



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-633

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

Appearances:

Gutman Vasiliou, LLP, attorneys for petitioners, by Mark Gutman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Heitz, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request that respondent (the district) fund the costs of their daughter's home-based applied behavior analysis (ABA) services delivered by Allgood & Tehrani Licensed Behavior Analysts, PLLC (AT-LBA) for the 2024-25 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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

A CSE convened on May 1, 2023 to develop an IEP as part of the "'Turning 5' process" for the 2023-24 school year, with an implementation date of September 1, 2023 (Parent Ex. B at pp. 1, 35, 38). The May 2023 CSE found the student eligible for special education as a student with autism (id. at p. 1).¹ The May 2023 CSE recommended a 6:1+1 special class in a specialized school with the related services of four 30-minute sessions per week of individual occupational therapy (OT), four 30-minute sessions per week of individual physical therapy (PT), four 30-

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]).

minute sessions per week of individual speech-language therapy, a daily, full-time individual behavior support paraprofessional, and special transportation, on a 12-month school year basis (id. at pp. 30-32, 35-37). In addition, the CSE recommended that the parents receive one 60-minute session per month of group parent counseling and training (id.).

The parents obtained a private "neuropsychoevaluational evaluation" of the student, which took place between December 2022 and March 2023, and in an undated report, the private psychologist recommended that the student attend a 12-month special education school that provided 1:1 instruction and ABA instruction and receive 15-20 hours per week of home-based ABA services (Parent Ex. C at pp. 1, 21-22).

In January 2023, an assessment of the student was conducted by AT-LBA, after the parents requested 1:1 ABA services and parent training (Parent Ex. D at p. 1).

By letter dated June 14, 2024, the parents wrote to the district advising that the last IEP developed by the CSE in May 2023 was found to have denied the student a FAPE at an impartial hearing and that the district had not convened a CSE since May 2023 (Parent Ex. E at p. 1). The parents provided written notice of their intention to reenroll the student at Tribeca Prep and seek public funding for the cost of the student's attendance at Tribeca Prep, related services, transportation and home-based ABA services (id.).²

A. Due Process Complaint Notice and Events Post-Dating the Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A at p. 1). Specifically, the parents alleged that the district failed to convene a CSE to conduct the student's annual review for the 2024-25 school year, failed to develop an IEP, and failed to recommend ABA services for the 2024-25 school year (id. at pp. 2-3). The parents asserted that they provided timely notice of their intent to unilaterally place the student, that Tribeca Prep was an appropriate unilateral placement for the student, and that equitable considerations supported an award of tuition funding for the 2024-25 school year (id.). As relief, the parents sought pendency, tuition funding for Tribeca Prep, and funding for home-based ABA services (id. at p. 3).

On July 30, 2024, the parents signed an enrollment contract with Tribeca Prep for the 12-month 2024-25 school year from July 8, 2024 through June 26, 2025 (Parent Ex. K at pp. 1-7).

On August 6, 2024, the district countersigned a pendency implementation form that indicated the student's pendency services consisted of the 12-month program at Tribeca Prep and 20 hours per week of home-based ABA services delivered by the parents' private provider (Parent Ex. P at p. 1).

² Tribeca Prep has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 30, 2024 (Tr. pp. 8-70).³ In a decision dated November 21, 2024, the IHO found that the district failed to offer the student a FAPE for the 2024-25 school year, that the parents' unilateral placement of the student at Tribeca Prep for the 12-month 2024-25 school year was appropriate and that equitable considerations supported an award of tuition funding for Tribeca Prep in the amount of \$165,000 (IHO Decision at pp. 6, 7-9, 15).

The IHO then addressed the parents' claim that the student further required 15-20 hours per week of home-based ABA to make progress at Tribeca Prep (IHO Decision at pp. 10-13). The IHO found that the parents' argument was without merit and determined that Tribeca Prep offered the student the necessary skills to make progress in the classroom and to apply those skills in the home and community (*id.* at p. 10). The IHO also found that the parents' assertions of regression without the provision of home-based ABA services were refuted by the testimony of the Tribeca Prep head of school (*id.* at pp. 10-11). The IHO further determined that the student's home-based board certified behavior analyst (BCBA) did not know what Tribeca Prep was working on with the student, and that the BCBA later contradicted her testimony (*id.* at p. 11). The IHO found that the BCBA's testimony about regression and what the student was working on at Tribeca Prep were not credible (*id.*). The IHO determined that the parents' home-based ABA services were unnecessary to ensure that the student made progress in the classroom setting at Tribeca Prep and that the home-based ABA services were focused on generalizing skills outside of school (*id.*). Next, the IHO found that the evidence in the hearing record regarding the number of hours of home-based ABA services the student received was inconsistent (*id.* at pp. 12-13). The IHO further found that "[r]egardless of how many hours [the s]tudent receive[d] a week, the record indicate[d] that the home-based ABA therapy [wa]s overwhelming to a young child that already receive[d] ABA based services embedded throughout the entire school day" (*id.* at p. 13). The IHO noted that the BCBA testified that the student was unable to tolerate the recommended 15-20 hours per week during the start of the 10-month school year, but the BCBA believed that the student would acclimate once she got used to attending a full day of school (*id.*). The IHO also noted that the BCBA further testified that the student had made progress receiving 7.5 hours per week and 4 hours per weekend of ABA services and that the student would make even more progress once she could tolerate the recommended number of hours (*id.*). For the foregoing reasons, the IHO denied the parents' request for funding of the home-based ABA services (*id.*).

The IHO next addressed the parents' request for reimbursement for transportation costs (IHO Decision at pp. 13-14). The IHO ordered the district to reimburse the parents for transportation and to provide transportation to and from Tribeca Prep for the remainder of the 2024-25 school year (*id.* at pp. 13, 15).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in denying their request for funding for 15-20 hours per week of home-based ABA services and erred in determining that the BCBA's

³ A prehearing conference was held on August 1, 2024 (Tr. pp. 1-7).

testimony was not credible. As relief, the parents request that the district fund 15-20 hours of home-based ABA services for the 2024-25 school year.

