The University of the State of New York

The State Education Department
State Review Officer
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No. 25-082

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

Appearances:
Mayerson & Associates, attorneys for petitioner, Gary S. Mayerson, Esq., Christina Mure, Esq., and John Hobbs, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jay St. George, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's private services delivered by IDEA Associates for the 2023-24 and 2024-25 school years. Respondent (the district) cross-appeals from that portion of the IHO's decision which determined that the parent's unilaterally obtained special education services were appropriate. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 this case and the IHO decision will not be recited in detail. Briefly, the student received a diagnosis of autism spectrum disorder as a young child and began attending IDEA Associates in September 2018 (Parent Ex. O at p. 1).[1] As of June 2022, the student's programming consisted of

[1] IDEA Associates has not been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7).

"1:1 academic instruction throughout the school day, as well as related services consisting of speech therapy, occupational therapy [OT], supervision, home[-]based behavior therapy and parent training" (id.).

According to the parent, on November 16, 2022 a CSE convened and recommended that the student attend a 6:1+1 special class placement in a district specialized school, together with counseling, OT, speech-language therapy, and parent counseling and training (Parent Ex. QQ ¶¶ 1, 29, 31).[2]

In a letter to the district dated June 15, 2023, the parent expressed her concerns with the November 2022 IEP, alleging that the district had inadequate evaluations and assessments of the student, and that the IEP: included inadequate transition planning and support; failed to meet the student's individual needs; provided for insufficient teaching interventions; did not provide the student with one-to-one instruction; offered an insufficient level of service; did not recommend individual parent training and counseling; did not recommend sufficient behavior interventions; included insufficient goals and objectives; and did not recommend a methodology (Parent Ex. D at p. 1). The parent also alleged that the district failed to provide her with a public school placement for the student (id.). The parent stated her intention to unilaterally place the student at IDEA Associates for the 2023-24 12-month school year if her disagreements with the student's IEP were not addressed, as well as her intention to seek public funding for that placement (id.).

According to the parent, on June 18, 2023 she received a notice from the district identifying the school location the district assigned the student to attend for the 2023-24 school year and attempted to "reach out to the school multiple times," but did not receive a response (Parent Ex. QQ ¶ 33). The student attended IDEA Associates during the 2023-24 school year (Parent Exs. L; N).

In a letter dated June 14, 2024, the parent alleged that the district had not developed an IEP for the student for the 2024-25 school year (Parent Ex. E). The parent stated her intention to unilaterally place the student at IDEA Associates for the 2024-25 12-month school year and seek public funding for that placement if an appropriate IEP was not developed for the student (id.).

The student attended IDEA Associates during the 2024-25 12-month school year (Parent Exs. Z; AA). According to the parent, a CSE convened on October 7, 2024 and recommended programming for the student consisting of an 8:1+1 special class placement with related services (Parent Ex. QQ ¶¶ 37, 42). In a letter dated October 25, 2024, the parent expressed her disagreements with the student's October 2024 IEP and stated her intention to continue the student's unilateral placement at IDEA Associates for the 2024-25 12-month school year and seek public funding for that placement if her concerns were not addressed (Parent Ex. F).

[2] The hearing record does not contain any individualized education program (IEP) for the student; however, the parties do not dispute the student's eligibility for special education programs and services (see Parent Exs. A-QQ; IHO Ex. I).

A. Due Process Complaint Notice

In an amended due process complaint notice dated October 25, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years (Parent Ex. C).[3] The parent invoked the student's pendency entitlements, which she asserted were based on a prior IHO's April 2023 interim order and included funding for tuition and costs for the student's placement at IDEA Associates, up to 10 hours per week of home-based applied behavior analysis (ABA) services, two hours per week of home-based ABA supervision, two hours per week of home-based parent counseling and training, and special transportation to and from his nonpublic school with 1:1 transportation paraprofessional services (id. at p. 2).

