equitable considerations weighed in favor of the parent's requested relief (*see* IHO Decision at pp. 6-14). In finding that the district failed to offer the student a FAPE, the IHO noted that the student had been known to the district since preschool, and during adolescence, the student's behaviors had escalated and had "created even more significant obstacles to learning" (*id.* at p. 8). According to the IHO, it had been "clear for some time that ABA-based modalities [we]re the only ones that result[ed] in progress," and when the district "refuse[d] to find a program of ABA for [the student] ostensibly because it [wa]s not a modality that the [district] espouse[d], it [wa]s failing to provide this [student] with a basic education" (*id.*). Although the district did not present any evidence or a "strenuous defense," the IHO found that "it [wa]s clear to [her] that without ABA instruction, the [s]tudent ha[d] failed to thrive, educationally in the past" and the same would result if the student's current "ABA program" was "curtailed, as the [district] ha[d] attempted to do in the most recently created IEP program" (*id.* at p. 9).

With respect to the parent's unilateral placement of the student at SPARTA for the 2023-24 school year, the IHO found that the student was receiving 1:1 ABA services at SPARTA, "both in school and before and after school" (IHO Decision at p. 10). Additionally, the IHO noted that the student currently had a "pendency order in place but [had] request[ed] that the pendency program [be] found to be the student's adjudicated program" for the 2023-24 school year (*id.*). Next, the IHO noted that, based on the student's 2023 neuropsychological evaluation, the "diagnosis of autism spectrum disorder continue[d] to cause the student to present with cognitive and language development challenges" (*id.*).⁶ As determined by the IHO, the neuropsychological

⁶ The IHO indicated that the neuropsychological evaluation was conducted in 2020; however, this appears to have been a typographical error as the IHO cited to the April 2023 updated neuropsychological evaluation (IHO Decision at p. 10; *see* Parent Ex. D).

evaluation noted "significant improvement in communicating and [a] decrease in negative behavior since entrance into an ABA-based program," and moreover, that the student's continued progress depended on his participation in a "[f]ull-day, one-to-one intervention in a modality such as ABA" (id.).

Next, the IHO considered the concerns raised by the district with regard to the credentials and qualifications of the student's providers at SPARTA (see IHO Decision at p. 11). The IHO found the BCBA to be "entirely credible" (id.). The IHO further found that the BCBA testified about the student's steady progress during the 2023-24 school year, including improvements in his "attention span, academic skills, particularly in reading readiness and mathematics," his communication skills as assisted by the student's communication device, and his ability to "relate to other students by participating in group activities, a skill [the student] had been lacking" (id.). In addition, the IHO noted that, based on caselaw, "where nothing in the [hearing] record suggest[ed] that such [ABA] instruction ha[d] to be delivered by a BCBA in order to be effective," a district's decision to hire a "behavior consultant to consult with and train the program's staff was [] sufficiently appropriate" (id. at pp. 11-12, citing M.S. v. New Hyde Park-Garden City Park Union Free Sch. Dist., 2022 WL 903064 [E.D.N.Y. Mar. 28, 2022]). The IHO also noted that the hearing record included a "detailed description of the data-based program used with the [s]tudent," and the BCBA testified about the student's "steady progress" (IHO Decision at p. 12, citing Tr. p. 93 and Parent Exs. E-H). As a result of the foregoing, the IHO concluded that SPARTA "was entirely appropriate and well exceeded the standard set by caselaw" (IHO Decision at p. 12).

Having found that the parent established the appropriateness of the student's unilateral placement at SPARTA, the IHO examined equitable considerations (see IHO Decision at pp. 12-14). The IHO found that the parent cooperated with the district, timely provided the district with a 10-day notice of unilateral placement, and after no response from the district, the parent took reasonable action by enrolling the student at SPARTA (id. at p. 13). With regard to the "excessiveness of services," the IHO disagreed with the district's position that "either the cost or the hourly schedule [wa]s excessive" (id.). The IHO pointed to the director's testimony, which, according to the IHO, "spoke to the cost of running such a program including hiring skilled professionals and necessary overhead" (id.). The IHO found such expenditures for the program to be "reasonable and necessary costs" (id.).

With respect to the district's argument that the student's home-based services were "considered generalized education across environments other than school," the IHO indicated that both the director and the BCBA "described this [s]tudent as one who need[ed] a great deal of instruction and basic one-to-one assistance in the life skills necessary to prepare for and to travel to and from school" (IHO Decision at p. 13). According to the IHO, it was "clear that this [wa]s a [s]tudent who, without the assistance of an ABA therapist would not at this point in his life, be able to get to school at all without such assistance"; moreover, the IHO found that, with regard to the home-based services, the "continuity of this service ensure[d] that the progress made during the day w[ould] not be lost to regression" (id.). The IHO further noted that the student in this matter had "severe delays in the areas of cognition, socialization, behavior and communication, gross motor and fine motor development" (id. at pp. 13-14). As a result, the IHO indicated that the student was "not able to perform daily living tasks independently and [his] education and safety depend[ed] on the consistency of this instruction" (id. at p. 14). In further support of this determination, the IHO pointed to the neuropsychological evaluation, which indicated that an

"adherence to routines and individualized instruction" was required for the student to "avoid maladaptive behaviors and regression" (*id.*). Consequently, the IHO concluded that the hearing record demonstrated that the student had made "strides in achieving independence" and the "ABA home instruction as it ha[d] been performed [wa]s still a program necessary for the [s]tudent and equity d[id] not bar recovery for this service"; therefore, equitable considerations weighed in favor of the parent's requested relief (*id.* at pp. 14-15).

As a final matter, the IHO noted that SPARTA, as a "not-for-profit program," charged \$155.00 per hour for its center-based and its home-based services, and SPARTA provided all related services the student needed and paid all of the related service providers the same rate of \$150.00 per hour (IHO Decision at p. 14). The IHO indicated that "[i]nvoices must be presented for payment of the entirety of the hours the [s]tudent received" (*id.*). The IHO also noted that the costs of the student's transportation provided by SPARTA must be "funded as an inclusive part of the home-based hours" (*id.*).

In light of these determinations, the IHO ordered the district, as relevant herein, to fund the costs of 35 hours of center-based services and up to 20 hours of home-based services, at a rate of \$155.00 per hour, upon proof of services provided to the student during the 2023-24 school year (see IHO Decision at p. 15). In addition, the IHO ordered that all funding was for an "extended 12-month school year," and the district was required to convene a CSE to develop a "current IESP" for the student and to conduct evaluations of the student in all areas of suspected disability (unless it had already done so) (*id.* at p. 16).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO's decision contains a typographical error by ordering the district to develop an "IESP" for the student, rather than an "IEP," and the parent seeks to correct this error. The parent also alleges that the IHO erred by failing to determine whether the district violated section 504 of the Rehabilitation Act of 1973 (section 504).⁷ As relief, the parent seeks an order modifying the IHO's decision by correcting the typographical error.

In an answer, the district responds to the parent's allegations, and concedes that the IHO's decision contains a typographical error by ordering the district to develop an IESP for the student.

⁷ In the parent's answer and reply submitted in response to the district's answer and cross-appeal, the parent acknowledges that an SRO lacks jurisdiction over the section 504 claim set forth in the request for review; however, the parent notes that he included the section 504 claim to ensure that it was exhausted, to the extent that exhaustion was required (see Answer & Reply ¶ 21). Consistent with the parent's acknowledgement, it is well settled that an SRO lacks jurisdiction to consider a parent's challenge to an IHO's finding or failure or refusal to rule on section 504, as an SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of 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.