In an answer, the district argues that the IHO correctly denied the parents' request for 15-20 hours of home-based ABA services and asserts that the IHO's decision should be affirmed.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at

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

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

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).

⁴ 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).

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

Neither party appeals from the IHO's determinations that the student was denied a FAPE for the 12-month, 2024-25 school year, that Tribeca Prep was an appropriate unilateral placement, or that equitable considerations warranted full funding of the student's tuition at Tribeca Prep in the amount of \$165,000, or the IHO's order for the district to reimburse the parents for the costs of transportation or provide transportation to and from Tribeca Prep with travel time of no more than 30 minutes for the remainder of the 2024-25 school year. Accordingly, 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]).

Turning to the parents' assertion on appeal that the IHO erred in failing to award home-based ABA services, it is clear that a parent may privately secure services for a student in addition to a private school placement as part of a unilateral placement (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and noting that the parents had privately secured the required related services that the private school did not provide], quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006]). The IHO considered the appropriateness of the student's home-based ABA services separately from the student's day program at Tribeca Prep but determined that "there [wa]s undoubtedly a benefit to [the s]tudent's receipt of 15-20 hours per week of 1:1 home-based ABA services" (IHO Decision at p. 10). There is no material dispute between the parties on appeal that, taking into account the totality of the circumstances, the privately secured ABA services in combination with the student's attendance at Tribeca Prep constituted an appropriate unilateral placement.

As noted however, the IHO analyzed the private school and home-based services separately and determined that the Tribeca Prep alone offered special education services sufficient to provide a FAPE to the student, even without the home-based ABA services. Thus the IHO went on to find that the home-based services were not necessary for the student to make progress at Tribeca Prep (id. at p. 11). The issue of whether the home-based ABA services in this case constituted maximization of services that the district was not required to fund is an equitable factor that must be considered in determining appropriate relief based upon the evidentiary record.

Under the Burlington/Carter framework, 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"])).

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]). An 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). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F.3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"])).

Additionally, as the IHO noted 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., C.M. v. Mount Vernon City Sch. Dist., 2020

WL 3833426, at *21, *28 [S.D.N.Y. July 8, 2020]; F.L. v. New York City Dep't of Educ., 2016 WL 3211969, at *11 [S.D.N.Y. June 8, 2016]; L.K., 2016 WL 899321, at *8-*10).

In examining whether the home-based ABA constituted services that exceeded what was required to provide the student a FAPE, it is necessary to review evidence regarding the source of the recommendation for the home-based services. A review of the hearing record indicates the parents obtained a private neuropsychological evaluation, which was conducted between December 12, 2022 and March 26, 2023 (Parent Ex. C at p. 2).⁵ At the time of the March 2023 private neuropsychological evaluation, the student was 4.4 years old and attending a general education preschool with the support of a 1:1 special education itinerant teacher (SEIT) (*id.* at p. 4). It was also noted that the student attended school part-time because she required a 1:1 SEIT "to attend every day and a provider was not available for the additional time, she could only attend school part time" (*id.*). The March 2023 neuropsychological evaluation report described the student as endearing, sweet and perceptive and as previously diagnosed as having autism spectrum disorder, which "was also confirmed in this evaluation" (*id.* at p. 19). The report stated that, in addition to attending a part-time preschool program, the student also received related services of speech-language therapy, OT, PT, and ABA services after school (*id.*). The report indicated that during testing the student appeared to attend to the best of her abilities, and, therefore, her performance was deemed a reliable indicator of her true functioning at the time (*id.* at p. 20). Nevertheless, the report stated that "[b]ecause [the student] ha[d] not yet received wrap-around treatment for her significant special needs, it [wa]s likely that with the proper interventions and an appropriate educational program, positive changes w[ould] be seen in the[] test scores when [the student] was further tested in the future" (*id.*). Additionally, the private psychologist stated that a "diagnosis of an intellectual disability w[ould] be deferred at this time and that cognitive capacity should be assessed further in a few years to determine the extent of growth that [the student] has made at that point and if, indeed, she meets the criteria more definitively for an intellectual disability" (*id.*). The student's cognitive ability as measured by the Wechsler Preschool and Primary Scales of Intelligence, Fourth Edition (WPPSI-IV) yielded a "composite score that place[d] her functioning in the deficient range for cognitive abilities[]; a]daptive skills based on parent reports were in the moderately low range; cognitive, language, social, gross, and fine motor

⁵ The parents' attorney read into the hearing record that parent exhibit C was an April 9, 2023 independent neuropsychological evaluation that was 31 pages in length (Tr. p. 13). However, the date April 9, 2023 does not appear anywhere in the document. Parent exhibit C is a privately obtained "neuropsychoevaluational evaluation" that included a parent intake interview conducted on December 12, 2022; assessments conducted by the private psychologist on January 25, 2023, January 29, 2023, February 5, 2023, and February 26, 2023; as well as the psychologist's observations of the student during a speech-language therapy session on "1/23/22," during the student's home-based ABA services on February 1, 2023, at school on January 28, 2023, and at home with the family on March 26, 2023 (Parent Ex. C at p. 2; *see* Parent Ex. C at p. 8 [corrected date of January 23, 2023 for speech-language therapy observation]). The April 9, 2023 date was included in the IHO's exhibit list, the parents' exhibit list, and the transcript exhibit list (IHO Decision at p. 18; Tr. p. 9). A clarification provided by OATH stated that "Parent's Exhibit C is correctly dated 4/9/23 where the IHO relied on Parent's provided date" (Nov. 25, 2024 OATH Email Clarification at pp. 2, 4). For clarity, the document will be referred to in this decision by the date of the last observation, which was conducted on March 26, 2023.

skills w[ould] require intensive therapeutic interventions" according to the private psychologist (id.).⁶

The private psychologist conducted academic testing for preschool skills and learning readiness skills using "several measures, such as the [Wechsler Individual Achievement Test, Fourth Edition] WIAT-4 and the Brigance [Comprehensive Inventory of Basic Skills II]" (Brigance CIBS II) (Parent Ex. C at p. 20). The student could name the letters of the alphabet (upper and lower case), and she knew a few letter sounds (id.). The student could also identify numbers from "at least 1-to 20 (and beyond that to 100 at home)" (id.). The student could "count with 1:1 correspondence up to at least 10" (id.). The private psychologist noted that the student's "learning w[ould] need to be monitored as she proceed[ed] in Kindergarten" and in the future "although she present[ed] with some basic foundational preschool skills" at the time, "there [wa]s the likelihood that the confounding executive functioning differences (processing, attention, and memory difficulties) and language processing needs c[ould] cause [the student] to need further interventions with learning in later grades" (id.).