The parent asserted numerous claims for the 2023-24 and 24-25 school years, including allegations that: the CSEs were not duly constituted; the district failed to conduct a functional behavioral assessment (FBA) or develop a behavioral intervention plan (BIP) for the student; the district failed to gather sufficient information about the student or adequately assess him before developing his IEPs; the student's IEPs were not reasonably calculated to offer the student a FAPE; the district failed to develop appropriate annual goals; the district failed to recommend appropriate parent counseling and training, an appropriate class size, appropriate related services and supports, or ABA services, and, specific to the 2023-24 school year, that the district did not provide the student with an appropriate assigned public school site (Parent Ex. C at pp. 3-17). Regarding the 2024-25 school year specifically, the parent alleged that, at the time of the filing of the amended due process complaint notice, the district had not provided the parent with a school location letter or a prior written notice, and the district failed to address the student's post-school vocational transition planning (id. at pp. 10-19).

For both the 2023-24 and 2024-25 school years, the parent requested reimbursement and direct funding for the cost of the student's attendance at IDEA Associates, 10 hours per week of home and community based ABA services, two hours per week of home and community based ABA supervision, two hours per week of home and community based parent counseling and training, and special education transportation to and from school (Parent Ex. C at p. 20). Additionally, for the 2024-25 school year, the parent requested a neuropsychological evaluation and two 30-minute sessions per week of counseling (id.).

B. Impartial Hearing Officer Decision

Following a prehearing conference conducted on August 6, 2024, and a status conference conducted on September 3, 2024, an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on November 26, 2024 (Tr. pp. 1-32).[4] In a decision dated December 31, 2024, the IHO found that the April 2023 pendency order issued in a prior

[3] The parent had previously submitted due process complaint notices dated July 1, 2024 and September 24, 2024 (Parent Exs. A-B).

[4] The transcripts from the prehearing and status conferences are consecutively paginated (see Aug. 6, 2024 Tr. pp. 1-5; Sept. 3, 2024 Tr. pp. 6-13). The transcript from the hearing conducted on November 26, 2024 restarted the pagination at page one (see Nov. 26, 2024 Tr. pp. 1-32). For purposes of this decision, citations to the transcript refer to the November 26, 2024 transcript unless otherwise specified.

matter involving the student was effective from September 15, 2022, the date the parent filed her due process complaint notice in that matter, through "at least the date of the [due process hearing]" he presided over (IHO Decision at p. 4; see IHO Ex. I). The IHO declined to issue a new pendency order, as he determined that the student was subject to a pendency order that was still in effect, and he had not been informed that the prior case had reached a conclusion (IHO Decision at p. 4).

Regarding the 2023-34 school year, the IHO found the student was subject to an ongoing pendency order that was effective from September 15, 2022 through "at least" November 26, 2024 (IHO Decision at p. 4). The IHO determined that the relief requested by the parent for the 2023-24 school year was the same as the relief granted in the previous pendency order; thus, the IHO declined to make a finding regarding the 2023-24 school year as the issues raised by the parent were moot (id.).

Regarding the 2024-25 school year, the IHO found that the district failed to offer the student a FAPE for the 2024-25 school year because the district rested its case "without offering any evidence or testimony in defense of the programs developed by the CSE" (IHO Decision at p. 5). The IHO went on to find that IDEA Associates was an appropriate unilateral placement for the student because IDEA Associates identified the student's academic and behavioral needs and developed goals to address those needs (id. at p. 6).

However, the IHO found that equitable considerations did not weigh in favor of the parent's requested relief because she did not establish a financial obligation to IDEA Associates (IHO Decision at p. 7). The IHO determined that the parent did not offer any evidence of a contract between herself and IDEA Associates enrolling the student at IDEA Associates for the 2024-25 school year and obligating her to pay for the cost of attendance or the services provided to the student (id.). According to the IHO, the parent offered into evidence a parent handbook for IDEA Associates which stated "if your child's case is under [the district] reimbursement please keep in mind that if [the district] does not reimburse for services, the parents and/or guardians of the child will be solely responsible for paying any unpaid balance/invoices due to [IDEA Associates]" (id., quoting Parent Ex. X at p. 3). The IHO found that the parent acknowledged receipt of the parent handbook by signing it on June 9, 2024, but that there was no document offered into evidence, prepared at the time of the student's enrollment, that described the services to be provided to the student or identified the cost of the services (IHO Decision at p. 7). Further, the IHO determined that the executive director of IDEA Associates (director) signed a "[p]rovider's [a]ffidavit of [s]ervice" on November 7, 2024, which listed the hourly rates of various services and stated that IDEA Associates would continue to provide "up to" varying frequencies of the various services (id.). The IHO found that the director's and parent's affidavit testimony both utilized language which referenced the parent's obligation to pay for services that the student received, but that an obligation to pay was not established with any certainty (id.). Additionally, the IHO found that the evidence in the hearing record did not establish a financial obligation by the parent and determined that the parent was not entitled to the requested relief (id. at p. 8).