On this point, the district agrees to a modification of the IHO's order, consistent with the parent's request. As a cross-appeal, the district asserts that the IHO erred by finding that the student's unilateral placement at SPARTA for the 2023-24 school year was appropriate and that equitable considerations weighed in favor of the parent's requested relief.⁸ The district seeks to overturn the IHO's finding that SPARTA was appropriate, or alternatively, that the parent is not entitled to reimbursement for the costs of the student's unilateral placement at SPARTA and the costs of the home-based program delivered by SPARTA based on equitable considerations.⁹

In an answer to the district's cross-appeal, the parent responds to the district's allegations and argues to uphold the IHO's findings with respect to the appropriateness of SPARTA and equitable considerations. The parent also asserts that the IHO's decision contains a "likely typographical error with respect to the order for 20 hours of home-based ABA," noting that the student was receiving 10 hours per week of home-based ABA services and the parent simply sought to continue the student's program.¹⁰

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

⁸ In light of the district's concession that the IHO erred by ordering the district to develop an IESP for the student as opposed to an IEP for the then current 2024-25 school year and further considering further that the CSE should have already reconvened to have a program in place for the student for the 2024-25 school year and the subsequent 2025-26 school year, the parent's appeal of this issue is now moot and will not be addressed (see Answer & Cr. App. ¶ 19). Additionally, since the district does not challenge the IHO's findings that the district failed to offer the student a FAPE for the 2023-24 school year, including the more specific determination that the student required ABA services or instruction to make progress, these findings 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 Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

⁹ The district submits additional documentary evidence for consideration (see Answer & Cr. App. ¶ 2).

¹⁰ In light of the parent's concession that the IHO erred by ordering the district to provide the student with up to 20 hours per week of home-based ABA services, rather than 10 hours per week of home-based ABA services the student received during the 2023-24 school year, and given that the 2023-24 school year has concluded, the district's cross-appeal of this issue is now moot and will not be further addressed, except to the extent that the district argues that the 10 hours per week of home-based ABA services is excessive and not reimbursable under equitable considerations (see Answer & Reply ¶ 17).

York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹¹

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

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

VI. Discussion

A. Preliminary Matters—Additional Documentary Evidence

As noted, the district submits additional documentary evidence for consideration on appeal. The district asserts that the parent entered numerous documents, identified as parent exhibits A through J, into evidence at the impartial hearing, including two testimonial affidavits (see Answer & Cr. App. ¶ 2). However, the district contends that the IHO failed to enter parent exhibit J—the purported affidavit of the BCBA's direct testimony—into the hearing record, notwithstanding that the parent proffered the testimonial affidavit at the impartial hearing. Here, the district not only attempts to enter parent exhibit J as additional documentary evidence, but also resubmits all of the parent's documentary evidence from the impartial hearing, which the district refers to as an "updated evidence package supplied by [the p]arent" and which includes a testimonial affidavit as well as a "signature/verification" for the parent's testimonial affidavit, for consideration. The parent does not object to the consideration of the proffered BCBA's affidavit testimony, but does

¹¹ 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).

not otherwise comment on the remaining additional documentary evidence submitted by the district (see Answer & Reply ¶ 20).

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

At the impartial hearing on February 15, 2024, the district's attorney raised a concern about the parent's disclosure of evidence sent by email on the previous day after 5:00 p.m. (see Tr. pp. 39, 43-44). The district's attorney acknowledged having received "some of the disclosures" in October 2023 (Tr. p. 44). The parent's attorney identified the "updated disclosure" as including "two affidavits, of the BCBA and the parent" (Tr. p. 45). The parent's attorney indicated that both the BCBA and the parent were "available" to provide direct testimony at the impartial hearing "if the affidavits c[ould not] be admitted into evidence" (Tr. pp. 45-46). The parent's attorney then clarified that the updated disclosure included "three additional exhibits, two of which [we]re notarized affidavits" and the third exhibit was an "updated progress report" (Tr. p. 46). At that time, the parent's attorney noted that the parent was willing to "withdraw that progress report" so the impartial hearing could move forward (id.). The IHO granted the parent's request to withdraw exhibits "H, I, and J," and indicated that the impartial hearing would proceed to "hear the testimony of the witnesses live" (id.). With those instructions in mind, the parent's attorney sought to call the first witness; however, the district's attorney interjected with an objection, noting that, even if the "affidavits [we]re withdrawn and the witnesses appear[ed] live" for testimony, the parent had not previously disclosed or otherwise identified the witnesses until the previous night (Tr. pp. 46-48). The parent's attorney noted, however, that on October 2, 2023, she had identified both the BCBA and the parent as witnesses in this matter (see Tr. pp. 48-49; see also Tr. p. 21). At that point, the parent called the first witness: the BCBA (see Tr. pp. 49-61). The BCBA's direct testimony continued into the next impartial hearing date, May 13, 2024, and the district's attorney completed cross-examination of the BCBA on that same day (see Tr. pp. 73, 81-138). Thereafter, on May 28, 2024, the district's attorney cross-examined the parent, who appeared as the next

witness in this matter, and the parent's attorney completed redirect examination of the parent to conclude his testimony (see Tr. pp. 148, 152-172).

On October 11, 2024, the parent's attorney appeared for the final day of the impartial hearing, which the IHO held for the sole purpose of entering evidence into the hearing record (see Tr. pp. 273, 276). The district did not appear (see Tr. p. 273). The IHO explained that, while in the midst of writing the decision in this matter, she realized that although the parties had discussed the evidence in this case, the evidence had not been entered into the hearing record during the previous proceedings (see Tr. p. 276). After some discussion, the IHO then read a description of each exhibit on the record and entered parent exhibits A through I into the hearing record as evidence (see Tr. pp. 274-75, 280-82). Notably absent from the IHO's recitation of the parent's evidence was the BCBA's affidavit testimony, which the district now seeks to enter into the hearing record as evidence (see Tr. pp. 275-75, 280-81).

Here, the parties had over one full year to enter evidence into the hearing record (see Tr. pp. 1, 273). And while it appears that the parties contemplated entering an affidavit in lieu of direct testimony for the BCBA, the affidavit was not entered into evidence and the BCBA appeared over the course of two days at the impartial hearing as a live witness for direct examination and cross-examination (see Tr. pp. 39, 49-61, 73, 81-138). Therefore, it is unclear what purpose it serves to now enter the BCBA's affidavit testimony—or any other documents submitted as part of the updated evidence package supplied by the parent—when neither party provides any justifiable basis to replace the evidence already entered into the hearing record or why any of the updated evidence package was neither available at the time of the impartial hearing nor is now necessary to reach a decision in this matter (see generally Answer & Cr. App.; Answer & Reply). Therefore, in an exercise of my discretion, I decline to consider the additional documentary evidence submitted by the district for consideration.

B. Unilateral Placement

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 Needs

Although the student's needs are not at issue, a review thereof facilitates the discussion of the issue to be resolved—namely, whether the parent sustained his burden to establish the appropriateness of the student's unilateral placement at SPARTA for the 2023-24 school year, which included, among other things, the provision of 35 hours per week of center-based ABA services and 10 hours per week of home-based ABA services. Here, the April 2023 neuropsychological evaluation of the student contains the most recent information about the student's needs prior to the parent's decision to unilaterally place him at SPARTA for the 2023-24 school year. Additionally, the hearing record includes a December 2023 special education teacher support services (SETSS)-ABA progress report (December 2023 progress report), which also provides some limited information about the student's needs.¹²

¹² To be sure, a review of the appropriateness of a unilateral placement is not restricted to only the evidence available to the parent at the time he made the unilateral placement decision insofar as implementation of the programming and services and the student's progress are relevant to the analysis (see Khanimova v. Banks, 2025 WL 722876, at *6 [S.D.N.Y. Mar. 6, 2025], citing C.L., 744 F.3d at 836). Nevertheless, evaluative information

As reported in the April 2023 neuropsychological evaluation report, the parent requested the evaluation to "determine [the student's] current level of cognitive, academic and emotional functioning" (Parent Ex. D at p. 1). Based on behavioral observations of the student, conducted as part of the evaluation process, the evaluator noted that the student "once again impressed as an energetic nonverbal learner who demonstrate[d] behaviors consistent with children diagnosed with an autism spectrum disorder" (id. at p. 2). The evaluator also noted that the student used his "communication device with greater proficiency but continue[d] to require support to avoid engaging in perseverative behaviors (i.e., pressing the same button repeatedly)" (id.). As reflected in the report, the student "attempt[ed] to use his device to respond to questions with inconsistent results," however, it was also noted that the student used the device "for certain mands and tacts" and "demonstrated [a] greater ability to remain in his seat and complete the presented materials" (id.). Next, the evaluator indicated that he did not observe the student's "previously noted compulsive cleaning behaviors," and the student was "much less likely to engage in avoidant behavior or to escalate into aggressive behaviors when presented with challenging behaviors" during the current evaluation (id.). The evaluator further indicated that the student "continued to follow single-step directions and some multi-step directions," and he could "respond to 'Your Turn'/'My Turn' prompts" (id.).

