The University of the State of New York

The State Education Department
State Review Officer
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No. 25-002

Application of a STUDENT WITH A DISABILITY, by his 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:
The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tamara J. Roff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 cost of their son's tuition at Happy Hour 4 Kids, Inc., d/b/a "RISE NY" and "The Foundry Center" (RISE NY) for the summer portion of the 12-month 2024-25 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case will not be recited in detail here. During the relevant time, the student, "who has been classified by the [CSE] as a student with autism," attended a nonpublic school and received services including applied behavior analysis (ABA), occupational therapy (OT), and speech-language therapy (Parent Exs. A at pp. 1-2; F at p. 1; G at p. 1; H at p. 1; O ¶ 15).[1]

[1] While the hearing record does not include a copy of the student's IEP, the district has not disputed the parents' allegation that the student is eligible for special education as a student with autism (see Parent Ex. A at pp. 1-2; 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

On May 14, 2024, the student's father signed an enrollment contract with RISE NY, a private school for "children and young adults with a diagnosis of autism," for the 12-month 2024-25 academic year, which would run from July 8, 2024 through June 16, 2025 (Parent Exs. F at pp. 1, 5, 7; H at p. 1; I at p. 1). The parents thereby agreed to pay $145,500.00 in tuition for the 12-month 2024-25 academic year at RISE NY, which amount included the cost of related services as needed to meet the student's unique needs (see Parent Ex. F at p. 1). Their contract with RISE NY also provided that, if the parents accepted a public-school placement and provided written notice of the student's withdrawal from the summer session on or before July 31, 2024 or withdrawal from the 10-month term on or before October 31, 2024, then the parents would "only be responsible for a pro-rated tuition cost based on the number of months in which [the student] attended RISE NY" (id. at p. 3).

In a letter dated June 21, 2024, the parents, through their attorney, notified the district that the CSE had not convened to review and update the student's educational program for the 2024-25 school year, nor had the CSE provided a public-school placement for the 2024-25 school year (Parent Ex. D at p. 1). The June 2024 letter informed the district that, absent an updated IEP and public-school placement, the parents intended to enroll the student at RISE NY and seek public funding for the costs of the student's placement at RISE NY, as well as the student's after-school services of ABA services, OT, and speech therapy (id.).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated July 8, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A at pp. 1-2). Among other procedural violations, the parents alleged that the district failed to convene a CSE to review the student's educational program and develop an updated IEP for the student for the 2024-25 school year (see id.). More specifically, the parents alleged that the district had not convened a CSE to discuss the student's educational needs since March 30, 2020 (id. at p. 2). The parents requested pendency services pursuant to a prior IHO's decision dated June 30, 2017 (id.). As relief, the parents requested an order directing the district to provide a home-based program for the 2024-25 school year and fund/reimburse the cost of the student's unilateral placement at RISE NY for the 2024-25 school year (see id.).

On July 25, 2024, the student's mother signed a contract with The Manhattan Behavioral Center (MBC) for after school services consisting of six hours per week of ABA services and ABA supervision consisting of 10 percent of the ABA hours during the 12-month 2024-25 school year (Parent Exs. E at pp. 1, 3, 5; N ¶22).

During the 2024-25 school year, the student attended RISE NY, where he received the related services of OT and speech-language therapy in addition to instruction focusing on math, reading/writing, social skills, and vocational skills, among other things (see Parent Exs. F at p. 1; G at p. 1; H at p. 1).

During the 2024-25 school year, MBC provided ABA services to the student, with supervision from a board-certified behavior analyst (BCBA), both at home and in a community-based setting (Parent Ex. O ¶¶ 15-16, 32).

B. Impartial Hearing Officer Decision

Following a pre-hearing conference, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on October 21, 2024 (see Aug. 12, 2024 Tr. pp. 1-10; Oct. 21, 2024 Tr. pp. 1-30).[2] The impartial hearing concluded the following day, October 22, 2024 (see Oct. 22, 2024 Tr. pp. 31-74). The parents presented various exhibits, each of which the IHO admitted into evidence (see Oct. 21, 2024 Tr. pp. 11, 18; Oct. 22, 2024 Tr. pp. 39, 58; Parent Exs. A-O). The parents' exhibits included testimony by affidavit of the director of RISE NY, the director of education at MBC, and the student's mother, each of whom appeared for cross-examination during the hearing (see Oct. 21, 2024 Tr. pp. 16-30; Oct. 22, 2024 Tr. pp. 36-55, 56-66; Parent Exs. M-O).[3, 4] The district presented no documentary evidence or witness testimony (see Oct. 21, 2024 Tr. pp. 5-6, 16).