The IHO went on to find that, even if the evidence had established the parent's financial obligation, the IHO would have found that the district was not liable to pay for the home-based services provided by IDEA Associates, because those services were not necessary to offer the student a FAPE (IHO Decision at p. 8). Thus, the IHO would not have ordered funding for the student's home-based ABA services, home-based board certified behavior analyst (BCBA)

supervision, or home-based parent counseling and training (id.). The IHO denied the parent's request for tuition reimbursement for the student's unilateral placement at IDEA Associates for the 2024-25 school year (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by dismissing the parent's claims for the 2023-24 school year as moot. Specifically, the parent alleges that, while there was a valid and enforceable pendency order during the 2023-24 school year, which would have provided the parent with all the requested relief for the 2023-24 school year, the parent alleges that the district failed to provide full funding pursuant to the pendency order, thereby violating the pendency order. The parent argues that the IHO should have considered the evidence presented and rendered a decision granting the parent's request for complete funding. The parent also argues that the IHO erred in finding that equitable considerations did not weigh in favor of the parent's requested relief because the parent was financially obligated to pay for the student's unilateral placement at IDEA Associates. The parent argues that the parent handbook, which was signed by the parent on June 9, 2024, is evidence that the parent was financially obligated to fund the student's program at IDEA Associates. In the alternative, the parent argues that she was not obligated to enter into a contract because the district was and is obligated to provide services under pendency at its expense. The parent asserts that, since the district was obligated to pay for the student's attendance at IDEA Associates, she was not obligated to show a financial obligation for services the district was required to fund. Finally, the parent argues that the IHO erred in finding that the home-based portions of the services provided by IDEA Associates exceeded a FAPE because those services were required for the student to receive educational benefit. The parent requests an order providing full funding for all services delivered by IDEA Associates to the student for the 2023-24 and 2024-25 school years.

In an answer and cross-appeal, the district argues that the IHO correctly dismissed the parent's claims for the 2023-24 school year as moot because the student has received all of the services sought as relief for the 2023-24 school year through pendency. Regarding the parent's claim that the district failed to fund the student's services pursuant to the pendency order, the district argues that the parent never alleged this claim in her due process complaint notice, nor did the parent make this allegation during the impartial hearing process; rather, the district argues that it provided funding for the services provided to the student by IDEA Associates for the 2023-24 school year pursuant to the pendency order. The district also argues that the IHO correctly found that equitable considerations do not favor the parent's requested relief. The district cross-appeals from the portion of the IHO's decision which found that IDEA Associates was an appropriate unilateral placement for the student. Specifically, the district argues that there is doubt regarding the frequency of the services the student received and that the hearing record indicates that, for the 2024-25 school year, the student was regressing despite his placement at IDEA Associates.

In an answer to the district's cross appeal, the parent denies the claims made in the district's answer and argues that the district's cross-appeal should be dismissed.

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

Neither party appeals the IHO's finding that the district failed to offer the student a FAPE for the 2024-25 school year. Nor does the parent contend that the IHO erred in failing to order funding for a private neuropsychological evaluation. 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

[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).

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. Mootness

Regarding the parent's assertion that the IHO erred in finding her claims for the 2023-24 school year to be moot, a dispute between parties must at all stages be "real and live," and not "academic," or it risks becoming moot (Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; see Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ. of Webster Cent. Sch. Dist., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4; but see A.A. v. Walled Lake Consol. Schs., 2017 WL 2591906, at *6-*9 [E.D. Mich. June 15, 2017] [considering the question of the "potential mootness of a claim for declaratory relief"]). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007). A claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Toth, 720 Fed. App'x at 51; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040).