In addition, the evaluator noted that the student "once again continued to vocalize spontaneously and attempted to use his device to communicate when appropriate" (Parent Ex. D at p. 2). The student also "continued to attempt to communicate using gesture, his device, or general vocalization," and during breaks, the student played with his "iPad" (id.). According to the evaluator's observations, although the student had engaged in "aggressive behaviors previously when not immediately given access to his iPad, these behaviors no longer occurred" (id.).

Next, the evaluator indicated that the student was "much less motor restless," he remained "in his seat to complete tasks and cooperated with presented tasks," and he "did not attempt to hit or pinch the examiner when challenged" (Parent Ex. D at p. 2). Additionally, the evaluator indicated that the student required "redirection prompts when h[is] attention wandered from the task at hand or when he began to engage in perseverative responding" with his device (id.). The evaluator further indicated that although the student's eye contact was "fleeting," he was "more likely to engage in eye contact when seeking or offered preferred items" (id.). Overall, the evaluator reported that the "current evaluation appeared to be a valid and reliable estimate of [the student's] cognitive, academic and emotional functioning" (id.).

With regard to the student's testing results, the evaluator found that, when compared to his previous assessment, the student had "demonstrated some increase in functional skills," there were "no aggressive outbursts," and he had "also demonstrated limited verbal responses but was more likely to mand using his [communication] device" (Parent Ex. D at p. 6). With respect to his cognitive functioning, the evaluator determined that, while the student's "performance on standardized measures remained largely unchanged," his "prerequisite skills for participating in an individualized assessment ha[d] improved," and consistent with the previous evaluation, he was "cooperative and attentive" throughout the process (id. at pp. 3, 6). During the current assessment,

about the student's needs gathered several months into the school year at issue would tend to be relevant to a review of the student's progress or lack thereof at the unilateral placement, rather than establishing the student's underlying needs, which the parent was required to establish were met by the unilateral placement.

the student could "complete more complex tasks" than on the previous assessment, and he "demonstrat[ed] fewer avoidant behaviors and attempt[ed] more challenging activities" (*id.* at p. 6). According to the evaluator, the student's gains, however, did not consistently equate to "gains in his performance on standardized measures" (*id.*). An administration of the Comprehensive Test of Nonverbal Intelligence, Second Edition (CTONI-2) to the student—which the evaluator selected to "assess [the student's] performance on tasks that were seemingly devoid of excessive language load"—revealed that the student, who was "previously unable to participate in this task," was then-currently able to "complete many of the items" (*id.* at pp. 3-4). On the CTONI-2, the student achieved a standard score of 57 on the composite nonverbal intelligence index (below the first percentile), however, he "excelled at recognizing geometric categories" (average range) and performed within the low average range on the pictorial categories (*id.* at p. 4). These scores indicated to the evaluator that the student could "engage in categorical thinking, likely related to his practice and proficiency when using his speech generating device" (*id.*). However, the student "struggled through the other tasks on this measure, with a majority of his scores falling in the [e]xtremely [l]ow range (below the [first] percentile)" (*id.*). The evaluator concluded that the student's weaker performance within these domains was "likely due to challenges processing the nuances of the directions of these tasks" (*id.* at p. 6).

Academically, the testing results revealed that the student continued to "present with considerable challenges with language and delays in cognitive functioning" and "with difficulties understanding age-appropriate information" (Parent Ex. D at pp. 3, 6). As part of the evaluation process, the evaluator administered the "Nonverbal items from the Stanford-Binet, Fifth Edition (SB5)" to the student, which resulted in a nonverbal index standard score of 42 (extremely low range) (*id.* at p. 3).¹³ According to the evaluator, the student could "recognize and write some letters," but could not "spell words"; he appeared able to "engage in limited silent reading based on his ability to navigate his [communication] device," but he could not "read aloud" despite being able, at time, to "make letter sounds"; and the student engaged in "perseverative behaviors when asked to write letters and numbers" (*id.* at pp. 6-7). For example, in reading, the student's limited speech complicated his ability to complete tasks; however, while the student could "point to letters and some words," he could not read the words aloud (*id.* at p. 4). Similarly, he could "match symbols and words on a comprehension task but he could not complete cloze 'fill-in-the-blank' items" due to his limited speech (*id.*). In writing, the student could "write individual letters, but he was unable to connect letters into words" and "perseveratively wrote his name and the letters 'ABCD'" when asked to "write individual letters" (*id.*). In mathematics, the student struggled to "understand math word problems (read aloud to him) and often confused the language of the problems"; additionally, the student could not "write the numbers 0 [through] 10 without prompts due to perseverative behaviors" (*id.*).

In addition to weak cognitive and academic functioning, the evaluator determined that student's sustained attention was an "area of significant weakness," but further noted that he responded to prompts for redirection (Parent Ex. D at p. 5). In the area of language, the evaluator found that the student had "greater proficiency" with his communication device, given his

¹³ In assessing cognitive functioning, the student's performance on subtests in the areas of fluid reasoning, knowledge, quantitative reasoning, visual-spatial index, and working memory all fell below the first percentile (extremely low range) (*see* Parent Ex. D at pp. 3-4, 9).

familiarity with items on the device and noting that the student had difficulty "focusing on the books" because the student did not receive the any "feedback from pointing to the pictures in a book, unlike when pointing to his items on his communication device" (id.). In the area of memory and learning, the student demonstrated a "strong" ability with regard to his "memory for simple routines"; however, he had a "harder time for more complex routines" (id.). Next, in the area of visuo-spatial and visual motor skills, the student "demonstrated weaknesses within the fine-motor domain" (id.). The student had difficulty drawing shapes; however, he could "complete a formboard puzzle" (id.). The student had more difficulty completing "non-interconnecting puzzles" (id.).

With regard to behavior and emotional adjustment, the evaluator indicated that the student's "aggressive behaviors appear[ed] to have abated, although he maintain[ed] his rigid behaviors" (Parent Ex. D at p. 7). Notably, the student demonstrated a "relative strength in his daily living skills (a simple self-care routine, simple chores)," while exhibiting "considerable weaknesses in the other domains, specifically communication and socialization" (id. at p. 5). The evaluator further noted that the student could "respond better to routines and engage[d] in fewer avoidant behaviors, which previously led to an escalation of aggressive behaviors" (id. at p. 7). The evaluator indicated that the student was "cooperative with many of the presented activities and demonstrated fewer motor-restless behaviors" (id.). Overall, the student continued to demonstrate "fleeting eye contact, limited verbal output, perseverative behaviors, sensory-seeking and self-stimulatory behaviors, and cognitive challenges" (id.).

To address the student's needs, the evaluator recommended, in part, that the student "remain in a program that c[ould] provide full-day, individual (one-to-one) intervention that utilize[d] a systematic behavioral methodology (i.e., [ABA]) that w[ould] identify the functions of his aggressive behavior and develop intensive, supportive behavior-intervention programs that w[ould] address and reduce these actions" (Parent Ex. D at p. 7). The evaluator also recommended that the student receive home-based, "structured behavioral intervention (i.e., discrete trial ABA training) under the coordination and supervision" of a BCBA on a 12-month basis, and the parents should receive "ongoing parent support and training under the supervision of a BCBA" (id.). The evaluator further recommended that the student receive speech-language therapy and OT services, but did not indicate the duration and frequency of those recommended related services (id. at p. 8).

Finally, the December 2023 progress report—which was drafted by the BCBA—indicated that the student required more time to acquire new skills, engaged in some compulsive behaviors that might interfere with his learning, needed redirection and errorless teaching strategies, and needed a "structured environment where he c[ould] systematically learn skills that allow[ed] him to be independent, guided by behavioral principals and in collaboration with other disciplines, such as OT and [s]peech" (Parent Ex. H at p. 13; see Tr. p. 133).

2. Specially-Designed Instruction

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part,

the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

The district argues in its cross-appeal that the IHO erred by finding that SPARTA was an appropriate unilateral placement, noting specifically that the hearing record lacked sufficient evidence to conclude that 35 hours per week of center-based ABA services was based on the student's needs or "after a consultation amongst his providers." Instead, the district contends that the decision to provide the student with 35 hours per week of center-based ABA services was based on a prior IHO's decision ordering the district to fund 35 hours per week of services for the student. As a result, the district asserts that the hearing record is devoid of evidence that the student required this specific level of center-based services. In addition, the district contends that the hearing record contains insufficient evidence to establish how the ABA services were delivered to the student, other than a "brief, undated one and one-quarter page document outlining goals for the school year."

