



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 25-014**

**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:**

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

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 son's private home-based applied behavior analysis (ABA) services and home-based board certified behavior analyst (BCBA) supervision services delivered by Busy Bees Licensed Behavior Analyst P.C. (Busy Bees) 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**

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, according to parent report, the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD) and autism spectrum disorder (ASD) (Dist. Ex. 6 at p. 6). During the 2023-24 school year, the student was "unilaterally placed at the Manhattan Star Academy"

(MSA) (id. at p. 1).<sup>1</sup> A CSE convened on October 18, 2023 for an annual review, found the student eligible for special education as a student with autism, and developed an IEP with a projected implementation date of October 18, 2023 (see Dist. Ex. 6).<sup>2</sup> The October 2023 CSE recommended a 12-month program in a specialized school consisting of an 8:1+1 special class in the areas of English language arts (ELA), math, social studies and sciences with related services consisting of one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group speech-language therapy (id. at pp. 20-21, 26). The October 2023 CSE also recommended parent counseling and training once per month in a group for 60 minutes (id. at p. 21).

On April 15, 2024, the parents entered into an enrollment contract with MSA for the student's attendance for the 2024-25 school year from July 1, 2024 to June 30, 2025 (Parent Ex. H). According to the enrollment contract, the base tuition included academic instruction and the related services of speech-language therapy, OT, and physical therapy (PT), as needed (id. at p. 1). The enrollment contract further indicated that additional services not covered in the base tuition may be included at an extra cost, but that the student did not need any additional services (id. at pp. 2, 7).

In a 10-day notice letter dated June 14, 2024, the parents indicated that they disagreed with the October 2023 CSE because it recommended an inappropriate program and refused to recommend applied behavior analysis (ABA) services (Parent Ex. G at p. 1). The parents also indicated they had not received a school location letter from the district and that they intended to reenroll the student at MSA for the 12-month 2024-25 school year and seek district funding for such placement including funding for related services, home-based ABA services, and transportation costs (id. at p. 2).

In a prior written notice and school location letter dated June 18, 2024, the district summarized the recommendations of the October 2023 CSE and indicated the district school location which would implement the student's IEP for the 2024-25 12-month school year (Dist. Ex. 4).<sup>3</sup>

A CSE convened on September 27, 2024 for the student's annual review, found the student continued to be eligible for special education as a student with autism, and developed an IEP for the student for the 2024-25 school year (Dist. Ex. 1 at pp. 1, 16-17, 22). The September 2024 CSE recommended a 12-month program in a specialized school consisting of a 6:1+1 special class and related services consisting of one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, two 30-minute sessions per week

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

<sup>2</sup> The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300. [c][1]; 8 NYCRR 200.1[zz][1]).

<sup>3</sup> The June 2024 prior written notice and school location letter were also provided in Spanish (see Dist. Ex. 4).

of individual OT, two 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of group speech-language therapy (id. at pp. 16-18). The September 2024 CSE also recommended parent counseling and training once per month in a group for 60 minutes (id. at p. 17).

### **A. Due Process Complaint Notice**

In a due process complaint notice dated July 1, 2025, 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). Initially, the parents requested a pendency placement based on a prior April 1, 2024 IHO decision (Parent Ex. A at p. 2; see Parent Ex. B).<sup>4</sup> As for the denial of a FAPE allegation, the parents claimed the district: denied the parents the right to meaningfully participate in the development of the student's educational program by refusing to consider the parents' request for ABA services and BCBA supervision; failed to provide the student with an appropriate program in the October 2023 IEP by failing to recommend individualized support and services, particularly ABA services, and by failing to consider a nonpublic school placement; failed to develop appropriate annual goals in the October 2023 IEP; failed to implement the student's October 2023 IEP by failing to timely inform the parents of the student's assigned school location for the 2024-25 school year so they could schedule a tour of the school; and failed to address the student's behavioral needs (id. at pp. 3-4). The parents also alleged that MSA was an appropriate unilateral placement for the student and that equitable considerations would favor the parents' requests for relief (id. at pp. 4-5).