Here, neither party disputes the basis for the student's pendency placement or that the student was entitled to services provided by IDEA Associates pursuant to pendency for the entirety of the 2023-24 school year. Nor does the parent argue that an exception to mootness should apply. Instead, the parent claims that the IHO should have reached the merits of her claims for the 2023-24 school year because, although required to do so, the district had failed to provide full funding for the student's services for the 2023-24 school year in violation of the student's undisputed pendency entitlement. The parent's concerns in this regard do not render the underlying dispute live. An order from the IHO directing the district to fund the student's unilateral placement for the 2023-24 school year would not assist the parent in obtaining the funding that the district had allegedly not provided. That is, to the extent that the district has failed to provide the funding as required under pendency, the remaining issue relates to enforcement of the student's pendency entitlement. It is well settled that neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at

*7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Accordingly, to the extent that the parent seeks enforcement of the previous IHO's order on pendency, such a request is outside the jurisdiction of this administrative process. Based on the foregoing, I find no reason in the hearing record to disturb the IHO's determination that the parent's claims for the 2023-24 school year are moot.

For that matter, it appears that the parent's claims for the 2024-25 school year have also, in essence, been rendered moot. According to the parent, the prior impartial hearing that had been pending at the time the IHO in this matter issued his decision has now been decided on the merits in the parent's favor (Parent Reply Mem. of Law at p. 3 n.3). Therefore, it would not appear that any pendency changing event has occurred while this matter has been ongoing and that the district is required to fund the entirety of the student's program for the duration of these proceedings, which have now encompassed the entirety of the 2024-25 school year. However, as the hearing record includes only the parent's statement as to the outcome of the prior matter in a footnote in a memorandum of law, I do not find that the hearing record is sufficiently developed on the question. Accordingly, I will address the parties' disputes regarding the 2024-25 school year.

B. Unilateral Placement

Turning to the district's cross-appeal of the IHO's finding that the parent's unilateral placement was appropriate for the student for the 2024-25 school year, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist.,

773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

After citing to evidence relating to the school-based portion of the student's unilateral placement, the IHO found that IDEA Associates' "full day program" was specially designed to allow the student to make progress towards his goals and that parent met her burden with respect to the "day program" IDEA Associates offered to the student (IHO Decision at p. 6; see Parent Exs. M; T; U; V; X; PP). To the extent the IHO found the unilaterally obtained programming appropriate in part (i.e., the school day portion) but did not find the home-based portion to be appropriate, this was error as the Second Circuit has explained, it is not appropriate for an IHO to "conduct[] reimbursement calculations in [the] appropriateness analysis"; rather, "[t]he first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any" (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hours day]). Accordingly, I will address both components of the student's unilateral taking into account the totality of the circumstances. To determine whether the services IDEA Associates delivered to the student during the 2024-25 school year were appropriate, a review of the student's needs is necessary.

1. The Student's Needs

The student was 15 years old at the beginning of the 2024-25 school year and has received diagnoses of autism, moderate intellectual disability, and attention deficit hyperactivity disorder (ADHD), combined presentation (Parent Exs. OO at p. 6; QQ ¶¶ 1, 2). The parent reported that

the student, "has had some schizophrenia symptoms, but was not officially diagnosed" (Parent Ex. QQ ¶ 2).

With regard to cognitive development, administration of the Stanford-Binet Intelligence Scales—Fifth Edition (SB-5) to the student in April 2024 yielded a full scale IQ of 41, which the evaluator described as "well below the 1st percentile, placing his level of cognitive functioning within the [m]oderate [i]ntellectual [d]isability range" (Parent Ex. OO at pp. 1, 3-4, 6). Further, results of the Vineland Adaptive Behavior Scales—Third Edition (Vineland-3) parent report placed the student's communication, daily living, socialization, and overall adaptive behavior skills in the low range, with scores below the first percentile (id. at pp. 4-5, 6). Administration of the Wide Range Achievement Test—Fifth Edition word reading subtest to the student, which measured his word recognition and decoding skills, yielded a standard score of 59 at the first grade level equivalent and below the first percentile (id. at p. 6).