The March 2023 neuropsychological evaluation report indicated that the student's adaptive behavior was assessed using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3), via a parent report (Parent Ex. C at p. 13). The student's standard scores in communication and socialization placed her in the first percentile and within the low range of adaptive functioning (id. at 29). With regard to the student's receptive language skills, the evaluation report stated that the student sometimes followed one-part instructions with redirection and prompting, was able to listen to stories read to her occasionally and could point to some common body parts and objects in books and pictures (id. at p. 13). Concerning the student's expressive communication skills, the student was able to speak in single words and some phrases, however her comments were sometimes out of context (id.). The evaluation report indicated that with regard to the student's reading and writing skills, she knew the letters of the alphabet and some letter sounds (id.). In the area of socialization, the evaluation report indicated the student required scaffolding and support to approach peers and that she was not able to do so independently (id. at p. 13). The student's attentional limitations and limited language skills reportedly made socializing with peers and adults challenging (id.). The student was described as "sometimes nervous with new people; however, once she fe[lt] more at ease and trusting, she approach[ed] the other person, ma[d]e[] increased eye contact, and m[ight] respond more to questions" (id.). With regard to play and leisure skills, the student was reportedly "able to play some games with the support of a grown-up, but because her sustained joint attention [wa]s limited, [the student wa]s not able to play for too long in cooperation with another (primarily parallel play)" (id.). The student demonstrated pretend play skills with dolls (feeding them and putting them to sleep), sometimes pretended she was sleeping when interacting with others, and played dress up (would try different clothes) (id.). Concerning the student's coping and adapting skills, the student reportedly needed support with changes in routines, and the evaluation report stated that the student's parents explained things to her and gently guided her to assist with coping (id.).

⁶ The student's composite scores on the WPPSI-IV yielded a full scale IQ of 44, which placed her below the first percentile of same age peers (Parent Ex. D at p. 28). The student's composite scores in verbal comprehension, fluid reasoning, working memory, and processing speed placed her below the first percentile in each subtest (id.). The student's composite score in the visual spatial domain placed her in the fourth percentile (id.).

The student's standard score in daily living skills as measured by the Vineland-3 placed her in the 19th percentile and within the moderately low range of adaptive functioning (Parent Ex. C at p. 29). With regard to the student's personal skills, she reportedly needed help dressing and bathing herself, could feed herself with her hands but needed adult support to complete a meal (id. at p. 13). The student could reportedly participate in daily hygiene activities with adult support, such as grooming and toothbrushing and "use[d] the toilet during the day and at nighttime" (id.). According to the evaluation report, the student lacked safety awareness in the home, specifically around hot objects (id.). She was able to help clean up her belongings with prompting and adult support (id.). Concerning community skills, the student needed to be held close to her caregivers as she might wander off (id.). The student reportedly was able to stay seated and in her seat belt when riding in the car (id.). The student's standard score in motor skills placed her in the seventh percentile and within the moderately low range of adaptive functioning (id. at p. 29). In describing the student's fine motor skills, the evaluation report indicated that she was able to scribble and liked tracing letters with 1:1 adult support, she could not copy designs or produce letters/numbers/shapes in imitation, and her fine motor grasp was reportedly weak (id. at p. 13). The student was able to stack blocks and turn doorknobs independently and was able to complete 35-piece puzzles at home (id.). With regard to gross motor functioning, the student lacked awareness of her body in space and might not be aware of others around her (id.). The student could throw a ball and could climb on high objects, such as the jungle gym at the playground (id. at pp. 13-14). The student could walk up and down the stairs, alternating her feet, but reportedly she had trouble hopping on one foot consistently (id. at p. 14). The student was also able to ride a tricycle (id.). Overall, the student's adaptive behavior composite score placed her in the third percentile and within the moderately low range of adaptive functioning (id. at p. 29).

According to the private psychologist, the student demonstrated significant deficits with expressive language formulation consistent with autism spectrum disorder on neuropsychological measures (Parent Ex. C at p. 20). It was noted that the student's language processing for simple demands was stronger than for embedded instructions or directions processing (id.). Visual motor skills were relatively weak due to the loose grasp of the writing utensil; however, the student was described as "interested in making pictures and designs when shown them by the examiner" (id.). The student reportedly had trouble with other visual spatial tasks that involved selecting pictured items from an array "(she could not comprehend instructions on what to do)" (id.).

The March 2023 neuropsychological evaluation report indicated that multiple social/emotional and neurobehavioral measures were administered along with parent reports, providers' reports, and clinical observations to determine other factors related to autism spectrum disorder contributing to the student's functioning (Parent Ex. C at p. 20). The student's "vulnerabilities in executive functioning/attention and concentration [we]re significant, and she require[d] much refocusing to gain and sustain her focus" (id.). The student's attentional challenges were reported to be "part of the overarching levels of Autism Spectrum Disorder" (id.). Additionally, it was reported that the student could also become overwhelmed and anxious, which might lead her to cry, the private psychologist stated that "[b]ecause she cannot express herself, it c[ould] add to her frustration" (id.). The private psychologist stated that "[n]eurodevelopmentally, [the student]'s profile as a learner and her skills need[ed] to be understood and appreciated holistically" and that "[s]he [wa]s a girl with a warm, gentle, curious, and endearing personality" (id.). The private psychologist further described the student as "generally easygoing" and capable of following along with demands when she understood what was expected of her (id. at p. 21).