As relief, the parents requested: a pendency order establishing the student's pendency placement at MSA with 10-hours per week of home-based ABA services, 4-hours per week of parent training and counseling services, and 2-hours per week of BCBA supervision; an order finding the district denied the student a FAPE for the 2024-25 school year, that MSA was an appropriate unilateral placement for the student, and that equitable considerations favored the parents; an order directing the district to fund the student's tuition at MSA for the 2024-25 school year, including the cost of transportation; and an order directing the district to fund the cost of 10-hours per week of home-based ABA services, 4-hours per week of parent training and counseling services, and 2-hours per week of BCBA supervision for the 2024-25 school year "as a necessary component of an appropriate program" (Parent Ex. A at p. 5).

### **B. Impartial Hearing Officer Decision**

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on August 9, 2024 and concluded on October 7, 2024, after two days of proceedings including a prehearing conference (Tr. pp. 1-97; see IHO Decision at p. 3). The parents introduced fourteen exhibits that were admitted into the hearing record over the objections

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<sup>4</sup> The IHO in the April 1, 2024 IHO decision determined that the district failed to meet its burden that the student was provided a FAPE for the 2023-24 school year; that MSA was appropriate and provided education instruction that was specifically designed to meet the student's unique needs; that home-based ABA services were appropriate; and ordered the district to fund the student's tuition at MSA, home-based ABA services at a rate of \$300.00 per hour for 10-hours per week of ABA direct services, 4-hours monthly of parent training, and 2-hours per week of supervision by a licensed behavior analyst or BCBA for the 2023-24 school year (see Parent Ex. B). The district did not appeal these findings.

of the district representative, and witness testimonies from the student's mother, the IEP and hearing coordinator from MSA (MSA coordinator), and the owner of the Busy Bees (Busy Bees owner) who provided home-based ABA services, BCBA supervision, and parent training and counseling during the 2023-24 and 2024-25 school years (Tr. pp. 13-97; see IHO Decision at p. 2). The district introduced nine exhibits that were admitted into the hearing record over the parents' objections and no witness testimony (see Tr. pp. 5, 20-21).

In a decision dated November 26, 2024, the IHO found that the district denied the student a FAPE for the 2024-25 school year because the district did not offer any testimony or credible evidence to rebut the parent's testimony that the student had failed to make progress at a district school prior to attending MSA, nor offered a cogent and responsive explanation for its decisions in creating the student's IEPs (IHO Decision at pp. 6-7).

Regarding the student's unilateral placement at MSA, the IHO determined MSA was an appropriate unilateral placement because the student's classroom teacher implemented ABA services under the supervision of a BCBA, which benefited the student; the student was appropriately grouped in his class academically, socially and behaviorally; and that the student "made great strides in reading, writing, and math" (IHO Decision at p. 8).

The IHO also determined that equitable considerations weighed in favor of the parents because the hearing record did not demonstrate that the parents acted with the requisite level of unreasonableness or misconduct such that reimbursement should be denied on equitable grounds, and because the parents timely served the district with the statutory 10-day notice letter (IHO Decision at p. 9).

The IHO also addressed the parents' request for district funded home-based ABA services and noted that in an August 2024 home-based ABA progress report (ABA report), the parents identified the student's codependency when sleeping and his bathroom routine as concerns to be addressed by home-based ABA (IHO Decision at pp. 10-11; see Parent Ex. K). The IHO determined that the home-based ABA services were not addressing concerns that would interfere with the student's ability to make progress in the classroom (IHO Decision at p. 11). The IHO stated that it was understandable that the parents wanted the student to sleep through the night in his own bed; however, the purpose of ABA services was to help the student make progress in the classroom, not to help the parents manage the student's sleeping codependency and nighttime bathroom routine (id.) The IHO also noted that there were no other parent concerns listed in the ABA report (id.).

Additionally, the IHO determined that testimony from both the student's mother's and the Busy Bees owner was not credible regarding the student's aggressive behaviors because the ABA report did not mention these aggressive behaviors, the parents' concerns regarding the aggressive behaviors, or the progress the student had made in this area (IHO Decision at p. 11). Further, the IHO noted that the MSA coordinator testified that MSA provided the student with an appropriate program, including ABA services and BCBA supervision during the school day, that met the student's unique needs and would enable him to make progress "academically, socially, and emotionally" during the 2024-25 school year (id.). The IHO determined the home-based ABA services were for generalization of the student's skills at home and were not necessary for the student to make progress in the classroom (id. at pp. 12-13). Accordingly, the IHO denied the

parents' request for funding of the home-based ABA services (id. at p. 13). The IHO also denied the parents' request for home-based BCBA supervision based on her findings that the home-based ABA services were not needed (id.). The IHO also denied the parents' request for four hours of parent counseling and training, noting that MSA provided parent training once per month on various topics such as behavior methods to use at home, and that the parents failed to show why the parent counseling and training at MSA was not sufficient and the additional hours were required (id.).