The student has a history of difficulty expressing his emotions, struggling with changes in routines and transitions, and exhibiting executive functioning and attention deficits (Parent Exs. OO at p. 5; QQ ¶¶ 21, 23). The parent reported that, although the student's behaviors occurred less frequently during the 2023-24 school year, during the 2024-25 school year, the student's behaviors had increased (Parent Ex. QQ ¶ 15). Specifically, the parent described the student's interfering behaviors as "refus[ing] to do things when asked, ignor[ing] people, grab[bing] things, and hav[ing] tantrums" (id.). Additionally, the parent stated that the student "ha[d] been more impulsive and ha[d] a lot of anxiety," and exhibited aggressive behaviors (id. ¶¶ 15; 18). The parent further reported that "[t]his [school] year, [the student's] academics ha[d] regressed due to his increased behaviors" (id. ¶ 26). Further, the parent indicated that the student's speech-language skills were "severely delayed" in that he struggled to understand and follow directions, communicate his needs, and participate in conversations (id. ¶ 20). The director indicated the student's "biggest challenges," were his "severe anxiety, focus and emotional stability throughout his day" as well as "processing issues" (Parent Ex. PP ¶¶ 1, 30).

2. IDEA Associates

According to the director, IDEA Associates "provide[d] students with a plethora of services, dependent on their educational and developmental needs" (Parent Ex. PP ¶ 7). Services at IDEA Associates included, among other things, special education teacher support in school, 1:1 home and community based ABA services, speech-language therapy, and OT (id.). Regarding the school-based portion of the student's programming during the 2024-25 school year, the student was part of one class of three students, whose ages ranged from 14 to 17 years old, with one academic teacher, and one "instructor" per student "for redirection and behavior management" (id. ¶¶ 8, 36). A description of the school-based program included in the hearing record indicated that a BCBA supervised the student's ABA program and New York State certified teachers worked with the student on a daily basis, on a 1:1 basis and in small groups (Parent Ex. M; see Parent Ex. Z).

The hearing record includes the student's June 2024 progress report; the June 2024 speech-language progress report; and the June 2024 OT progress report, which reflected that the student made some progress in his academic, speech-language, fine motor, and social skills during the 2023-24 school year (see Parent Exs. T; U; V; see also Parent Ex. PP ¶ 28, 49, 89). Review of the

progress reports and the director's affidavit testimony shows that IDEA Associates identified the student's continuing needs as of the start of the 2024-25 extended school year, and set forth goals to address his needs in reading, math, writing, listening/comprehension, and social skills (see Parent Exs. T; U; V; PP ¶ 39).

The evidence in the hearing record also includes the student's classroom schedule, which indicated that the student was to receive daily literacy, math, handwriting, writing, and social studies instruction, and participate in activities such as morning meeting, "[s]pecials, [a]rt, [m]ovement," recess, computer keyboarding, social group, and choice time (Parent Ex. Z). Further, according to the schedule the student was scheduled to receive three 30-minute sessions per week each of OT and speech-language therapy (id.).

Based on the director's affidavit testimony, during the 2024-25 school year, academically, the student was working at a late kindergarten to early first grade level and required "frequent verbal support and redirection to complete the work presented," as well as "constant reminders and repetition of directions to follow tasks and complete his work" (Parent Ex. PP ¶ 34). Additionally, the director testified that the 1:1 support provided to the student was "mandatory" and he would not have been able to complete academic lessons and activities without that scaffolding and behavioral support (id. ¶ 37). According to the director, the student's "academic work align[ed] with the New York State Common Core Standards" and "[e]ach subject [wa]s broken down and taught based on the learning modules" (id. ¶ 35). The director testified that "[a] multi-sensory and behavioral approach [wa]s used to present work to [the student], in addition to both paper pencil, keyboard and virtual lessons," and that the student's programming also included "[f]requent community outings and field trips" (id.). Also, the director stated that the student's ABA services used direct teaching and direct and/or indirect prompts, picture cues and visual supports, gestures, breaking down multistep directions to one step, shaping, modeling, and reinforcing tasks, which were essential for the student's learning (id. ¶ 48).

Socially, the student showed an interest in peers but required "1:1 social support," language support, and prompting to engage with them (Parent Ex. PP ¶ 51). During the 2024-25 school year, the student's "social programming [wa]s incorporated in the curricula throughout the school day, specifically during periods of group learning" (id. ¶ 52). During the one hour per day of "[s]ocial [g]roup," students and their 1:1 therapists played games and completed activities "geared towards conversational skills and working together to solve a problem," such as puzzles and board games (id.). The director reported that compared to his performance during the 2023-24 school year, the student had exhibited a decline in peer engagement, and interest in what peers were doing (id. ¶ 54). Transitional, basic vocational, and activities of daily living skills were targeted both at school and home, using "directives, repetition and showing [the student] the process needed to complete the task" (id. ¶ 55). According to the director, once the student accomplished the tasks without 1:1 directives, they would be added to his daily routine (id.).

With respect to the student's speech-language therapy, the director indicated that, during the student's individual sessions, which focused on addressing his expressive, receptive, and pragmatic skills, the speech-language pathologist employed methodologies such as direct instruction, visual supports, and natural language acquisition strategies (Parent Ex. PP ¶¶ 56, 57, 59, 61). According to the director, the student was working on goals designed to improve his conversation turn-taking skills, responses to open-ended questions, and ability to ask for

clarification or additional information, use new vocabulary words, and follow two to three step directions (id. ¶ 58). The director testified that during the 2024-25 school year the student demonstrated "some improvement" in his ability to use new vocabulary and simple adjectives to describe objects independently, as well as follow directions in simulated daily activities, although more recently he had exhibited increased distractibility and difficulty with multi-step directives, and the parent was in the process of consulting the student's doctor regarding possible medication adjustments due to these challenges (id. ¶ 61).

In the area of OT, to address the student's delayed fine motor and handwriting skills, difficulty with sensory regulation, following directions, ability to remain on task, and with activities of daily living, the occupational therapist developed goals to improve the student's handwriting legibility, ability to complete two step directions, transition from preferred to nonpreferred activities, and complete various activities of daily living (ADL) activities (Parent Ex. PP ¶¶ 62-64). According to the director, visual and sensory cues, multisensory and behavioral support, verbal redirection, activity analysis, sensory breaks and sensory regulatory programs, "typing without tears," use of a sensory gym, assistive technology, and hands-on activities focused on functional and vocational skills in sessions (Parent Ex. PP ¶¶ 63, 65-66). The director reported that the student's progress in OT was "slow yet steady" and punctuated by "some regressions" noted "across his academic areas" requiring "more behavioral support, maximum verbal and physical cues, and repetition/modeling of activities" (id. ¶ 67).

The evidence in the hearing record shows that, when the student's behaviors began increasing at the beginning of the 2024-25 school year, IDEA Associates developed an updated BIP to address the student's needs at that time (Parent Ex. BB; see Parent Ex. QQ ¶ 18). The student's updated BIP dated July 30, 2024 reflected definitions of the student's target behaviors; his strengths and academic challenges; potential rewards, motivators, and consequences; results from direct observation; replacement behaviors; and a reward system (Parent Ex. BB). Target behaviors identified on the student's BIP included intentional refusal to follow directions, negative attention seeking behavior, and impulsive behaviors (id. at p. 1). The BIP described in detail each of the student's target behaviors and noted potential rewards and motivators for the student, along with potential consequences of the student's behaviors (see id. at pp. 1-3).

As part of her affidavit testimony, the parent indicated that she received two hours per week of parent training, and the student received 10 hours per week of home and community-based ABA services, together with two hours per week of ABA supervision (Parent Ex. QQ ¶ 50).[6] Regarding the student's services, the director testified that the student participated in a home-based ABA program five days per week for two hours per session, which focused on extending behavioral, ADL, and academic skills from school into the home and community environments (see Parent Ex. PP ¶¶ 69-71). According to the director, during home-based sessions, staff use ABA instruction to work on homework completion, ADL skills, and to "decrease behaviors and work on his academic regression," with goals that the student was "behaviorally under control, following directions, listening to [his] mother/therapist, [and] answering questions" (id. ¶¶ 71-73). The

[6] The parent testified that the student also received one 60-minute session per week of OT; two 60-minute sessions per week of PT, one 30-minute session per week of counseling, one 60-minute session per week of group counseling, and social skills programming through a different agency outside of school (see Parent Ex. QQ ¶ 50).

director testified that "anecdotal notes" were taken after each session, which were "incorporated with [the student's] school data, and discussed with his entire team (id. ¶¶ 74, 76).