Next, with respect to the home-based ABA services, the district argues that the hearing record is devoid of any progress reports or annual goals related to the home-based ABA services delivered to the student, other than testimonial evidence establishing that "home-based providers work[ed] on at least some different skills at home."¹⁴

In response, the parent argues to uphold the IHO's finding that SPARTA's center-based and home-based services were appropriate, and generally asserts that the evidence in the hearing record demonstrates that the student made progress during the 2023-24 school year. With respect to specially-designed instruction, the parent contends that SPARTA provided 1:1 ABA services and related services to address the student's needs, and in particular, his academic and functional goals. The parent also argues that the director of SPARTA testified that 35 hours per week of 1:1 ABA services had been assessed to be an appropriate mandate of services for the student for the 2023-24 school year.

¹⁴ To the extent that the district contends that the hearing record lacks evidence of progress, it is well settled that, while relevant a factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). In this instance, the hearing record includes copies of the student's annual goals developed by SPARTA to address his related services needs in speech-language therapy, OT, and PT, as well as including a copy of the annual goals pertaining to the ABA services for his needs in cognitive functioning, speech-language and communication skills, social/emotional functioning, motor skills and abilities, self-help skills and adaptive functioning, and community inclusion and vocational skills (see generally Parent Exs. E-F). In addition, the hearing record includes a December 2023 progress report with respect to the student's annual goals related to his ABA services (see generally Parent Ex. H).

Initially, the parties do not appear to dispute that SPARTA provided the student with both center-based ABA services and home-based ABA services, or that ABA, itself, was an inappropriate special education program or methodology to address the student's needs during the 2023-24 school year. Instead, the crux of the dispute is whether the evidence supports a determination that SPARTA, which allegedly delivered 35 hours per week of individual, center-based ABA services and 10 hours per week of individual, home-based ABA services to the student, constituted an appropriate unilateral placement during the 2023-24 school year.

To that end, the evidence in the hearing record reflects that, at the impartial hearing, the BCBA described SPARTA as a "center that provide[d] ABA services" to students who had received a diagnosis of autism, and as a "full-day program" focused on "independence and teaching kids all the routines—home routines and school routines—using technology" (Tr. p. 57). More specifically, the BCBA testified that SPARTA used an "activity visual schedule that ha[d] an embedded reinforcer initially that [wa]s progressively faded out" (*id.*). The BCBA also testified that students "obtain[ed] independence throughout their morning routine, [and] transitions," and "during the school routine," SPARTA had "individualized target programs for [students] to work on"; she also testified that, in the afternoons, SPARTA helped students "transition for home" (*id.*). At the impartial hearing, the BCBA described ABA as a "science based on behavioral data, reinforcers, and behavioral principles," which was used to "manage and modify behavior based on scientific principles" (Tr. p. 52).

Turning to the BCBA's testimony, she began working with the student in 2018 through her employment with Kidz Choice, and she testified that she was responsible for ABA supervision and delivery of ABA services (*see* Tr. p. 54).¹⁵ According to the BCBA, Kidz Choice was already providing services to the student before she began working with the agency, and therefore, the agency had completed an initial assessment of the student; she described the student as presenting with a "lot of rigidity in his behaviors," and noted that he "tended to organize and move things around," which "interfered with his learning" (Tr. pp. 54-55).

When asked to describe the student's then-current presentation (i.e., in February 2024), the BCBA noted that his attention span had "greatly improved"; he had moved from "tangible reinforcers, edible reinforcers to social reinforcers and finishing tasks"; academically, the student could "arrange numbers 1 to 100" and count numbers using manipulatives and his assistive technology device; and he was "learning to decode words, CVC words," "CVCV words," and

¹⁵ The BCBA's testimony occurred in February and May 2024, during the 2023-24 school year (*see* Tr. pp. 39, 73). At the impartial hearing, the BCBA described the student when she first began working with him in 2018 (*see* Tr. pp. 54-55). She testified that the student was nonverbal, and although he used a speech-generating device (i.e., "talker"), he was not able to fully use it to communicate all of his wants and needs; the student could follow a "few one-step instructions"; he had "very poor" eye contact"; he was not fully toilet trained; and the student had difficulties with his "adaptive living skills," such as delayed fine motor skills, and an inability to tie shoes or unfasten buttons (Tr. p. 55). When she initially began working with the student, he was still attending the nonpublic school (which used ABA principles) and received home-based ABA services after school (Tr. pp. 55-56; *see* Tr. pp. 113-14). She believed the student stopped attending the nonpublic school in or around "winter 2019" and he remained "without a school program" but continued to receive home-based services (Tr. p. 56). When the COVID-19 pandemic occurred (i.e., March 2020), she testified that the student received ABA services remotely, and "after that period," the agency delivered home-based ABA services "as much as possible" (Tr. pp. 56-57).

"sight words at a kindergarten level" (Tr. pp. 58-59).¹⁶ The BCBA also testified that the student was "learning to identify . . . familiar words in text" (Tr. p. 59). The student had also learned to request "desired, needed, wanted objects, edibles, [and] activities" with his communication device, and according to the BCBA, his "communication ha[d] greatly advanced" (id.). Next, the BCBA testified that the student could "form simple sentences" with his communication device, and "deliver sentences using a carrier phrase," but they were working on the student's tendency for "overgeneralization" (Tr. pp. 59-60). Socially, the BCBA testified that the student had developed a "tolerance to work with other people," noting that the student appeared to have a "noise sensitivity" and it was "one of the reasons why initially [the nonpublic school] was not able to keep him in [that] setting" (Tr. p. 60). Now, however, the student could "participate in small groups," he could "tolerate more noisy places," and he could "share materials and participate in reciprocal activities with other kids" (id.). Turning to the student's motor skills, the BCBA testified that he could now "sustain workouts for longer periods of time" and was "learning to use the gym equipment at a center" (id.). While the student could "sustain . . . some yoga positions," he continued to have "stiffness in his muscles," and he "rarely perform[ed movements] in a full range of motion" (id.). With respect to adaptive skills, the BCBA testified that the student was "learning to perform the whole morning routine at home using a visual schedule with an embedded reinforcer on a tablet," however, he continued to struggle with a "shower routine," which his mother and provider had been working on with him (Tr. pp. 60-61). The BCBA noted that the student had "developed . . . a lot of independence in these skills" (Tr. p. 61). Finally, the BCBA testified that the student was "working on completing vocational activities in the center" using a visual schedule (id.).

The BCBA also described how the student performed academically during the 2023-24 school year, indicating that he had "increased his time to remain on task either at a table or in a group setting as well," although the student may have needed "some embedded breaks" (i.e., "movement" or "sensory") (Tr. p. 90). The BCBA testified that the student improved his mathematics skills, noting that he counted with his communication device, he identified numbers from 1 to 100, and he could perform "very simple addition with using manipulatives and visuals" (id.). According to the BCBA, the student was also beginning to generalize the use of his communication device to "count, to describe a setting or a scene independently or with little prompt," and he could "identify kindergarten and [fir]st grade sight words . . . receptively" (id.). The BCBA explained that the student was also learning to "copy and type the words to be reproduced" in his communication device, and he was using the device to "communicate more spontaneously with his peers" (Tr. p. 91).

With respect to the student's behavior during the 2023-24 school year, the BCBA testified that his "behavior [wa]s pretty stable," and he had learned to use his communication device to "request desired items or activities"; in addition, the BCBA noted that sometimes the student would "perseverate on asking for something if he really want[ed] it," so they were working on his "tolerance to withhold or waiting for the reinforcer" (Tr. pp. 91-92). The BCBA testified that the student "understood the concept of completing a task and then obtaining a reinforcer," he could

¹⁶ Although not explained in the hearing record, "CVC" typically refers to words spelled in a consonant-vowel-consonant pattern (i.e., cat, dog). Similarly, "CVCV" typically refers to words spelled in a consonant-vowel-consonant-vowel pattern (i.e., gate, hero).

use an "activity schedule" to complete tasks, and his frustration levels could vary with "changes" and when "new people" were present (Tr. p. 92). In addition, the BCBA testified that the student may engage, at times, in self-injurious behaviors (i.e., pinching his cheek if upset) and "some aggressive behaviors in the form of poking or pushing his provider or a new provider" (id.).