The IHO also determined that the district did not object to the parents' proposed pendency program and thus the student's pendency was based on a prior IHO decision dated April 1, 2024, which found the student's placement at MSA for the 12-month school year with 10-hours per week of home-based ABA services, 2-hours per week of home-based BCBA supervision, and 4-hours per month of parent counseling was appropriate (IHO Decision at p. 4; see Parent Exs. B-C).<sup>5</sup>

As relief, the IHO ordered the district to fund the student's tuition at MSA for the 12-month 2024-25 school year in the amount of \$122,304 and for the district to provide pendency based on the April 1, 2024 prior IHO decision (IHO Decision at p. 14).

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

The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer, and the parents' reply is also presumed and, therefore, the specific allegations and arguments included therein will not be recited in detail here. The essence of the parties' dispute on appeal is whether the IHO erred in denying the parents' request for funding of the student's home-based ABA services and BCBA supervision provided by Busy Bees.<sup>6</sup>

#### **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

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<sup>5</sup> According to the April 1, 2024 IHO decision and the proposed pendency implementation form, the cost of the at-home ABA, BCBA supervision, and parent counseling was \$300 per hour for each service (Parent Ex. B at p. 11; C).

<sup>6</sup> The district argues in its answer that the parents' request for review should be dismissed in its entirety because the notice of intention to seek review was not signed by an attorney or by a parent. State regulation requires that "[a]ll pleadings shall be signed by an attorney, or by a party if the party is not represented by an attorney" (8 NYCRR 279.8[a][4]). The parents concede that the notice of intention to seek review was not properly signed prior to serving the district but that such mistake should not result in a dismissal of the appeal, arguing that the notice of intention to seek review was timely served and fulfilled its intended function of putting the district on notice that an appeal would be served. The undersigned agrees with the parents' argument that the district suffered no confusion or prejudice due to the lack of a signature, and that it did not allege any confusion or prejudice in its answer. The district was able to timely send the hearing record to the Office of State Review. Further, the notice of intention to seek review included the parents' attorneys contact information as required by practice regulations (see 8 NYCRR 279.7[a]). Additionally, the request for review was timely served upon the district and the district was able to respond to all the parents' claims. Accordingly, I decline to exercise my discretion to reject and dismiss the request for review in this instance. The attorney for the parents is cautioned that failure to comply with the practice requirements of Part 279 of State regulations in future matters may result in rejection of submitted documents (see 8 NYCRR 279.8[a]).

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]).<sup>7</sup>

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (*Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7 [1993]; *Sch. Comm. of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-70 [1985]; *R.E.*, 694 F.3d at 184-85; *T.P.*, 554 F.3d at 252). In *Burlington*, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see *Gagliardo*, 489 F.3d at 111; *Cerra*, 427 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**

At the outset, neither party has appealed from the IHO's determination that the district denied the student a FAPE for the 2024-25 school year; that MSA was an appropriate unilateral placement for the student; that equitable considerations favored the parents; or the IHO's denial of funding for parent counseling and training provided by Busy Bees during the 2024-25 school year.

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<sup>7</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (*Endrew F.*, 580 U.S. at 402).



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]).

### **A. Preliminary Matters – Credibility Determinations**

Regarding the mother's and the Busy Bees owners' testimony regarding the student's aggressive behaviors, the IHO determined that such testimony was not credible because the ABA report did not report aggressive behaviors (IHO Decision at p. 11). The parents argue in their request for review that the ABA report noted that the primary objective of the home-based ABA services was to amplify favorable behaviors while minimizing unfavorable ones, which were escape behaviors and attention-seeking behaviors, such as tantrums, loud laughter, and stomping (see also Parent Ex. K at pp. 2, 4).<sup>8</sup> 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).

A review of the ABA report supports the IHO's finding that no aggressive behaviors were indicated or described (see Parent Ex. K). The ABA report does not explicitly mention any aggressive behaviors exhibited by the student (id.). Instead, the ABA report focused on various aspects of the student's behavior, including his positive and negative behaviors, attention-seeking behaviors, escape behaviors, and other specific behaviors related to his ABA goals (id.).