According to the private psychologist, the student could "access learning with careful 1:1 support" and "[w]hen she fe[lt] safe with trusted adults, she w[ould] likely learn more readily as she relie[d] on the consistency and continuity of familiar people" (id.). The private psychologist also stated that the student could "continue growing, developing, and making progress with the proper intensive interventions and the ongoing nurturing approach by her family, treating therapists, and educators" (id.).

According to the private psychologist, essential recommendations for the student included attending a 12-month, small, special education school that offered 1:1 instruction in a supportive, nurturing, and highly individualized manner with a small teacher-to-student ratio that could provide the student with both 1:1 instruction and small group (dyads to start) instruction opportunities (for academics, executive functioning, language, and socialization) (Parent Ex. C at p. 21). The March 2023 neuropsychological evaluation report further recommended that the student "ha[d] the potential to learn with a highly specialized language-rich and language-based instructional methodology" and that the school should also provide support in teaching the student how to "use/access an assistive communication device" (id.). It was also recommended that the student receive intensive related therapy supports in school and "access to 1:1 and small group (dyad initially) ABA instruction, as [the student] require[d] this evidence-based approach for her learning and regulation of attention" (id.). The private psychologist stated that the student "should have tailored therapy supports after school, such as additional ABA at home," to "support acquiring critical developmental skills necessary for [the student]'s growth" (id.). It was further recommended that the student receive additional related services after school, such as further speech-language therapy, as this would aid in developing the student's communication skills (id.). The private psychologist stated that the "coordination of special education supports in and after school and the consistent repetition of learning specific skills/tasks [wa]s essential" and that the student could "be at risk of regressing without this integration of all educational interventions and therapy supports" (id.). According to the private psychologist, "[h]aving all these supports (in and after school) ensure[d] that [the student] c[ould] make appropriate developmental progress in her academic and social development" (id.).

The March 2023 neuropsychological evaluation report recommended that the student receive "ABA services after school in the home environment" consisting of "at least 15-20 hours per week" (Parent Ex. C at p. 22). According to the private psychologist, the student "required] this level of instruction and practice to continue acquiring new abilities and to maintain the skills she ha[d] already learned" (id.). The private psychologist further stated that "[t]his additional 1:1 instruction c[ould] continue to address [the student]'s adaptive daily living skills . . . socialization goals . . . and general independence" (id.). Additionally, the private psychologist stated that the purpose of the home-based "1:1 support (ABA) [was to] provide[] [the student] with the support to solidify her skills and apply them in various settings (not just at home and school, but in the community and other social settings)" (id.). The private psychologist also stated that, "[w]hile it [wa]s not possible to predict exactly how children will continue to progress, it should be noted that with the right level of intensive, behavioral, academic, and other therapeutic instruction/intervention and services at this time, it [wa]s likely that" the student would "reach a point in time where she c[ould] transition to a somewhat less intensive or less restrictive educational and therapeutic program" and that "[t]his [wa]s all the more reason why [the student] must receive the appropriate level and type of services, instruction, and intervention for the next school years ahead" (id.).

In addition to the neuropsychological evaluation, the hearing record also includes a treatment plan prepared by AT-LBA (Parent Ex. D at pp. 1-39). The treatment plan indicated that the parents contacted AT-LBA in January 2023 "to provide 1:1 ABA services and parent training" (Parent Ex. D at pp. 1, 2, 10). At the time, the student was five years old, attending Tribeca Prep, receiving speech-language therapy, OT, and PT throughout the school day, and receiving 1:1 direct services from a registered behavior technician (RBT) and a BCBA five days per week for one and a half hours per day (*id.* at p. 1). The treatment plan indicated that a clinical interview was conducted on January 5, 2023; direct observations were conducted on January 4, 2023, January 12, 2023, January 18, 2023, January 20, 2023, and January 25, 2023; the student was assessed using the Vineland-3 on January 16, 2023, January 26, 2023 and March 18, 2024; and that the student was assessed using the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP) on February 13, 2024 and May 1, 2024 (*id.* at p. 2).

The treatment plan included results from the Vineland-3 comprehensive teacher form completed on March 15, 2024, by the student's home-based BCBA (Parent Ex. D at pp. 2, 5). The student's adaptive behavior composite standard score was 70, which placed the student in the second percentile; the student's communication standard score was 74, which placed her in the fourth percentile; the student's daily living skills standard score was 73, which placed her in the fourth percentile; the student's socialization standard score was 68, which placed her in the second percentile; and the student's motor skills standard score was 78, which placed her in the seventh percentile (*id.* at pp. 2-3). The student's results on this administration of the Vineland-3 indicated that daily living skills and motor skills were relative strengths for the student, and that socialization was a relative weakness (*id.* at p. 3). The treatment plan stated that, after reviewing the results of the Vineland-3 teacher form, it was determined that the student had deficits across all domains of adaptive functioning when compared to same age peers, and that "[p]rogramming w[ould] continue to focus on [the student]'s deficits until their remediation (*id.* at p. 5). It was also noted that the clinical interview completed with the student's parents "partially supported the observations conducted" and that the teacher form that was completed by the student's BCBA "also partially supported the observations conducted" (*id.*).

The treatment plan also includes results from administrations of the VB-MAPP on February 13, 2024 and May 1, 2024 (Parent Ex. D at pp. 8-9). The results summary indicated that the VB-MAPP assessed the student's language, learning, and social skills, as well as behavioral barriers that were interfering with her ability to learn more advanced skills (*id.* at p. 7). The student's overall score on the initial milestones assessment on February 13, 2024 fell in the level 2 range, and the student's overall score on the May 1, 2024 milestones assessment was also reported to fall in the level 2 range (*id.*). The treatment plan noted that the student had "been learning in a more intensive teaching format that involved a high number of teaching trials with carefully arranged contingencies in addition to naturalistic environment teaching" (*id.*). The treatment plan further stated that "[a]s evidenced in the assessment and from direct observation" the student had made "significant strides in the six basic language and related skills" (*id.*). Reportedly, the domains with the most growth demonstrated were tacting, listener skills, visual-perceptual skills matching to sample, "LRFFC," writing, and math (*id.*). The domains with the least growth demonstrated were independent play skills and motor imitation (*id.*). According to the treatment plan, these "results suggest intervention priorities and specific program goals that w[ould] help [the student] develop more effective language and social skills" (*id.*).