Turning to the student's social development during the 2023-24 school year, the BCBA testified that he was "still developing the skills that allow[ed] him to participate with peers in collaborative play," but the student engaged in "parallel play" and greeted people with his communication device (Tr. p. 93). The student had also "developed tolerance for other peers or participants to interrupt or change a little bit his play" (id.). She confirmed that the student had an opportunity to interact with peers at SPARTA to work on "social skills with either one or two more peers" (Tr. pp. 93-94).

With respect to his communication skills, the BCBA testified that the student, who was nonverbal, had "developed immensely his communication skills" and used his communication device "in a more spontaneous independent way" (Tr. p. 94). However, they were working with the student "on structuring more complex sentences" to "describe the environment" and to "generalize this behavior in other settings such as [in the] community" because the student was already "doing it at home" and at SPARTA (i.e., center) (id.).

Physically, the BCBA testified that the student could "navigate the space around him" but with some "limitations" in his movements (Tr. p. 95). The BCBA explained that the student had "some stiffness" in his movements, but they were in contact with the occupational and physical therapists in order to "try to incorporate discrete trial training to develop skills that . . . [we]re still missing" (id.).

With respect to adaptive daily living skills, the BCBA testified that, during the 2023-24 school year, the student made "great progress," and he could complete his "daily activities using an activity schedule that [wa]s run in the mornings and in the . . . evenings at home and throughout the day at SPARTA" (Tr. pp. 95-96). For example, the BCBA noted that the student used his activity schedule to complete his morning routine, which included "waking up, brushing his teeth, [and] taking a shower," and they were working on generalizing these "strategies for him to learn vocational skills such as watering plants, clean[ing] the desk, sweeping, vacuuming certain spots or his . . . worksite at SPARTA" (Tr. p. 96). Additionally, the BCBA indicated that the student continued to require prompts, at times, and he "benefit[ed] from different schedules of reinforcement as he might not complete the schedule . . . in the appropriate order"; therefore, the student continued to require supervision for the development of this area (id.).

In addition to the BCBA's testimony, the district presented the clinical director of ABA services at SPARTA (director) as a subpoenaed witness (see Tr. pp. 182). The director testified that he was the "owner of the agency"—meaning SPARTA—and he was also "one of the supervisors at the [SPARTA] center and for the student" (id.; see Tr. p. 184). The director described SPARTA as a "center-based, one-to-one ABA program" that offered "one-to-one ABA for children who may not be able to go to regular public school or may not have a placement at a private school or any other appropriate placement" (Tr. p. 185). According to the director, SPARTA provided services to students from ages 7 to 22 (see Tr. p. 186). At the time of the impartial hearing, the director testified that 11 or 12 students attended SPARTA (id.). The director

described the SPARTA facility, which students attended "daily or [on a] scheduled basis" (Tr. p. 187).

The director noted that SPARTA provided more services than another agency that he owned, Kidz Choice, noting, for example, that SPARTA provided "door-to-door transportation" (one student per vehicle) and delivered "therapy [that] start[ed] in the home" because the "school day start[ed] in the child's home" (Tr. pp. 189, 191-92). He explained that SPARTA staff arrived at a student's home 30 minutes "before the child" awoke and "train[ed] the child to get ready for school in the morning, by themselves" by using an "individualized digital photographic activity schedule" (i.e., visual schedule) (Tr. p. 190). He also testified that the SPARTA staff would then accompany the student during transportation from his home to SPARTA, and upon arrival, would "continue the activity schedule and all the therapies [and] related services" (*id.*). The director noted that SPARTA staff would also accompany the student from SPARTA back to his home (*id.*).

With respect to the student's educational program for the 2023-24 school year at SPARTA, the BCBA testified that he received 30 hours per week of center-based ABA services, 10 hours per week of home-based ABA services, BCBA supervision (by her), program development services, parent counseling and training services, speech-language therapy (five hours per week), PT, and OT (*see* Tr. p. 58). Subsequently, however, the BCBA testified that, during the 2023-24 school year, the student received the following services: 35 hours of center-based ABA services, 20 hours of home-based ABA services (i.e., afterschool), five 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (*see* Tr. pp. 82-83).

According to the BCBA, during the 2023-24 school year, the student received his 1:1 ABA services from two providers: a registered behavior technician (RBT) and another BCBA (*see* Tr. p. 96). The BCBA testified that she delivered one 60-minute session per week to the student and his family, herself, and also provided direct supervision to the RBT who provided services to the student (*see* Tr. pp. 96-97).¹⁷ The BCBA testified that she constantly communicated with the student's providers, and she was "with them at least—once a week either remotely or in person" (Tr. p. 97). The BCBA testified that she communicated with the student's providers to develop strategies and programs and to help the providers implement the student's program (*id.*). In addition, the BCBA reviewed data with the providers and designed or acquired materials if needed (*see* Tr. p. 98). The BCBA testified that she also communicated at least once per month with the student's related services providers (*id.*).

When asked if the student had a behavior intervention plan (BIP), the BCBA testified that the student previously had a BIP when he "used to have problems, behavioral challenges that were affecting his therapy sessions and the family" (Tr. pp. 100-01). However, the BCBA clarified that the BIP was in place in 2021 and currently remained in place "in case these maladaptive behaviors appear[ed] again" and because the potential existed for his behaviors to reemerge "in certain circumstances" (Tr. p. 101).

¹⁷ It is unclear from the BCBA's testimony whether her reference to delivering one 60-minute session per week to the student and his parents pertained to the delivery of 1:1 ABA services, BCBA supervision services, or parent counseling and training services (*see* Tr. pp. 96-97).

As to the supervision she provided to the student's ABA providers, the BCBA explained that she was responsible for "developing and creating programs" for the student, and she would see the providers either in person or remotely "in order to implement and assist them with the strategies that they need[ed] to put in place during his sessions" (Tr. p. 104).

To assess the student's progress, the BCBA testified that data was collected on the "different skills" worked on with the student, and the data was analyzed (Tr. p. 104).¹⁸ The BCBA further testified that the student's progress was determined by the rate of acquisition of skills (see Tr. pp. 104-05). Based on her review of the student's data, the BCBA confirmed that the student was making progress in several areas, including "cognitive, language, social-emotional, [and] motor skills" (Tr. p. 105). The BCBA also testified that the student was making progress in "developing his reading skills, his communication skills, [and his] language skills" with his communication device (Tr. pp. 105-06). She testified that the student was making progress socially, and he was becoming more independent in his daily living skills through use of an activity schedule "in different settings" (Tr. p. 106). According to the BCBA, the student would not make appropriate progress without receiving 1:1 ABA instruction, and she noted that, in the past, the student "regressed while he was not having an individualized education based on behavioral principles" (Tr. p. 107). She also testified that the student required services during school breaks and vacations, as "any interruption" or "prolonged interruption of the services [wa]s detrimental" to the student, and he would "regress in his skills" (Tr. p. 108). On cross-examination, the BCBA testified that "holiday breaks" included when SPARTA "would not be open," such as during spring and winter breaks (Tr. p. 110). For this student, the BCBA testified that they "might see some regression of some of the skills" when he "stop[ped] receiving services for probably more than a week," and the student could potentially experience regression in his behaviors if the "environment and the routine change[d] drastically" (Tr. pp. 111-12).

Turning to a review of the student's daily schedule at SPARTA, it reflects that overall, the student's "Program" was from 8:00 a.m. to 3:00 p.m. (see Parent Ex. F). According to the schedule, at 8:00 a.m., the student's "Morning Routine"—which took place at his home—consisted of waking up, making his bed, brushing his teeth, showering, dressing, having breakfast, and taking a "walk around his house" (id.).¹⁹ At 9:00 a.m., the schedule indicates that the student rode the

¹⁸ During cross-examination, the BCBA admitted that the evidence in the hearing record did not include any of the data collected for the student's program through the data platform used at SPARTA (see Tr. p. 117). She clarified, however, that the "conclusions and the summary of the data [wa]s in the report," which was identified as parent exhibit I, or the "SETSS/ABA progress report" (Tr. pp. 117-18). For the sake of clarity, the document described by the BCBA at the impartial hearing had not yet been entered into the hearing record as evidence when she was testifying; however, the document was eventually entered into the hearing record as parent exhibit H (see Tr. pp. 273-74, 281; Parent Ex. H). The BCBA testified that a SETSS/ABA progress report—which she drafted—would be prepared every quarter at SPARTA (see Tr. pp. 133-34; Parent Ex. G). The BCBA confirmed that a similar progress report would have been completed in September 2023 and March 2024 for the student; however, the hearing record did not include copies of those additional progress reports (see Tr. pp. 134-35). The BCBA also indicated that the student's goals, as reflected in parent exhibit G, were "derived from the data that ha[d] been collected so far" (Tr. pp. 118-19, 280-81; Parent Ex. G).

¹⁹ As reflected in a December 2023 SPARTA progress report, at that time, the student was able to "complete various tasks at home such as making the bed, washing dishes, pairing socks and folding [a] shirt" (Parent Ex. H at p. 10). The progress report also indicated that the student could "follow his morning routine consisting of bathroom, brush[ing] teeth, wash[ing] face with physical prompting to stay on-task," but without specifying what

bus to SPARTA and arrived at 9:45 a.m. (*id.*). At the impartial hearing, the BCBA confirmed that an RBT would arrive at the student's home and work with him from 8:00 a.m. until he arrived at SPARTA at 9:45 a.m. (*see* Tr pp. 131-32; Parent Ex. F).²⁰ The director testified that SPARTA staff arrived at the student's home 30 minutes prior to the student waking to assist with the morning routine (*see* Tr. p. 190).

Turing to the evidence in the hearing record regarding what occurred after the student arrived at SPARTA, the student's schedule reflects the following activities, which were not identified as occurring at any specific times throughout the day, other than noting that the activities occurred between the student's arrival at SPARTA at 9:45 a.m. and his subsequent dismissal from SPARTA at 2:00 p.m.: arrival, snack, movement and workouts, playtime, programs, gym, vocational skills, art gym, programs, lunch, and related services (*see* Parent Ex. F). In addition, each item on the schedule included a description of the activity; for example, "Arrival"—identified as the first item of the center-based portion of his school day schedule—was described as the student putting his backpack and other items in his cubby, placing his lunch in the refrigerator, and retrieving materials he needed to "start his day" (*id.*). Notably, the activity identified as "Programs" was the only item on the student's schedule that included information pertaining to the delivery of center-based ABA services—or more specifically, discrete trial training—to the student, which, based on the schedule, occurred two times per day during the approximately four hours (i.e., 9:45 a.m. through 2:00 p.m.) that the student attended his center-based program at SPARTA (*id.*). Significantly, the student's schedule did not identify any activity as occurring from 2:00 p.m. to the end of the student's program, which was identified as 3:00 p.m. (*id.*).

When asked at the impartial hearing to refer to the student's SPARTA program schedule, the director explained that the "bulleted list" of events identified from the student's 9:45 a.m. arrival at SPARTA and through his 2:00 p.m. dismissal from SPARTA represented a "flexible program with examples of what [wa]s done throughout the period" and was not a fixed schedule that proceeded in the order that it appeared on the document (Tr. pp. 192-93; Parent Ex. F). He further explained that a student's daily schedule depended on that student's "neurological functioning, their behavioral issues," the "presenting problems," and the "supervisory decisions based on how they [we]re doing that week, that day" (Tr. p. 193). Generally, however, SPARTA followed a "typical schedule," where the student arrived and engaged in "some routines," but then "ha[d] to get their trials and their activity schedule treatments, and their related services" (*id.*). The director noted that the "three major treatments that need[ed] to be done [we]re the trials, the activity schedule, and the related services" (*id.*). Additionally, the director noted that all other activities, such as music and movement, gym, and art, were "secondary" (Tr. pp. 193-94). The director also testified

those physical prompts entailed (*id.*). The progress report also noted that the student had "difficulties with his shower routine and require[d] more invasive prompts," but without specifying what those more invasive prompts entailed (*id.*).

²⁰ The hearing record does not contain any evidence that the student required adult support during transportation to and from school; for example, the August 2023 CSE—while recommending special transportation—only noted that the student required door-to-door transportation and from the "closest safe curb location to school" (IHO Ex. I at pp. 1, 37-38, 42). In addition, the parent's enrollment contract with SPARTA did not include a charge for adult support during transportation to the school, but instead, reflects that SPARTA would provide door-to-door transportation for \$80.00 per day (*see* Parent Ex. C at pp. 1-2).

that the SPARTA program schedule in the hearing record "applie[d] to all students," and therefore, it was not specific to the student in this matter (Tr. p. 195; Parent Ex. F).

Similar to the BCBA's testimony, the director testified that the student in this matter could "get ready for school in the morning by himself," noting that the student had "learned the activity schedule" (Tr. p. 194; see Tr. pp. 95-96).²¹

Turning to the enrollment contract, the director confirmed that SPARTA was not a "tuition-based program," but rather, it was "strictly [an] hourly rate per provider" fee structure (Tr. p. 196; Parent Ex. C at pp. 1-2). He also confirmed that the contract for 35 hours per week of center-based ABA services was specific to this student, but then noted that "almost all the students at SPARTA ha[d] similar mandates" (Tr. p. 197; Parent Ex. C at p. 1). When asked how it was determined that the student in this matter required 35 hours per week of center-based ABA services, the director explained that "it was determined at the hearing" and "the judge ordered it for the year past" (Tr. pp. 197-98). The director then confirmed his understanding that the student's mandate for 35 hours per week of center-based ABA services had been ordered for the student in a "prior school year, and so they continued for th[e current] school year," noting also that "[t]hey were found to be effective" and were "commensurate with a full-time school day," from "8:30 to 2:30," or a "six-and-a-half-hour school day" (Tr. p. 198). The director also testified that the mandate "just got transferred under pendency" (id.). When asked if the student was "evaluated, at any time, or assessed to determine whether this program should be changed or tweaked," the director testified that SPARTA considered "every quarterly progress" as an assessment and that every fourth quarter there was an "annual assessment" (Tr. pp. 198-99).

The director also testified, however, that to develop the student's program, relied, in part, on the April 2023 updated neuropsychological evaluation (see Tr. p. 212; Parent Ex. D at p. 1). More specifically, he testified that the evaluation informed the "goal setting and [SPARTA's] approach" to the student, but it did not alter their "theoretical orientation" (Tr. p. 213). He noted, for example, that the "main goals stay[ed] the same," because "[w]e still need kids to use a spoon" and to ascend and descend stairs (Tr. pp. 213-14). The director considered the evaluation as a "neuropsychological snapshot" of the student's then-current status (Tr. p. 213).

With respect to specially-designed instruction, the December 2023 progress report indicated that the student "greatly benefited from an individualized systematic instruction throughout his day at SPARTA and at home, that managed and [wa]s based on behavioral strategies and [a] scientific approach to learning, e.g., the use of token economy system with an embedded reinforcer to help him stay on-task and learn new skills" (Parent Ex. H at p. 13). Additionally, the progress report indicated that the student "benefited from forward and backward chaining methods to help learn complex behaviors; he greatly benefited from the use of a visual activity schedule to engage independently in various tasks for an extended period of time" (id.). The progress report further indicated that the student "learned skills by the use of prompt and prompt fading strategies as well as errorless teaching procedures" (id.). It was noted that the student could "use timers to increase his self-managing skills, and thus, decrease[d] maladaptive

²¹ The director's testimony on this point occurred in July 2024 (see Tr. pp. 179, 194).

behaviors" and that "many of the acquired skills ha[d] been taught with [d]iscrete [t]rial [l]earning procedures and later generalized to other settings" (*id.*).

Based on the foregoing, even if the center-based ABA services were appropriate for the student and even if the parent's enrollment contract with SPARTA called for the delivery of 35 hours per week of individual, center-based ABA services, the evidence in the hearing record does not support a finding that the student actually received 35 hours per week of individual, center-based ABA services at SPARTA. For example, the BCBA provided conflicting testimony on this point, first stating that the student received 30 hours per week of center-based ABA services, and then subsequently stating that he received 35 hours per week (compare Tr. p. 58, with Tr. pp. 82-83). Next, the student's schedule reflects that he essentially attended his center-based program at SPARTA from 9:45 a.m. through 2:00 p.m., or four hours and fifteen minutes per day, out of what was identified in the program schedule as a seven hour per day program (i.e., 8:00 a.m. to 3:00 p.m.); additionally, the program scheduled fails to identify any activity occurring for one hour from 2:00 p.m. to 3:00 p.m., other than noting it was dismissal time (see Parent Ex. F). Thus, even if the student attended SPARTA five days per week, for four hours and fifteen minutes per day, there is no mathematical calculation that would equate to the student being able to receive 35 hours per week of center-based ABA services during that time frame. At best, the student attended the center-based portion of his program at SPARTA for approximately 21 hours per week (i.e., accounting for the four hours fifteen minutes per day, five days per week, during which the student attended the center-based portion of the program).

The hearing record is also devoid of sufficient evidence to establish that the decision to provide the student with 35 hours per week of center-based ABA services had been based on something other than what had previously been ordered as services for the student through previous impartial hearings or because it was essentially the same mandate for all students attending SPARTA (see Tr. pp. 196-99). Moreover, consistent with the district's argument, the hearing record is devoid of evidence to establish how the center-based ABA services were delivered to the student, as the hearing record does not include any data with respect to the discrete trials identified in the student's schedule, or for that matter, with regard to any center-based ABA services delivered to the student throughout any portion of the center-based program (see generally Tr. pp. 1-284; Parent Exs. A-I; IHO Ex. I).

Thus, to the extent that the hearing record does not establish that the student received more than 21 hours per week of center-based ABA services, the parent is not entitled to be reimbursed for the costs of center-based ABA services exceeding 21 hours per week.

Turning to the student's home-based ABA services delivered after school, the BCBA testified that he was working on "adaptive skills at home on his visual schedule" for his morning routine, "his play skills, [and his] social skills," as well as for some "academics, if necessary" (Tr. pp. 101-02, 208).²² According to the BCBA, the student received home-based ABA services because he "still face[d] a lot of challenges in the different developmental areas," and the home-based program was an "essential part of his development because [they] work[ed] with the stimulus

²² To be clear, the 10 hours per week of home-based services to be delivered by SPARTA during the 2023-24 school year did not include the services provided to the student from 8:00 a.m. to 9:45 a.m. (at home and during transportation to SPARTA), but only pertained to the home-based services delivered to the student after school.

that [we]re relevant to home, not only school, to home," such as "family" and "people" and the "setting" (Tr. p. 102). The BCBA testified that the student required "instruction to be able to develop the skills that he need[ed] in this particular environment as well as generalizing the skills that [we]re . . . being taught at his school and that should be generalized at home" (*id.*). The BCBA also testified that it was also to "prevent maladaptive behaviors" so the student could continue to learn at an appropriate rate (*id.*). The BCBA further indicated that the student would experience regression "when any of the skills [we]re not practiced" and without ABA services, he "would lose the skills that he ha[d] gained" at home or at school (Tr. pp. 102-03).

During cross-examination, the BCBA confirmed that a schedule did not exist for the student's home-based program, but instead, she explained that it varied based on the "day, even the . . . weather or the season according to certain . . . goals that [they] want[ed] to address as well" (Tr. pp. 119-20). In addition, she noted that the student's "schedule in the afternoon may vary more than his schedule in the morning" (Tr. p. 120). She further added that the home-based program hours took place on weekdays after school and were used "at home and in the community for different community activities" (Tr. p. 120).

Next, the director testified that the student participated in home-based services after his center-based program at SPARTA, because SPARTA, itself, did not have an "afterschool program" (*see* Tr. p. 208). He noted that the same BCBA worked with the parents and the student, even though he and another provider were "extremely active in [the student's] case . . . throughout this year and throughout the years" (Tr. p. 209).

Overall, while sparse, the limited evidence in the hearing record demonstrates that the home-based services delivered to the student were appropriate to meet his needs.

3. Related Services

The district argues that the hearing record is devoid of evidence concerning the details of the BCBA's services or parent counseling and training provided to the parents. Similarly, the district argues that the hearing record lacks sufficient evidence with respect to the related services delivered to the student. According to the district, the one and one-half page report regarding the related services annual goals does not describe the student's baselines in speech-language therapy, OT, or PT, and provides no explanation regarding the development of the student's annual goals in these areas or why the goals were appropriate. Additionally, the district argues that the hearing record lacks evidence that the student actually received related services or made any progress.

Based on the parent's enrollment contract with SPARTA for the 2023-24 school year, SPARTA was responsible for delivering two 60-minute sessions per week of parent counseling and training services, five 60-minute sessions per week of speech-language therapy, four 45-minute sessions per week of OT, and two 30-minute sessions per week of PT (*see* Parent Ex. C at p. 2).

Turning to the district's allegations concerning the parent counseling and training services delivered during the 2023-24 school year, the hearing record contains little, if any, evidence demonstrating that SPARTA provided the parent with the duration frequency of those services called for by the contract. Instead, the hearing record includes the BCBA's testimony, indicating

that she met with the parents "every week," either remotely, in person, or over the telephone (Tr. p. 103). The BCBA further testified that, when she met with the parents, they discussed the student's program and the "current strategies" being used, "especially to generalize skills" (*id.*). In addition, the BCBA testified that, when it became apparent that certain skills were "lacking," she and the parents would discuss and "model how to apply that at home" and "provide feedback" when the parents attempted to implement it with the student (Tr. pp. 103-04). The parent testified that he received parent counseling and training services during the 2023-24 school year, where he "learn[ed] ways to reinforce some of [the student's] skills and ways that [he] c[ould] better support him when he [wa]s presenting with maladaptive behaviors" (Parent Ex. I ¶ 36). As a result, even if the hearing record contains sufficient evidence that the BCBA delivered parent counseling and training services on a weekly basis, the hearing record does not contain sufficient evidence to establish the actual duration and frequency of those services. Thus, the parent is only entitled to reimbursement for the costs of parent counseling and training services delivered during the 2023-24 school based upon the presentation of invoices for services delivered.

With respect to the student's related services, the BCBA testified that she communicated at least once per month with the student's related services providers (*see* Tr. p. 98). She also testified at one point in the impartial hearing that the student received five hours per week of speech-language therapy, as well as unspecified amount of PT and OT (*see* Tr. p. 58). Subsequently, however, the BCBA testified that the student received the following related services: five 30-minute sessions per week of speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (*see* Tr. pp. 82-83).

Pursuant to pendency, the district was required to provide the student with the following related services: two hours per week of parent training, five 60-minute sessions per week of individual speech-language therapy, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT (*see* Pendency Impl. Form at p. 2).

The director testified that the student received speech-language therapy, OT, and PT at SPARTA (*see* Tr. p. 195). With respect to the related services providers, the director confirmed that they were "licensed certified individuals who work[ed] by the hour" with the student, and the "majority" of the related service providers were SPARTA employees (Tr. pp. 209-10). The director also testified that SPARTA paid all related service providers—speech-language providers, occupational therapists, and physical therapists—the same rate, which was capped at \$150.00 per hour (*see* Tr. pp. 210-11). The director further testified that the related service providers billed for their services and all related service providers were "per diem" (Tr. p. 211).

Overall, the hearing record contains limited and conflicting evidence as described above, concerning the frequency or duration of the related services delivered to the student. Based on that limited evidence, however, it appears that the student did not receive OT services consistent with the parent's enrollment contract with SPARTA, which called for the delivery of four 45-minute sessions per week of OT, but rather, the student may have received two 30-minute sessions per week of OT consistent with the student's pendency services and the BCBA's testimony (*compare* Tr. pp. 82-83, *with* Parent Ex. C at p. 2, *and* Pendency Impl. Form at p. 2). Similarly, it is unclear from the hearing record whether the student received five 60-minute sessions per week of speech-language therapy—consistent with the enrollment contract with SPARTA and consistent with the student's pendency services—or whether the student received five 30-minute sessions per

week of speech-language therapy (compare Parent Ex. C at p. 2, with Tr. p. 58, and Tr. pp. 82-83, and Pendency Impl. Form at p. 2).