A review of the hearing record and the examples cited by the parents also do not support their argument that the IHO's credibility determinations should be overturned based on the documentary evidence; however, even if the undersigned agreed with the parents that the IHO's credibility determination should be overturned, as discussed below, the hearing record does not otherwise support a finding that the home-based ABA services and BCBA supervision services were required for the student to make progress in his educational programming at MSA.

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

The crux of the parties' dispute is whether the IHO erred in failing to order the district to fund ten hours per week of home-based ABA services and three hours per week of BCBA supervision services provided to the student by Busy Bees during the 2024-25 school year.

The home-based ABA services and BCBA supervision providers identified the student's needs and provided behavioral management support to the parents that helped address the student's behaviors at home. However, a closer analysis of the IHO's determination shows that the IHO

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<sup>8</sup> Both the district and parents submitted a copy of the August 24, 2024 home-based ABA progress report developed by Busy Bees into the hearing record (compare Parent Ex. K, with Dist. Ex. 2). For purposes of this decision, only the parent exhibit will be cited.

believed that the programming the student received at MSA alone was sufficient to address his behavioral needs, and the addition of home-based ABA and BCBA supervision services was excessive (see IHO Decision at pp. 11-13). The district in its answer also argues that the home-based ABA and BCBA supervision services exceeded what the student required to make progress at MSA and were unnecessary.

It should be noted that as opposed to being assessed as part of the inquiry concerning whether a parent's unilaterally-obtained services were appropriate for the student,<sup>9</sup> the issue of excessive services generally is examined as an equitable consideration that may warrant a reduction in tuition or costs sought if the frequency of the services or the rate for the services can be deemed excessive based on the evidence in the hearing record (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). Accordingly, I will analyze the parents' requested relief of home-based ABA services and BCBA supervision under an equitable considerations 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., 758 F.3d at 461 [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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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"]). Moreover, an IHO may consider evidence regarding whether any segregable services for which a parent seeks funding or reimbursement exceed the level the student required to receive a FAPE in the first instance, thereby rendering them "excessive" for equitable considerations purposes (see L.K. v. New York City

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<sup>9</sup> A private unilateral placement or private services obtained by must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school or services offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129), in order for a parent to obtain relief in the form of reimbursement or funding of the privately-obtained placement or services. Here, as previously discussed, the IHO found that MSA passed muster under this standard and its costs were reimbursable to the parents.

Dep't of Educ., 2016 WL 899321, at \*7 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100).

The IHO determined that the "major concerns" the home-based ABA services were addressing were not concerns that would interfere with the student's ability to make progress in the classroom (IHO Decision at p. 11). The IHO noted that the home-based ABA services were addressing the student's sleeping codependency and night bathroom routine, which were not educational concerns (*id.* at pp. 10-11).

The IHO also determined that the home-based ABA services were for generalization of skills and that the 10 hours of home-based ABA services were not necessary for the student to make progress in the classroom (IHO Decision at pp. 12-13). The parents allege the IHO inaccurately characterized the concerns that the home-based ABA services were addressing, arguing that a complete reading of the ABA report reflects that the home-based ABA services addressed the student's academic and behavioral concerns, including reducing escape and attention-seeking behaviors, learning to mand for desired items, increasing attention, improving spelling, creating sentences with appropriate verb tense, and developing appropriate social skills.

Several courts have held that the IDEA does not require school districts, as a matter of course, to design educational programs to address a student's difficulties in generalizing skills to other settings outside of the school environment, particularly where it is determined that the student is otherwise likely to make progress, at least in the classroom setting (*see, e.g., F.L. v. New York City Dep't of Educ.*, 2016 WL 3211969, at \*11 [S.D.N.Y. June 8, 2016]; *L.K. v. New York City Dep't of Educ.*, 2016 WL 899321, at \*8-\*10 [S.D.N.Y. Mar. 1, 2016], *aff'd in part*, 674 Fed. App'x 100 [2d Cir. Jan. 19, 2017]; *P.S. v. New York City Dep't of Educ.*, 2014 WL 3673603, at \*13-\*14 [S.D.N.Y. Jul. 24, 2014]; *M.L. v. New York City Dep't of Educ.*, 2014 WL 1301957, at \*11 [S.D.N.Y. Mar. 31, 2014]; *K.L. v. New York City Dep't of Educ.*, 2012 WL 4017822, at \*14 [S.D.N.Y. Aug. 23, 2012], *aff'd*, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; *Student X*, 2008 WL 4890440, at \*17; *A.D. v. New York City Dep't of Educ.*, 2008 WL 8993558, at \*7 [S.D.N.Y. Apr. 21, 2008]; *see also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1152-53 [10th Cir. 2008]; *Gonzalez v. Puerto Rico Dep't of Educ.*, 254 F.3d 350, 353 [1st Cir. 2001]; *Devine v. Indian River County Sch. Bd.*, 249 F.3d 1289, 1293 [11th Cir. 2001]; *JSK v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 [11th Cir. 1991]).