In a decision dated November 19, 2024, the IHO found that the district failed to offer the student a FAPE for the 2024-25 extended school year (IHO Decision at p. 6). The IHO reasoned that the district did not dispute the allegation that it failed to develop an IEP for the student for the 2024-25 school and, in fact, conceded that it denied the student a FAPE for the 2024-25 extended school year (see id. at p. 6).

Having determined that the district denied the student a FAPE for the 2024-25 extended school year, the IHO next addressed whether instruction at the private school, RISE NY, which included the related services of OT and speech-language therapy, along with after-school ABA services through the private agency, MBC, provided an appropriate educational program for the student (see IHO Decision at pp. 6-8). The IHO found that both RISE NY and MBC identified the student's individual needs, determined appropriate goals based on those needs, and developed and utilized a program that allowed the student to make progress toward his goals (id. at 7-8). Thus, according to the IHO, both RISE NY and MBC addressed the student's individual needs and provided instruction reasonably calculated to enable the student to receive educational benefits (id.).

However, the IHO found that the hearing record did not support the parents' request for funding of the programming provided to the student during the summer portion of the 2024-25 school (i.e., July and August 2024) because the parents did not present sufficient evidence of substantial regression to support the student's need for 12-month programming (IHO Decision at p. 9). The IHO also found that the hearing record did not support the parents' request for funding

[2] The hearing record includes three transcripts dated August 12, 2024, October 21, 2024, and October 22, 2024. The transcripts dated August 12, 2024 and October 21, 2024 each begin with page one. The transcript dated October 22, 2024 was paginated consecutively from the prior October 21, 2024 hearing date (see generally Aug. 12, 2024 Tr. pp. 1-10; Oct. 21, 2024 Tr. pp. 1-30; Oct. 22, 2024 Tr. pp. 31-74). For purposes herein, any citation to the transcripts will be notated with the transcript date and page number.

[3] The affidavits, which were unnotarized, were admitted into evidence only after the affiants affirmed their affidavits' contents during the hearing (see Oct. 21, 2024 Tr. pp. 16-18; Oct. 22, 2024 Tr. pp. 37-39; Oct. 22, 2024 Tr. pp. 56-58; Parent Exs. M-O).

[4] Parent Exhibit N, the affidavit of the student's mother, was mistakenly referenced as Parent Exhibit M in the transcript dated October 21, 2024 (see Oct. 21, 2024 Tr. pp. 3, 16-18; Parent Ex. N).

of after-school speech-language therapy (id. at p. 8). In that regard, the IHO reasoned that RISE NY provided the student with three 45-minute sessions of speech-language therapy per week, the cost of which was included in the base tuition, and the hearing record did not show that additional after-school speech-language therapy was required for the student to make progress (id.).

The IHO then addressed whether equitable considerations supported the parents' request for relief (see IHO Decision at pp. 9-10). The IHO found that, although the parents enrolled the student at RISE NY prior to sending their 10-day notice to the district, the parents' decision to sign the enrollment contract on May 14, 2024 was not in bad faith because the contract allowed the parents to withdraw the student, "without financial penalty or continuing responsibility for tuition payments," if they accepted a public-school placement (id. at 10). The IHO noted that the district presented no evidence to show that the contracted tuition amount was unreasonable or that reduction of the requested relief was warranted (id.). Thus, according to the IHO, the equities supported the parents' request for relief (id.).