The director testified that the student's home-based program was structured to maintain the student's behaviors so he could be a part of the family unit, demonstrate appropriate behavior in the community, increase independence, and continue to benefit from his school program (Parent Ex. PP ¶ 69). Additionally, the director testified that the student required a home-based program to maintain consistency throughout the day, as the "skills worked on in the home [were] important to maintain what he ha[d] gained in school in order to function" in various environments and prevent regression (id. ¶ 70). The director indicated the student's home program was especially crucial during the 2024-25 school year given his behavioral and academic regression, and that he "need[ed] significant intervention" to decrease behaviors, work on academic regression, and increase his independence (id. ¶ 71). Further, the director testified that the student made "slow and steady progress" with his home-based services during the 2024-25 school year and that with this support, he was "able to function more at school and within his family unit" (id. ¶ 75).

Next, the parent testified that she received "approximately two hours" per week of parent training from IDEA Associates (Parent Ex. QQ ¶ 50). The director reported that during parent training, the ABA providers worked with the student and parent on daily living skills as well as how to approach "any and all behaviors" that arose with the student (Parent Ex. PP ¶ 77). Specifically, the director testified that the home-based ABA providers "worked through behaviors together" to provide consistency between how they were addressed at home and school (see id.). The director indicated that if issues arose when the home-based providers were not there, the parent had access to "phone and face-time calls" (id.).

In its cross-appeal, the district asserts that the IHO erred in finding the student's IDEA Associates programming was appropriate given the "uncontroverted testimony" that during the 2024-25 school year the student "was regressing despite the intensive program" (Answer & Cr.-App. ¶ 18). While a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]), it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Here, as discussed above, in comparison to the student's performance at IDEA Associates during the 2023-24 school year, due to changes at home and the student "fall[ing] into a depressive state and shut[ting] down," the student exhibited some academic and significant behavioral regression, and, in response, IDEA Associates developed a new BIP, reverted to lower grade level academic material, and provided increased verbal support, redirection, reminders, directions repeated, visual cues, and physical assistance to maintain focus and complete tasks (Parent Ex. PP

¶¶ 28, 29, 34, 42, 45, 47, 50). According to the director, frequent meetings occurred with the student's family to address the student's psychological/emotional needs and discuss his medication needs (id. ¶ 45). The director opined that without consistent, high-level academic and behavioral support, the student was unable to access or retain presented material, and his overall learning remained fragile and dependent on daily repetition and 1:1 intervention (id. ¶ 34). It is apparent from the evidence that the student's needs changed during the 2024-25 school year and that IDEA Associates recognized the student's increasing difficulties and attempted to adapt the student's programming to meet those needs (see id. ¶¶ 28, 29, 34, 42, 45, 47, 50). Accordingly, the evidence in the hearing record does not reflect that the student's struggles during the 2024-25 school year undermined a finding that the program was appropriate when taking into account the totality of the evidence.

Based on the foregoing, the evidence supports the IHO's conclusion that IDEA Associates identified both the student's academic and behavior needs, established goals to address those needs, and that the program offered to the student was specially designed to allow the student to make progress towards his goals, and that the parent had met her burden with respect to the school-based program offered to the student by IDEA Associates (IHO Decision at p. 6). Having determined the student's school-based program and services at IDEA Associates for the 2024-25 school year were appropriate, I will now turn to the inquiry regarding the student's need for home-based ABA services and briefly discuss whether the student required this to make progress at IDEA Associates, analyzing the entirety of the student's unilateral program.

C. Equitable Considerations

Having determined that the home-based ABA services were required for the student to make progress in his school-based ABA program at IDEA Associates, the next inquiry is whether equitable considerations weigh in favor of the parent's requested relief.

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

1. Excessive Services

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"]).

As the IHO noted, 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 (IHO Decision at p. 8; 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]).

However, the evidence discussed above, while reflecting that the home-based services assisted the student in extending skills into home and community environments (see Parent Ex. PP ¶¶ 69-71), also described that the services helped prevent regression and maintain skills so that the student could continue to benefit from the school-based program (id. ¶¶ 69-73). Moreover, the parent training from IDEA Associates allowed consistency in how the student's behaviors were addressed (id. ¶ 77). Based on the director's knowledge of the student, he testified that if the student did not receive "1:1 instruction using ABA and ABA therapy at home" during the 2024-25 school year "he would not have made meaningful progress, and it [wa]s quite likely that he

would have regressed" (id. ¶ 88). The director also opined that the school and home-based programming delivered by IDEA Associates was not only "an appropriate level of intervention for [the student], but he needed this level of instruction in order to make progress that was meaningful" (id. ¶ 83). The district did not present any evidence to rebut the director's testimony in this regard.