Consistent with the IHO's determination, the evidence in the hearing record supports a finding that the home-based ABA and BCBA supervision services obtained by the parents for their son were excessive given that MSA provided appropriate specialized instruction that addressed the student's identified needs, and he was likely to make progress at MSA without the home-based services. An October 31, 2021 neuropsychological evaluation report indicated a neuropsychological evaluation was conducted as part of a previous order by an IHO "to document [the student's] neurocognitive, academic, adaptive and social/emotional functioning, for the purpose of obtaining appropriate clinical and educational intervention recommendations" (Parent Ex. E at p. 1). Among other things, the evaluation report included a recommendation that the student "should be placed in a small classroom (no larger than 6:1:1) in a specialized school with access to an ABA teaching approach and multisensory instruction" (*id.* at p. 15). The report noted that the "[c]urriculum should include ABA interventions such as one-to-one behavioral rewards

and intensive basic skills instruction" (id.). Further, the evaluator recommended that "[t]eachers should be ABA trained and there should be a BCBA on staff" (id.). Additionally, the report included a recommendation that the student "should be exposed to a variety of service providers and settings each day for skill generalization purposes" (id.). While the IHO's finding that MSA was an appropriate unilateral placement for the student is not appealed, review of the evidence shows that MSA met the majority, if not all, of the evaluator's recommendations for school-based programming (compare Parent Ex. E at p. 15, with Parent Exs. I; M ¶¶ 1, 6-25).

With regard to home-based ABA, the October 2021 neuropsychological evaluation report reflected a recommendation that the parents pursue home-based ABA services "to reinforce skills taught at school and to work with [the] parents on behavior management consistency" (Parent Ex. E at p. 15). However, the hearing record reflects that since July 2022 when the student initially enrolled at MSA, staff members had provided the student with behavioral support (Parent Exs. I at pp. 1, 7; J at pp. 1, 14-16; Dist. Exs. 3 at pp. 1, 16-17; 7 at pp. 1, 7; 8 at pp. 1, 12-13). This support included having a BCBA and a behavioral assistant (BA) on staff at all times, who were certified in crisis management (Parent Exs. I at pp. 1, 7; J at pp. 1, 14-16; Dist. Exs. 3 at pp. 1, 16-17; 7 at pp. 1, 7; 8 at pp. 1, 12-13). Additional supports included conducting daily check-ins and visits with the classroom team, attending all classroom team meetings, facilitating staff professional development trainings via workshops, and training staff in behavioral techniques during real-time scenarios across a multitude of different areas (Parent Exs. I at pp. 1, 7; J at pp. 1, 14-16; Dist. Exs. 3 at pp. 1, 16-17; 7 at pp. 1, 7; 8 at pp. 1, 12-13). Support was also provided outside of the school by collaborating with outside service providers, facilitating monthly parent support groups, providing workshops and trainings to caregivers, and offering additional as-needed individual meetings with caregivers (Parent Exs. I at pp. 1, 7; J at pp. 1, 14-16; Dist. Exs. 3 at pp. 1, 16-17; 7 at pp. 1, 7; 8 at pp. 1, 12-13). All students at MSA were provided with universal proactive and reactive supports that addressed all reasons why they might engage in the behaviors they did (i.e., reinforcement for appropriate/prosocial behavior, engagement in preferred sensory-stimulating activities/behaviors, visual schedules, opportunities for functional communication, incentive systems, complex tasks broken down into simpler components, opportunities and access to alternative preferred activities) (Parent Ex. J at pp. 1, 14-16; Dist. Exs. 3 at pp. 1, 16-17; 7 at pp. 1, 7; 8 at pp. 1, 12-13). At the time of a June 2024 MSA progress report, the student was described as "typically happy and regulated," and review of the report did not reflect that emotional regulation and coping skills were major areas of focus in school (see Parent Ex. J at pp. 1, 6-7).