Results of the VB-MAPP reported on the treatment plan indicated that the student had 24 barriers that were impeding language and skill acquisition (Parent Ex. D at p. 7). According to the initial assessment, the student demonstrated elevations on 8 of the 24 barriers with an overall score of 28 (id.). The student's greatest barriers to typical learning were behavior problems, impaired social skills, reinforcement dependency, and hyperactive behavior (id.). On the May 1, 2024 assessment, the student showed an increase in barriers with elevations on 9 of the 24 barriers and an overall score of 30 (id.). The treatment plan indicated that the student's greatest barriers to typical learning continued to be behavior problems, impaired social skills, reinforcement dependency, and hyperactive behavior (id.). It was noted that "all barriers from initial assessment continue to be a barrier for [the student] and these will continue to be addressed" (id.).

The treatment plan concluded that based on observations and assessments, the student's greatest areas of need appeared to be socialization and communication (Parent Ex. D at p. 9). According to the Vineland-3, the student's greatest areas of need were in expressive communication, interpersonal relationships, play and leisure, and coping skills (id.). In addition, it was noted that both the Vineland-3 and VB-MAPP results indicated that the student's greatest area of need was in play and social skills (id. at pp. 9-10).

The hearing record also indicated that the district signed a pendency implementation form on August 6, 2024, that reflected the student's pendency services were based on an unappealed IHO decision dated August 3, 2023, and consisted of a 12-month program at Tribeca Prep and 20 hours per week of home-based ABA delivered by the parents' private provider on a 12-month basis (Parent Ex. P).

The head of school at Tribeca Prep (head of school) provided direct testimony by affidavit and appeared for cross-examination (Tr. pp. 22-35; Parent Ex. O).⁷ The direct testimony by the head of school acknowledged that the student received afterschool ABA services, however her affidavit did not describe any collaboration between Tribeca Prep and AT-LBA (Parent Ex. O ¶ 21). The head of school testified that, when the student returned to Tribeca Prep for the 2024-25 school year, "she immediately fit into her school environment and started where she left off at the end of her 2023-2024 school year in June" and that, due to her progress from the previous school year, for the 12-month, 2024-25 school year, the student was again placed in a class of six students, which included a "licensed" special education lead teacher, a dedicated full-time 1:1 ABA instructor under direct BCBA supervision, and related services of speech-language therapy, OT, and PT (id. ¶ 26). The head of school further testified that the student was receiving an appropriate well-rounded educational program which was student-centered and based on a full-time ABA model that provided the student with specially designed instruction and related services tailored to her unique needs (id. ¶ 40). She testified that she fully expected the student would continue to progress during the 2024-25 school year and would continue making significant academic, social/emotional, and behavioral advancements as the student did in the 2023-24 school year (id.).

The head of school further testified that the student required intensive in-school 1:1 ABA instruction in a small, highly structured class, "highly systematized and tailored to her unique needs

⁷ The affidavit of the head of school described a different student's educational team at Tribeca Prep (Parent Ex. O ¶ 14).

in order to acquire and maintain skills" (Parent Ex. O ¶ 41). The head of school stated that "all of the experts who have evaluated and assessed [the student] have concluded that she requires an ABA-based program in order to make progress and acquire new skills" and that in her "professional opinion" the student would "not make progress and w[ould] very likely regress without receiving intensive and consistent 1:1 ABA instruction services and support in school" (id.). On cross-examination, the head of school testified that she was unsure of the number of hours of ABA services the student received at home but stated that she knew the team did collaborative meetings, in which the head of school did not participate (Tr. pp. 29-30). When asked what the home-based BCBA was working on, the head of school testified that she did not know the exact programs that the student was working on at home, however she knew that there had been a recent observation, so the team met with the home-based BCBA (Tr. p. 30). The head of school also testified that she was not aware of any issues with regression (Tr. p. 33).

According to testimony by affidavit provided by the student's home-based BCBA, she had been employed by AT-LBA since June 2022 and had provided ABA services to the student since January 2023 (Parent Ex. N ¶¶ 4, 10). According to the BCBA, the student was a bright child who required ongoing ABA services and that the amount and quality of services the student received would be crucial to the trajectory of her learning (id. ¶ 11). According to her written testimony the BCBA stated that, without ongoing services, there was a risk of regression of skills, and that the student needed intensive 1:1 ABA services rendered by a skilled behavioral therapist, who could provide adequate modeling, shaping, and reinforcement of appropriate responding, to sustain her current skill set and access her learning environment for continued development (id.). The BCBA further testified that the student had required ABA services during the time AT-LBA was providing it and would require services going forward (id. ¶ 12). The BCBA stated that the student was a child who learned through intensive 1:1 support, shaping, prompting, and individualized reinforcement schedules to complete various routines and basic skills (id.).

Additionally, the BCBA testified that with the services the student had been receiving "this year," she had been able to make great progress (Parent Ex. N ¶ 13). The BCBA stated that the student was "working on her communication skills, specifically requesting her wants and expressing her needs, as well as her independence," and that a behavior plan had been implemented to address target behaviors including hitting her head, eloping, and climbing unsafe surfaces (id.). Next, the BCBA indicated that the student would continue working on pretend play, turn taking, and developing her personal independence skills, especially washing her hands and cleaning up after herself, and would also continue to work on reducing the frequency of her maladaptive behaviors (id. ¶ 14). In addition, the BCBA testified that the student would work on identifying objects and responding to social questions with increased frequency (id.).

According to the BCBA's written testimony, the student required a structured environment with visual support, consistent prompting, and clear expectations, and the BCBA stated that, without skilled ABA professionals to provide consistent support in the natural environment, at this time, the student would not be able to acquire and practice functional skills and would likely demonstrate regression of the skills learned thus far (Parent Ex. N ¶ 15). Lastly, the BCBA testified that, even if the student was in a setting that provided ABA-based learning in school, the student needed intensive 1:1 and data driven instruction (id.). The BCBA stated that the 1:1 instruction at home was to ensure the student continued to work on increasing social communication skills and reducing challenging behaviors that interfere with her learning, and that this type of instruction

was required for the student at home, not only to continue to make progress but to avoid regression (id.).

The student's BCBA provided both written and live direct testimony, which was sworn to before the IHO prior to being made available to the district for cross-examination (Tr. pp. 37-40; Parent Ex. N). In her direct testimony, the BCBA stated that the student was currently receiving 8.5 to 10 hours per week of ABA on weekdays and four hours of ABA on weekends (Tr. p. 39).⁸ The BCBA further testified that the student was not receiving the "full mandate" because the student had "a lower tolerance right now for those hours" noting that it was "the beginning of the school year," and, therefore, she was "not able to go past the current mandate" (Tr. p. 40). The BCBA also stated that "[w]hen she adjusts to the school year, I am confident that she will be able to move past what she's working on," noting that "to get up to those 15 hours is the goal" (id.).

On cross-examination, the BCBA testified that the student experienced regression when she was not in school, that she tended to regress between each day of school and school breaks, stating that "she does tend to regress" in terms of her routines and "[o]verall skills" such that "she really need[ed] the supplemental ABA at home to make sure that that doesn't occur" (Tr. p. 41; see Tr. pp. 41-42, 43). The BCBA further testified that the student had made progress with the amount of ABA services she was then-currently receiving, however she felt there was room for growth, noting that "once [the student wa]s able to kind of overcome that hump of, like, getting used to being in school and going through a full day, she[would] be able to make even more progress, which w[ould] just help her all around in her quality of life" (Tr. p. 43). On the issue of regression, the BCBA further testified that, although the student was receiving 12-month services, the student "had a break at the end of August, the beginning of September, so [they were] still kind of, you know, adjusting back to full-time" (id.). When asked how long it would take for the student to acclimate to 15-20 hours per week of ABA services, the BCBA testified that she could not answer with certainty but "would like to say a month" (Tr. p. 44).

With regard to the services she was providing, the BCBA testified that she "work[ed] on pairing for the first . . . 15, 20 minutes just to . . . get [the student] acclimated" and get her "back into . . . the swing of work" and worked on various skills "to help . . . with communication, personal independence, and socialization skills" (Tr. p. 44). According to the BCBA's testimony, the student "require[d] a lot of breaks to help self-regulate" (i.e., movement and sensory breaks) but that the student was "working really hard on a lot of her goals and has made a lot of progress" (id.). When asked what specific skills she was working on that were not being addressed by Tribeca Prep, the BCBA stated that she was working with the student "on manding, so that's requesting for preferred items, preferred people" and that they worked on "a lot of functional communication, which [she] kn[e]w [Tribeca Prep was] not working on at school" (Tr. p. 45). The BCBA further described the functional communication skills as "instead of, like, grabbing or pushing, having her request" a break or to request that they stop working, as well as working on "independence in the bathroom, various skills, playing with her sister appropriately, socialization

⁸ On cross-examination, the district's attorney asked the BCBA if the "eight and a half to ten hours encompass those four hours on the weekend?" to which the BCBA responded "Yes" (Tr. pp. 42-43; but see Tr. p. 39). However, the hearing record reflects that the student received a total of seven and one-half hours of ABA Monday through Friday and four hours on the weekends, for a total of 11.5 hours per week (Tr. pp. 49, 67).

skills, increasing the duration of work tasks, a lot of play-based activities as well because it's a lot of naturalistic teaching" (id.).

On cross-examination, the BCBA was unable to answer what was being worked on during the school day using ABA, stating that she could not say "what they're doing in the school because [she] d[id]n't work there" (Tr. p. 45). When asked how she knew that Tribeca Prep was not working on the student's functional communication, the BCBA responded that she had done a school observation of the student the previous week and knew that the school was "working on more of the academic types of programming, which [wa]s not what [she was] doing in the home" and that she "met with [the student's] school BCBA, and they [we]re not working on the functional communication that [she was] working on at home" (Tr. p. 46). With regard to how the home-based BCBA collaborated with Tribeca Prep, the BCBA testified that she was part of "an email thread with the school team, [her]self, the parents, and [her] colleague, who [was] an RBT" and that they discussed the student's "goals at school, . . . what they [we]re working on, any areas of concern such as . . . behavior" and that the participants would "make sure that [they were] all . . . working on things across the board to help [the student] . . . have a greater quality of life" (Tr. p. 47). The BCBA further testified that the student's weekend hours of ABA services were provided by the RBT and that the student received "the same programming that [they did] during the week, but because [the student wa]s not in school on the weekends, she [was] able to tolerate longer sessions" and that they "work[ed] on similar goals that [they did] during the week, but also when applicable, . . . including her sister, so to work on . . . the socialization goals, turn-taking, communicating, and things like that" (Tr. p. 48). The BCBA also clarified her testimony as to the number of hours of ABA services the student received as one and one-half hours per day Monday through Friday and four hours total on weekends (Tr. p. 49).

The IHO asked the BCBA if she had her own curriculum that she worked on with the student, since she did not know what Tribeca Prep was working on with the student, and she responded that she "create[d] the programs, . . . assess[ed the student], and [she] work[ed] on goals based on [her] assessments including the Vineland, the VB-MAPP, and direct observation" (Tr. p. 50). The IHO also asked the BCBA why the student received home-based ABA services after attending a full-time ABA program at school (id.). The BCBA responded that the student:

really need[ed], like, a structure to her day at all times. She really need[ed] somebody at -- in the home to help her with, like, communication, personal independence goals that may not necessarily be worked out in the school, so incorporating family, working on requesting things in the home that may not be in school, working on behaviors, because [the student] -- you know, when you're in a different environment, behaviors may change. And when [the student]'s at home, some of her behaviors [we]re much different from they [we]re -- from where they -- from how they [we]re in the school. So we're working on kind of decreasing those challenging behaviors and you know, ensuring that [the student wa]s happy in the home, able to express herself at home, complete things independently. [She] kn[e]w she's only five, but she's very, very bright, and she has a lot of potential to do -- to be independent, and

[she] th[ought] that's really important for her at home so she c[ould]
live, like, a successful life

(Tr. pp. 50-51).

The parent provided written testimony by affidavit, wherein she averred that, in January, she was finally able to find an ABA provider who could work with the student for 16 hours of therapy per week (Parent Ex. M ¶ 15). The parent further stated that "[f]rom this, [she] noted a marked improvement in [the student]'s progress and a reduction in the regression [she] had been seeing" (*id.*). The parent also testified that she lost her health insurance "in June" and could not continue paying out-of-pocket for the student's private services but that the district was ordered to fund the student's attendance at Tribeca Prep following an impartial hearing (*id.* ¶¶ 19, 23). The parent further stated that the student continued to require support at home to reinforce her skills and to make sure she did not regress and that with home-based ABA the student had been practicing greeting and responding to others and was reinforcing her abilities to follow directions (*id.* ¶ 25). The parent averred that she had seen the student start to follow routine directions and start to answer questions (*id.*). The parent also stated that the student continued to need the support she received at Tribeca Prep along with home-based ABA in order to make progress (*id.* ¶ 27). Although the district did not cross-examine the parent, the IHO asked her questions (Tr. pp. 15, 54). In response to a question about the student's schedule, the parent responded that "some of the support that the ABA g[a]ve[] us [wa]s on how to eat independently" and that the student's poor sleeping habits were also being "work[ed] on with [the] at-home ABA as well, especially during parent counseling" (Tr. p. 55). The parent further testified that student tended to play intermittently with her sibling and that was "another thing that [the parent] really rel[ied] heavily on [the BCBA and RBT] to facilitate because" if the student was "left alone, she would more parallel-play or independently work on something that [was] . . . really of her interest rather than engaging with her sister" (*id.*). The parent further elaborated that "the weekend times [we]re really vital because that's when [the student's sibling was] around, and they[were] really able to -- to, like, work on Legos together or try to play music together and make it much more of a bonding moment, which at times c[ould] be very isolating for" the student (Tr. pp. 55-56). The parent also testified that the home-based ABA services addressed the student's frustration tolerance for activities in the home and gave an example of the student building "interesting constructions" and becoming "very upset if people move it or touch it" (Tr. p. 56). The parent further stated that based on her visits to Tribeca Prep, the home-based ABA services "fe[lt] very different" in terms of "the things that [the student] and her teachers and her RBT and her BCBA work on at school versus at home" (*id.*). With regard to regression, the parent testified that, without home-based ABA services, the student's frustration tolerance worsened, in that "[the parent] really notice[d] it, even if it [had been] just one day that [was] missed, because . . . [the student] w[ould] sometimes scream or yell" and "ha[d] at times thrown objects or . . . rolled on the floor" when didn't receive support in an area such as feeding (Tr. pp. 56-57). The parent further testified that the student would "insist on watching something on the iPad and throw tantrums otherwise. So [the parent] really rel[ied] heavily on both [the BCBA and the RBT], our ABA providers, to help with regression" and that the student's regression was noticeable after being "gone for a weekend or something like that" and that the student's "sleep [wa]s also not so great" (Tr. p. 57).

In its closing statement, the district argued that it was "clear" that up to 20 hours of ABA services was "too much for this particular student to handle" and that it was "unclear" whether the

student would "ever get to a point where she c[ould] receive those 20 hours of after-school services" (Tr. p. 61). The district further argued that the student was "making good progress according to the witness with the amount of services that she[was then] receiving" (*id.*). Additionally, the district argued that generalization of skills to other environments was not a requirement of a FAPE and that there was some communication between the school and the home-based BCBA, however there was no collaboration between the student's providers (Tr. p. 62). The district then argued that the testimony of the BCBA indicated that the skills they were working on were not school-related, that the student was making progress at Tribeca Prep, and that it was unclear that the student "would not be able to make that progress without the ABA that she [was] receiving at home" (*id.*).

The parent argued in her closing statement that the student could not make progress in the classroom setting without home-based ABA services, that the case law relied upon for the proposition that generalization of skills to non-school environments was not a requirement of a FAPE predated Endrew F., and that progress was not meaningful if a student was learning skills to use in a classroom and then could not use those skills anywhere else (Tr. pp. 63, 65).

Overall, review of the IHO's decision shows that she weighed the foregoing evidence regarding the home-based ABA services and reached a reasoned conclusion that the services exceeded the amount that the student needed in order to receive a FAPE (*see* IHO Decision at pp. 10-13). In addition to weighing the evidence, the IHO found that BCBA's testimony was not credible (*id.* at p. 11). With respect to the parent's argument that the IHO erred in finding that the BCBA's testimony was contradictory and not credible, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (*see Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; *P.G. v. City Sch. Dist. of New York*, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; *M.W. v. New York City Dep't of Educ.*, 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], *aff'd* 725 F.3d 131 [2d Cir. 2013]; *Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer*, 84 A.D.3d 795, 796 [2d Dep't 2011]; *Application of a Student with a Disability*, Appeal No. 12-076). The parent cites different interpretations for the BCBA's testimony but does not point to sufficient evidence in the hearing record to compel a contrary conclusion. The IHO was in the best position to assess the witness's credibility, and I defer to the IHO's finding in this regard.⁹

One rationale repeatedly cited to justify the home-based services was to prevent regression. There was reference in the hearing record to a hypothetical "risk" of the student regressing when she was not in school (*see e.g.*, Tr. pp. 41-43; Parent Exs. C at p. 21; N ¶¶ 11, 15) and the parent's description of a regression in behaviors at home (Tr. pp. 56-57), but no data or evidence indicating that the student demonstrated a loss of skills in school without the provision of home-based ABA services. The purpose of 12-month services, which the student received, is to prevent substantial regression (*see* 8 NYCRR 200.6[k][1]). Further, there is insufficient basis in the hearing record to

⁹ Further, even if the IHO did not discredit the BCBA's testimony, in many respects, the testimony does not help the parents' case. For example, with respect to the difference in skills worked on with the student in the home program versus the school program, the BCBA demonstrated a limited knowledge of the school program (*see* Tr. p. 45), and the testimony of the home-based BCBA raised concerns about the student's tolerance for the after school services (Tr. p. 40).

disturb the IHO's findings that the home-based BCBA's testimony about regression was contradicted by the testimony of the head of school who stated that she was not aware of the student experiencing an issue with regression since beginning at Tribeca (compare Tr. pp. 41, 43 with Tr. p. 33).

Another rationale cited for the home-based services was to assist the student in applying skills to different environments. With respect to the IHO's finding that the home-based ABA services addressed the student's difficulties in generalizing skills to other environments, which was not required by the IDEA (see IHO Decision at p. 11), the parents argue that this position on generalization should be "reconsider[ed]" in light of Endrew F., 580 U.S. 386. However, the cases cited by the IHO do not, as the parent argues, rely on the 10th Circuit's "merely more than de minimis" standard that the Supreme Court reviewed in Endrew F. (580 U.S. at 387). While the cases cite a 10th Circuit case that discusses generalization (Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143 [10th Cir. 2008]), they set forth and apply the Second Circuit's standard, which provides that a school district satisfies its obligation to offer a FAPE under the IDEA if it develops an IEP "that is likely to produce progress, not regression," and affords the student with an opportunity for more than "the opportunity for only trivial advancement" (L.K., 2016 WL 899321, at *8, quoting Walczak, 142 F.3d at 130; F.L., 2016 WL 3211969, at *1, citing M.O. v. New York City Dep't of Educ., 793 F.3d 236, 239 [2d Cir. 2015]; see Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]). The Second Circuit has found that "[p]rior decisions of this Court are consistent with the Supreme Court's decision in Endrew F." (Mr. P. v. West Hartford Board of Education, 885 F.3d 735, 757 [2018]). Moreover, contrary to the parents' contention, at least one court has, since Endrew F., reiterated that provision for generalization of skills to other environments outside of school is not required by the IDEA (C.M., 2020 WL 3833426, at *21, *28). Accordingly, absent further authority from the courts, the general proposition that school districts are not, as a matter of course, required to provide for students' generalization of skills outside of the school environment stands.

Generally speaking, after-school services beyond the school day would be necessary to provide a student a FAPE only if, without such services, the student would be unable to make progress with the in-school programming alone (see Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *80 [S.D.N.Y. Mar. 20, 2017] [finding out-of-school services aimed only at managing the student's behaviors outside of the school day were not necessary to provide a FAPE]; R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *15 [S.D.N.Y. Sept. 27, 2013] ["While the record indicates that [the student] may have benefited from home-based services, it contains no indication that such services were necessary"], aff'd, 589 Fed. App'x 572 [2d Cir. Oct. 29, 2014]). Here, review of the evidence in the hearing record supports the IHO's finding that the student received educational benefit due to her attendance at Tribeca Prep, which "imbedded ABA services throughout their learning environment, starting with a full-time 1:1 or 2:1 instructional student-to-instructor ratio within a small classroom environment . . . and extending to their related service providers all of whom [we]re trained in ABA" and that Tribeca Prep offered the student the necessary skills to make progress in the classroom and apply these skills in the home and community (IHO Decision at p. 10, citing Parent Ex. O ¶ 10). Indeed, although the private psychologist who conducted the March 2023 neuropsychological evaluation recommended 15 to 20 hours per week of home-based ABA to allow the student to acquire new abilities, maintain skills, and generalize skills to other settings (see Parent Ex. C at pp. 21-22), the Tribeca head of school testified that the student needed intensive in-school 1:1 ABA instruction in a small, highly

structured class in order to acquire and maintain skills (Parent Ex. O ¶ 41). In addition, review of the testimony of the head of school shows that the student made progress during the 2023-24 school year across all educational areas, including academics, social/emotional, and behavioral areas of learning and functioning, and that the student's early struggles with attending to instruction, following directions, participating in individual and group instruction, and interacting with peers showed improvements (Parent Ex. O ¶ 25). The head of school further testified that, due to the progress the student made after a full year at Tribeca Prep, when she returned for the 2024-25 school year, "she immediately fit into her school environment and started where she left off at the end of her 2023-2024 school year in June" (*id.* ¶ 26).

While the parents argue that there was no evidence to suggest that the home-based services were not a critical part of the student's educational development, the converse is also true, and the parents were responsible to carry the burden of proof when it came to evidence regarding the unilateral placement and privately obtained services (Educ. Law § 4404[1][c]). As the evidence in the hearing record reflects that the home-based BCBA and RBT did not provide services which were required for the student to access her educational program at Tribeca Prep for the 2024-25 school year, I find no basis to disturb the IHO's conclusion that the home-based ABA services exceeded the level of services that the student required to receive a FAPE for the 2024-25 school year (Tr. pp. 45-51; Parent Exs. D at pp. 14-32, 33-38; O ¶¶ 25-26, 40-41). While I understand the parents' desire to see additional improvements in the student's experiences in the home, the district is not required to provide "every special service necessary to maximize the student's potential" (*Mr. P v. W. Hartford Bd. of Educ.*, 885 F.3d 735, 756 [2d Cir. 2018]).

VII. Conclusion

There is insufficient basis in the hearing record to disturb the IHO's determination that the home-based ABA services exceeded the level of services the student required to receive a FAPE and that, therefore, the district was not required to fund them as part of the unilateral placement of the student.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
May 22, 2025**

**JUSTYN P. BATES
STATE REVIEW OFFICER**