For that matter, where the hearing record does not include an IEP for the student for the 2023-24 or 2024-25 school years and the district does not cross-appeal from the IHO's determination that the student was denied a FAPE for the 2024-25 school year, the district has essentially declined to present its view of what would have constituted a FAPE for the student. It becomes less clear in such an instance at what point a unilateral placement exceeds that baseline of a FAPE. Under these circumstances, as the parent presented evidence to show the appropriateness of the entirety of the unilateral placement including the home-based services, and the district has not presented sufficient evidence, or argument, to show that the home-based services were in excess of a FAPE, equitable considerations weigh in favor of granting the requested relief in its entirety.

2. Financial Obligation

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under the IDEA (20 U.S.C. § 1412[a][10][iii]). The statute "textually presupposes that the parents had incurred those costs" (Moonsammy v. Banks, 2024 WL 4277521, at *7 [S.D.N.Y. Sept. 23, 2024]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "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]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985][noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, proof of an actual financial risk being

taken by parents tends to support a view that the costs of the contracted for program are reasonable, at least absent contrary evidence in the hearing record.

Regarding proof of financial risk, parents must come forward with evidence of their financial obligation and may not seek funding based on "nothing more than their say-so" (Moonsammy v. Banks [Moonsammy II], 2025 WL 733254, at *8 [S.D.N.Y. Mar. 7, 2025]). The Second Circuit has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]). In New York, a party may agree to be bound to a contract even where a material term is left open but "there must be sufficient evidence that both parties intended that arrangement" and an objective means for supplying the missing terms (Express Indus. & Terminal Corp. v. N.Y. State Dep't of Transp., 93 N.Y.2d 584, 590 [1999]; 166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp., 78 N.Y.2d 88, 91 [1991]).

Here, the parents were not necessarily required to show a financial obligation for the period of time when the district was required to fund the services pursuant to pendency (see Application of a Student with a Disability, Appeal No. 22-164; Application of a Student with a Disability, Appeal No. 22-177; Application of a Student with a Disability, Appeal No. 21-245; Application of a Student with a Disability, Appeal No. 20-042). Further, the parent signed an IDEA Associates parent handbook for the 2024-25 school year, which stated: "if your child's case is under [the district] reimbursement please keep in mind that if [the district] does not reimburse for services, the parent and/or guardian will be solely responsible for paying any unpaid balance/invoices due to IDEA Associates" (Parent Ex. X at p. 3). The parent handbook acknowledgement that the parent signed on June 9, 2024 stated that the parent had "read and agreed to all terms outlined in the IDEA Associates [p]arent [h]andbook" (id. at p. 7). In her written testimony, the parent acknowledged her financial obligation to IDEA Associates, stating that, if the district stopped funding the student's placement under pendency, she "would be obligated to pay for the services that [the student] received" (Parent Ex. QQ ¶ 60). Thus, the hearing record sufficiently demonstrates the parent's responsibility to pay any unpaid balances due to IDEA Associates, and the IHO's finding that the parent failed to establish a financial obligation to IDEA Associates is reversed.

VII. Conclusion

The evidence in the hearing record supports the IHO's finding that the parent's claims for the 2023-24 school year were moot. For the 2024-25 school year, the parent met her burden to prove that the school and home-based programming delivered to the student by IDEA Associates was appropriate for the 2024-25 school year. Further, equitable considerations weigh in favor of the parent's requested relief.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED

THE CROSS-APPEAL IS DISMISSED

IT IS ORDERED THAT the IHO decision dated December 31, 2024, is modified by reversing the portion which found that equitable considerations did not support the parent's

requested relief and which denied the parent's request for district funding of the student's unilateral placement at IDEA Associates for the 2024-25 school year; and

IT IS FURTHER ORDERED THAT the district shall directly fund and/or reimburse the parent for the student's tuition at IDEA associates for the 2024-25 school year including the home-based services the student received.

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

SARAH L. HARRINGTON
STATE REVIEW OFFICER