The owner of Busy Bees testified by affidavit that she was familiar with the student since 2022 (Parent Ex. N ¶¶ 1-2, 6). At the time of the impartial hearing, the student received 10 hours per week of home-based ABA services from her agency, provided by two registered behavior technicians (id. ¶ 7). The student also received two hours per week of home-based BCBA supervision provided by the owner of Busy Bees, who also provided the parents with four hours per month of parent counseling and training (id.). Consistent with an August 2024 progress report from Busy Bees, the home-based ABA services helped the student "increase positive behaviors and decrease negative behaviors across skill areas" (Parent Ex. N ¶ 8; see generally Parent Ex. K). The Busy Bees owner opined that home-based BCBA supervision was "crucial" for the student's home-based ABA program "to consistently review and analyze [his] data and modify his program

as needed to ensure that he continue[d] to make progress and problem solve any areas as needed" (Parent Ex. N ¶ 16). The owner of Busy Bees indicated that ABA supervision was "also used for regular communication and collaboration between the ABA therapists, parents, and school staff, to make sure that [the student was] receiving consistent intervention across environments and to make sure that his home-based ABA services [we]re supporting the skills that he [wa]s working on during the school day" (id.).

The student's home-based "ABA goals target[ed] manding, maintaining attention, turn taking, academic skills, comprehension, social skills, fine motor skills, activities of daily living and independence, engaging in conversation, remaining on topic, recalling the events of his day, and learning to regulate his body and emotions" (Parent Ex. N ¶ 8). While these skills could be addressed at both home and school, albeit in different settings, the evidence shows that the student was making progress in his program at MSA which was not necessarily attributed to the home-based programming. For example, the Busy Bees owner indicated the student made significant progress with the weekly home-based ABA services as his attention to task improved from one minute to 30-minutes with one five minute break across more than one provider (Parent Ex. N ¶¶ 9-10). The owner's testimony by affidavit also noted the student mastered comprehension of all "WH" cards with highlighted prompts (id. ¶ 11). Though it appeared the Busy Bees owner worked on some carry-over skills from school, the MSA coordinator testified that the student made progress answering "WH" questions during the school year and, according to the June 2024 progress report, he demonstrated fairly consistent attention and functional understanding of WH-question types independently; additionally, when questions were more abstract, he benefited from indirect verbal cues (Parent Exs. J at pp. 8, 11; M ¶ 26).

The student's mother opined that the student required home-based ABA services because the student was a "different child" when he was at home and became "very aggressive," and that the ABA services helped him behave, control his tantrums, and contain his emotion to socialize at home and within the community (Tr. p. 84). She testified that the ABA services helped the student in his development and "in his general behavior" (id.). The parent further testified that the support he received at MSA was reaffirmed at home (id.). The parent also testified that the Busy Bees owner taught her techniques to apply when he had tantrums and exhibited anxiety "when [they we]re on the street" (Tr. p. 85). The Busy Bees owner referred to the family's need for parent counseling and training to deal with the student's behaviors, specifically to teach the student's parents how to make antecedent and consequential changes to his environment (Tr. p. 76; Parent Ex. N ¶ 17).<sup>10</sup>

Similarly, during testimony, the Busy Bees owner indicated she believed the student needed home-based ABA services for the 2024-25 school year because when the student did not have ABA services his aggressive behaviors increased (Tr. p. 67). The Busy Bees owner testified that she observed the student in school for two days and found him to be a "model student" and that there was no aggression in school (Tr. p. 69). The Busy Bees owner further stated, "[b]ut at

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<sup>10</sup> However; as noted above, the IHO's denial of funding for the parent counseling and training Busy Bees delivered is not being appealed here.

home, he's a totally different child," and had "aggressive behaviors towards his mom, towards his dad, towards his sister" (Tr. pp. 69-70). She indicated that the student also tried to show aggressive behaviors towards the therapist, but since the therapist knew "the skills" and knew what to look for, she was able "to stop [the student's] behaviors in its tracks," and that this was something the parents and sibling needed to learn (Tr. p. 70).