However, based on the finding that the parents failed to prove the student's need for a 12-month program, the IHO limited the amount of funding for the student's private school tuition to $121,250.00, the cost of the student's attendance during the 10-month 2024-25 school year (IHO Decision at p. 10). The IHO established the awarded amount by dividing the total tuition by 12 to establish a monthly rate and then by multiplying that monthly rate by 10 for the 10-month school year (id.). The IHO then limited the award of funding for after-school ABA services to a reasonable market rate, to be determined by the district's Implementation Unit, because neither the parents' contract with MBC nor the agency director's testimony indicated the rate(s) charged by MBC for ABA services provided to the student during the 2024-25 school year (id.). Accordingly, the IHO ordered that the district "directly fund the balance of [the] [s]tudent's tuition at [RISE NY] in an amount not to exceed $121,250.00" and "provide and/or fund[,] at a reasonable market rate to be determined by [the] [d]istrict's Implementation Unit," "six . . . hours per week of after-school [ABA] services to be provided by a [BCBA] or Licensed Behavior Analyst ("LBA")[,] as well as one . . . hour per week of indirect ABA to be provided by a BCBA" (id. at p. 11).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the issues raised in the parents' request for review and the district's answer is presumed and, therefore, the allegations and arguments will not be recited here in detail. The parties dispute whether the IHO erred in limiting the award of tuition funding to the cost of the student's attendance at RISE NY during the 10-month 2024-25 school year.

V. Applicable Standards

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

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

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

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

As an initial matter, neither party has appealed the IHO's determination that the district denied the student a FAPE for the 2024-25 extended school year; the IHO's determination that both RISE NY and MBC provided appropriate instruction for the student; or the IHO's determination that equitable considerations supported the parents' request for relief. Nor has either party appealed the IHO's determination to limit the award of funding for after-school ABA services to a reasonable market rate to be determined by the district's Implementation Unit.[6] Those

[5] 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).

[6] In the request for review, the parents state that although they originally sought after-school speech-language therapy, they are no longer seeking the service on appeal.

unappealed determinations have, therefore, 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 (S.D.N.Y. March 21, 2013). The only remaining dispute to be addressed on appeal is whether the IHO erred in limiting the award of tuition funding to the cost of the student's attendance at RISE NY during the 10-month 2024-25 school year because the parents did not present sufficient evidence of substantial regression to support the student's need for 12-month programming.

Before addressing the merits, I must address the parents' submission of additional evidence with their request for review. The district objects to admission of the parents' additional evidence, an affidavit of the student's mother, for consideration on appeal (see Req. for Rev. at pp. 10-11).

Generally, evidence not presented at an impartial hearing may be 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]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; 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]).

As further discussed below, this matter hinges on whether the IHO erred in placing the burden of proof regarding the student's need for 12-month programming on the parents and reducing the awarded relief in line with that determination. The additional testimony by affidavit, which provides additional facts regarding the student's educational history, is not necessary to resolve the disputed issue on appeal (see Req. for Rev. at pp. 10-11). I therefore decline to accept the additional affidavit for admission and consideration on appeal.

B. Extended School Year

Turning to the merits, the parents contend that the IHO erred in limiting the award of tuition funding to the cost of the student's attendance at RISE NY during the 10-month 2024-25 school year. The parents argue that the IHO improperly shifted the burden of determining whether or not the students was at risk for substantial regression, such that he required a 12-month educational program, from the district to the parents. According to the parents, the evidence in the hearing record shows that a two-month interruption in services would result in regression; and the IHO erroneously imposed a requirement that the student demonstrate the need for eight weeks or more of re-teaching at the beginning of the next school year to recoup educational loss over the summer. The district argues that the IHO's decision should be affirmed. According to the district, the hearing record supports the IHO's finding that the parents failed to sustain their burden of proving the appropriateness of the summer 2024 program at RISE NY. Among other alleged deficiencies in the parents' proof, the district alleges a lack of evidence demonstrating the student's risk for regression over the summer.