Similarly, the hearing record lacks sufficient evidence describing the parent counseling and training services allegedly delivered to the parent, as well as the frequency and duration of those services, which pursuant to both the enrollment contract, required SPARTA to provide two 60-minute sessions per week (see Parent Ex. C at p. 1). However, notwithstanding that the parent had the obligation in the first instance to demonstrate that the student received related services as part of an analysis of the appropriateness of the unilateral placement, the district, in this matter, had the opportunity to present specific information about the related services delivered to the student during the 2023-24 school year as a part of its obligation to deliver such services pursuant to pendency, which the district failed to do.

While the hearing record does not include sufficient evidence to determine what related services SPARTA delivered to the student during the 2023-24 school year, as those services were required to be provided for by the district pursuant to pendency, the parent is only cautioned for the future that, as noted above, information about what instruction or services the student did or did not receive at the unilateral placement during the school year at issue is relevant to the analysis (see *Khanimova*, 2025 WL 722876, at *6 [noting that it was appropriate to consider that a unilateral placement did not "provide a substantial portion of the related services" that the student needed as planned in finding the unilateral placement inappropriate]). While in this matter, the absence of more specific information as to the totality of the educational program the student received during the 2023-24 school year will not weigh against the parent with regard to the appropriateness of the unilateral placement, it is expected that in any future proceeding, the parent will produce evidence of this nature or it may weigh against the parent's ability to prove the appropriateness of the unilaterally obtained services.

B. Equitable Considerations—Excessive or Unnecessary Services

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

that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA").

1. Home-Based ABA Services

Here, the district asserts that the home-based ABA services were excessive and "likely not appropriate" for the student, as a portion of the home-based services occurred while the student was still asleep in the morning and in light of evidence demonstrating that the student could "get ready" by himself in the morning. The district further asserts that, as a segregable service, the home-based ABA services focused on maximization and generalization rather than on the student's specific needs.

With regard to home-based ABA services, the parent asserts that it is unclear when the student mastered his morning routine, as the director's testimony on this point took place after the 2023-24 school year had ended.

The district's arguments that the home-based ABA services constituted generalization of skills or maximization are issues 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).

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]).

When asked if the student's current program at SPARTA consisted of generalizing skills, the director testified, "[n]ot necessarily, no" because they were "not trying to generalize from one setting to the other," but instead, they were "trying to actually explicitly teach" the student (Tr. p. 214). However, the director then confirmed that the student's program was "designed to be utilized both within the center-based setting as well as outside the center-based setting," which also included "community events" (Tr. pp. 216-17). He noted, for example, that sometimes a student's daily schedule included a "field trip to the park or to the pool or horseback riding or to a volunteer opportunity to clean a park or clean the rivers" (Tr. p. 217). The director clarified that they were "teaching [the student] and other students to follow the activity schedule, morning, school, in the environment, and back at home," so therefore, the director testified that the "answer" to the question was "yes" (id.).

In light of the director's testimony that the student's home-based ABA services were for the purpose of generalizing skills learned at school and/or the maximization of potential, this basis, alone, does not warrant the provision of such services, and the IHO's award of direct funding for a home-based program must be vacated. Overall, while the evidence in the hearing record may support the IHO's conclusion that the home-based services, although beneficial to the student and understandably desired by the parent to be continued, were not necessary for the student to receive educational benefits from SPARTA (*C.G. v. New York City Dep't of Educ.*, 752 F. Supp. 2d 355, 359-60 [S.D.N.Y. 2010]; see *Rowley*, 458 U.S. at 189, 199-200; *Grim*, 346 F.3d at 379; *Walczak*, 142 F.3d at 132).

2. 12-Month Programming

As a final point, the district argues that the SPARTA enrollment contract does not indicate that the center-based services would be delivered to the student during holidays or vacations. Additionally, the district contends that the hearing record lacks evidence that the 35 hours per week of center-based services at SPARTA took place when the school was closed. Therefore, the district seeks to modify the IHO's decision on this point—which ordered the district to provide the student with 35 hours of 1:1, center-based ABA services on a 12-month basis "over breaks and vacations to prevent regression"—to comport with the traditional 12-month programming, exclusive of school breaks and holidays.

The parent contends that the IHO properly ordered the district to provide the student with ABA services on a 12-month basis, indicating that the district should fund services during any breaks if the parent used those services during breaks, but not if the parent did not use services during breaks.

State regulations provide that, students "shall be considered for 12-month special services and/or programs in accordance with their need to prevent substantial regression" (8 NYCRR 200.6[k][1]). "Substantial regression" is defined as "student's inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa], [eee]). State guidance indicates that "an inordinate period of review" is considered to be a period of eight weeks or more (see "Extended School Year Programs and Services Questions and Answers," at p. 3, Office of Special Educ. [Updated June 2023], available at <https://www.nysed.gov/sites/default/files/programs/special-education/extended-school-year-questions-and-answers-2023.pdf>).

Initially, neither party disputes that the student requires 12-month programming to prevent substantial regression. To the extent that the IHO awarded center-based, 1:1 ABA services to continue through the student's breaks and vacations, a review of the evidence in the hearing record does not support the IHO's order. Specifically, although the BCBA testified that the student required services during school breaks and vacations, as "any interruption" or "prolonged interruption of the services [wa]s detrimental" to the student, and he would "regress in his skills," she further clarified that regression "might" occur if he "stop[ped] receiving services for probably more than a week" and the student could potentially experience regression in his behaviors if the "environment and the routine change[d] drastically" (Tr. pp. 111-12). But as noted, the student

was already receiving a 12-month program, and the hearing record does not include any evidence about SPARTA's school breaks or other vacation periods or whether SPARTA followed the public school calendar (see generally Tr. pp. 1-284; Parent Exs. A-I; IHO Ex. I). And aside from the anecdotal evidence via the BCBA's testimony, the hearing record is devoid of any evidence demonstrating that the student experienced a regression of skills during school breaks or other vacations or that the student received 1:1, center-based ABA services during holiday breaks or vacations when SPARTA was closed (see generally Tr. pp. 1-284; Parent Exs. A-I; IHO Ex. I).²³

Perhaps more damaging to the IHO's finding is the fact that the parent's enrollment contract with SPARTA did not include any provision to deliver center-based ABA services to the student during school breaks or vacations, other than noting that the contract provided for the "full 12-month academic year" from July 1, 2023 through June 30, 2024 (see Parent Ex. C at p. 2).²⁴ In addition, the IHO failed to make any findings of fact related to the 12-month programming in the decision or otherwise address the student's 12-month programming within the decision, and only addressed it through the ordering clause (see generally IHO Decision). Therefore, the IHO's order directing the district to provide the student with center-based, 1:1 ABA services during breaks and vacations will be annulled.

VII. Conclusion

Having found that the evidence in the hearing record does not support a determination that the parent sustained his burden to establish the appropriateness of the student's unilateral placement at SPARTA for the 2023-24 school year requiring the provision of 35 hours per week of ABA services, and that equitable considerations preclude an award of reimbursement for the costs of the student's home-based ABA services, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is not necessary to address them in light of the determinations made.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated October 24, 2024 is hereby modified to the extent that the IHO's ordered for the district to reimburse the parent for 35 hours per week of

²³ The BCBA testified that her reference to "holiday breaks" meant when SPARTA was closed, such as during spring and winter breaks (Tr. p. 110).

²⁴ Regarding proof of financial risk, the Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (*E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 458 [2d Cir. 2014]). In *New York*, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (*Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp.*, 93 N.Y.2d 584, 590 [1999]; *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91 [1991]).

center-based ABA services for the 2023-24 school year is modified to reflect that the district shall reimburse the parent for the costs of 21 hours per week of center-based ABA services at a rate not to exceed \$155.00 per hour; and,

IT IS FURTHER ORDERED that the IHO's order for the district to reimburse the parent for the costs of 10 hours per week of home-based ABA services is reversed; and,

IT IS FURTHER ORDERED that the IHO's order directing the district to provide the student with center-based, 1:1 ABA services during breaks and vacations is modified so that the district is required to provide services during the 12-month school year

IT IS FURTHER ORDERED that the IHO's decision dated October 24, 2024 is modified to reflect that all of the relief awarded as reimbursement or direct funding by the district is to be paid by the district following presentation of acceptable proof of delivery of services by the parent.

Dated: **Albany, New York**
 July 23, 2025

STEVEN KROLAK
STATE REVIEW OFFICER