The Busy Bees owner also testified in her affidavit that in early 2023 when the student's home-based ABA services were interrupted, she observed that he showed aggressive behaviors at home such as punching, screaming, throwing tantrums, and it was harder to regulate the student's emotions and redirect him (Parent Ex. N ¶ 15; see Tr. p. 65). According to the Busy Bees owner, when the student's home-based ABA services resumed at the appropriate frequency, he was able to return to the level of progress he had achieved before the interruption (Parent Ex. N ¶ 15). The owner of Busy Bees testified that when the student's home-based ABA hours had stopped, "we had to use compensatory" hours (see Tr. pp. 64-65). The Busy Bees owner indicated that due to the parents' concern that the compensatory hours would run out, Busy Bees did not provide 10 hours of ABA services (Tr. pp. 65-66). She testified that because the student's compensatory home-based ABA hours were reduced, his behaviors at home increased (i.e., aggression, tantrums, abusive behaviors, hitting himself) (Tr. p. 65). However, despite the increase in the student's aggressive behaviors at home, there is nothing in the hearing record showing that the student's behaviors increased while the student attended MSA, and the evidence described above shows that the home-based ABA services were used to address the student's behaviors exhibited at home and not at school (see Parent Ex. J; Dist. Exs. 7-8). Accordingly, the parents' argument that the IHO erred in finding that the student could make educational progress without home-based ABA services is not supported by the evidence in the hearing record.

The parents also allege the IHO misconstrued the MSA coordinator's testimony, arguing that the MSA coordinator testified that she expected the student to continue to make progress in his current setting, which included home-based ABA services. The parents also argue that other evidence in the hearing record supports the student's need for home-based ABA services, such as the parent's testimony and a November 2021 neuropsychological evaluation. Although the MSA coordinator testified that the student required home-based ABA services to continue what he was learning in school and to ensure constant repetition and exposure to content in multiple environments, the evidence supports the IHO's finding that the student received sufficient ABA support at school that enabled him to make progress, and the home-based ABA services were more to generalize skills and give support to the parents when the student was exhibiting behaviors at home that he did not have at school (Tr. pp. 52-53).

As cited by the parents in their appeal, the April 2021 neuropsychological evaluation noted that on March 16, 2020 the student exhibited disruptive behaviors and on December 8, 2017, when the student was 2 years 11 months old, he was "at-risk" for attention problems and aggressive behaviors (Parent Ex. E at p. 11); however, there is no evidence that the student exhibited aggressive behaviors while attending school during the 2024-25 school year that would necessitate the need for additional home-based ABA services (see Parent Exs. A-N; Dist. Exs. 1-9). Rather, according to the September 2024 IEP that was developed for the student, the MSA school personnel who attended the CSE meeting reported that the student did not present with aggressive or self-injurious behaviors at school (Dist. Ex. 1 at p. 3).

Accordingly, my review of the evidence in the hearing record leads me to the conclusion that the IHO did not err in weighing the evidence in the hearing record concerning the student's home-based services and determining that the primary function of the home-based ABA services were for generalization purposes and, while beneficial, were not necessary in order to provide the student with services that were reasonably calculated to enable the student to receive educational benefits, the standard enunciated in Rowley and Endrew F. As noted above, the IDEA ensures the provision of an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132).

In this instance, the hearing record contains evidence that MSA programmatically had supports available to encourage continuity and carry-over for the purpose of generalization of a student's skills between a school-based and a home-based environment (see Parent Ex. J at pp. 14-15; Dist. Exs. 3 at pp. 16-17; 7 at pp. 15-16; 8 at pp. 13-14). As a result, the parents are not entitled to funding for the costs of the student's home-based ABA services and BCBA supervision services because the evidence supports a conclusion that the home-based services were either for the purpose of generalization of the student's skills or were otherwise excessive and beyond what the district was required to deliver to enable the student to make progress in light of his circumstances and provide him with a FAPE.

## **VII. Conclusion**

Having determined that there are insufficient grounds upon which to overturn the IHO's determination that the student is not entitled to ten hours per week of home-based ABA services and three hours of BCBA supervision as per the parents' requested relief, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

**THE APPEAL IS DISMISSED.**

**Dated:**            **Albany, New York**  
                      **May 28, 2025**

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**CAROL H. HAUGE**  
**STATE REVIEW OFFICER**