Initially, it is worth noting that the IHO determined the educational program provided to the student by RISE NY was appropriate, a finding that did not differentiate between the summer

and 10-month portions of the school year (IHO Decision at pp. 7-8). This is consistent with the hearing record, as the hearing record also does not differentiate between the education program provided to the student by RISE NY during the summer and 10-month portions of the school year (see Parent Exs. F; G; I). During the hearing, the district did not argue, let alone present evidence, that 10-month programming would have adequately met the student's educational needs (see Oct. 21, 2024 Tr. pp. 12, 15-16; Oct. 22, 2024 Tr. pp. 67-68). In fact, the district conceded that it denied the student a FAPE for the 2024-25 extended school year (Oct. 22, 2024 Tr. p. 67).[7] Contrary to the district's argument on appeal, the IHO did not find that the parents failed to establish the appropriateness of the summer 2024 program at RISE NY (see IHO Decision at pp. 7-9). Rather, the IHO determined that lack of evidence of the student's need for 12-month programming necessitated denial of tuition funding for summer 2024, notwithstanding the appropriateness of the 12-month program at RISE NY (see id.).[8] In any event, lack of evidence of the student's need for 12-month programming is not a proper "basis to determine that the unilateral placement was not appropriate" (Application of a Student with a Disability, Appeal No. 23-248).[9] Accordingly, while the district may present an argument that the 12-month services were excessive, the district cannot argue that the services unilaterally obtained over the summer 2024 were not appropriate.

Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]).[10] Under State law, however, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85).

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[7] In the transcript dated October 22, 2024, the district's closing argument was mistakenly credited to the parents' attorney (see October 22, 2024 Tr. pp. 67-68).

[8] The IHO found that the student received appropriate instruction at RISE NY without drawing a distinction between the instruction the student received at RISE NY during summer 2024 and the instruction the student received during the 10-month school year (see IHO Decision at pp. 7-8). To the extent that the district disputes the appropriateness of the student's 12-month program at RISE NY, the district has not asserted a cross-appeal. Therefore, the matter will be not reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z., 2013 WL 1314992, at *6.

[9] The standard that parents seeking tuition funding for a unilateral placement must meet is whether "the placement provide[d] educational instruction specially designed to meet the unique needs of [the disabled student], supported by such services as are necessary to permit the child to benefit from instruction (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364-65 [2d Cir. 2006]).

[10] Ordinarily, which party bore the burden of persuasion in the impartial hearing becomes relevant only if the case is one of those "very few" in which the evidence is equipoise (Schaffer, 546 U.S. at 58; Reyes v. New York City Dep't of Educ., 760 F.3d 211, 219 [2d Cir. 2014]; M.H., 685 F.3d at 225 n.3; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 565 n.6 [S.D.N.Y. 2013]; A.D. v. New York City Dep't of Educ., 2013 WL 1155570, at *5 [S.D.N.Y. Mar. 19, 2013]; see F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 4 [2d Cir. Jan. 8, 2014]).

State regulation provides 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).

State regulation places the burden of determining whether or not students are at risk for substantial regression such that they require 12-month services on public school districts, not parents (8 NYCRR 200.16[i][3][v]). Hence, the IHO erred in placing the burden of proof regarding the student's risk of substantial regression on the parents.

To the extent that the IHO found that the parents should not receive funding for 12-month services, although not explicitly stated as such, the IHO's determination was that 12-month services were in excess of what the student would have received as part of a FAPE. 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"]).

In this instance, the entire basis for finding that the services provided to the student during the 12-month portion of the school year were excessive was that the parents did not present evidence of substantial regression. However, as noted above, it was the district's burden of determining whether or not students are at risk for substantial regression.

Based on the foregoing, I find that the IHO erred in limiting the award of tuition funding to the cost of the student's attendance at RISE NY during the 10-month 2024-25 school year.

In light of my determination herein, I find it unnecessary to address the parents' remaining contentions regarding the risk for substantial regression.

VII. Conclusion

In summary, I decline to accept the parents' additional evidence for admission and consideration on appeal. As explained above, the IHO erred in placing the burden of proof regarding the student's need for 12-month programming on the parents and, consequently, limiting the award of tuition funding to the cost of the student's attendance at RISE NY during the 10-month 2024-25 school year.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated November 19, 2024 is modified by reversing that portion which found that the parents failed to present sufficient evidence of substantial regression to support the student's need for 12-month programming;

IT IS FURTHER ORDERED that the IHO's decision dated November 19, 2024 is modified to provide that the district shall fund the cost of the student's annual tuition at RISE NY, in the amount of $145,500.00, by direct payment to RISE NY.

Dated: **Albany, New York**
April 7, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER