The University of the State of New York

The State Education Department
State Review Officer
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No. 25-147

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:
Law Offices of Lloyd Donders, attorneys for petitioner, by Lloyd Donders, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 that respondent (the district) fund the costs of her son's private educational and related services provided by Together They Grow, Inc. (Together They Grow) for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which found that unilaterally-obtained services provided by Together They Grow were appropriate. The appeal must be dismissed. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student has a history of autism and intellectual disability (Dist. Ex. 3 at p. 1). He initially received special education services through the Early Intervention Program (EIP) and the Committee on Preschool Special Education (CPSE) and, upon entering kindergarten, enrolled in a private school for children on the autism spectrum (id. at p. 2). The student attended district specialized schools from second through fifth grade, however, in sixth grade was "pulled" from school due to behavioral challenges (id.). He subsequently transitioned to a different district specialized school and, following remote learning due to school closures related to the COVID-19 pandemic, did not return to school (id. at pp. 2-3). Since 2019, the student has received educational instruction and related services at home (Dist. Ex. 1 at p. 1). At the time of the impartial hearing, the student had most recently received diagnoses of autism spectrum disorder level 3 with language and intellectual impairment requiring very substantial support, unspecified anxiety disorder, and developmental coordination disorder (Dist. Exs. 1 at p. 7; 3 at p. 13).

According to the hearing record, several independent evaluations of the student took place during the 2022-23 school year (see Parent Ex. C; District Exs. 3-6). An independent functional behavior assessment (FBA) was completed in October 2022 (Parent Ex. C). On November 20, 2022, Together They Grow conducted a speech and language evaluation and an augmentative and alternative communication (AAC) evaluation of the student (see Dist. Exs. 4; 6). On March 27, 2023, Together They Grow completed an occupational therapy (OT) evaluation (see Dist. Ex. 5). An independent neuropsychological evaluation of the student was completed on April 19, 2023 (see Dist. Ex. 3).

A CSE convened on July 17, 2023, found the student continued to be eligible for special education as a student with autism, and developed an IEP for the student for the 2023-24 school year with a projected implementation date of July 14, 2023 (Dist. Ex. 1 at pp. 1, 44). According to the IEP, at that time the student was "receiving instruction at home" consisting of three hours per day of applied behavior analysis (ABA) services, as well as speech-language therapy and OT (id.). The July 2023 CSE recommended that the student attend a 12-month program consisting of a 6:1+1 special class for all core subjects; five 30-minute sessions per week of individual OT; five 30-minute sessions per week of individual speech-language therapy; a daily individual behavior management/support plan for use during 80 percent of the day; a daily full-time individual paraprofessional for behavior support; and provision of an individual iPad Pro 10.2-inch ED-backlit multitouch display with IPS technology and a keyboard for use at home (id. at pp. 34-35).[1] The CSE also recommended that the parent be provided with four 60-minute sessions per year of parent counseling and training (id. at p. 35). According to the IEP, the CSE meeting took place as the result of an IHO decision which ordered the district to conduct certain evaluations of the student (id. at p. 7). The IEP reported that the parent intended to continue the student's program of services in the home and "ha[d] no intention of having [the student] return back to an in-person school setting at th[at] time" (id.). Through a prior written notice to the parent dated July 29, 2023, the district summarized the recommendations made by the July 2023 CSE and noted that the April 2023 neuropsychological evaluation was used by the CSE in creating the student's July 2023 IEP (Dist. Ex. 2 at p. 1-2).

According to the parent, there was a prior proceeding regarding the July 2023 IEP that resulted in an IHO decision dated January 9, 2024, which directed that the district fund providers of the parent's choosing to supply the student with: six hours per day of individual ABA services; three hours per week of oversight supervision by a Board Certified Behavior Analyst (BCBA); two hours per day of ABA services to address the student's activities of daily living (ADLs); one hour per week of BCBA oversight supervision for an afterschool program; one hour per week of parent counseling and training; two and a half hours per week of speech-language therapy; and two and a half hours per week of OT (Parent Ex. A at pp. 1-2, 4).[2] The parent indicated that the January 2024 IHO decision also awarded compensatory education and ordered the district to fund the parent's requested home program (id. at p. 4).

[1] Specifically, the July 2023 CSE recommended a 6:1+1 special class for five periods per week for math, 10 periods per week for English language arts (ELA), five periods per week for social studies, and five periods per week for sciences (Dist. Ex. 1 at pp. 34-35).

[2] The January 9, 2024 findings of fact and decision is referenced in the parent's due process complaint notice, but it was not entered into the hearing record (Parent Ex. A at pp. 1-2).

The hearing record does not include another IEP for the student for the 2024-25 school year.

By letter dated June 11, 2024, the parent advised the district that she disagreed with the student's most recent IEP as she did not believe it included the supports the student needed to make progress (Parent Ex. I at p. 1).[3] The parent further advised the district that she planned to create an educational program that could better address the student's needs and that she intended to seek reimbursement from the district for the costs of such program (id.).

A. Due Process Complaint Notice

In a due process complaint notice dated July 1, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (see Parent Ex. A). The parent argued that the district denied the student a FAPE by failing to: sufficiently evaluate the student; consider the independent evaluations of the student including an independent FBA; develop an IEP with sufficient present levels or performance, goals, related services, or appropriate assistive technology; and create an IEP that was reasonably calculated to enable the student to make meaningful progress (id. at pp. 4-5). The parent attached a pendency implementation form asserting that the basis for pendency was the unappealed IHO decision dated January 9, 2024 (id. at p. 7). The parent requested an order directing the district to continue to fund the student's home-based program (id. at p. 6).

The parent's pendency implementation form was signed by the district on August 26, 2024, with the following changes made by the district: Together They Grow's name and rates were crossed out; ABA services were reduced from 40 hours per week to 6 hours per day; and BCBA oversight supervision was reduced from 4 hours per week to 3 hours per week (see Aug. 26, 2024 Pendency Implementation Form).[4]

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on October 21, 2024 and concluded on October 28, 2024 (Tr. pp. 1-57). In a decision dated February 11, 2025, the IHO found: that the district failed to meet its burden of showing that it offered the student a FAPE for the 2024-25 school year; that the home-based services secured by the parent provided an appropriate educational program specially designed to meet the student's unique needs; but that equitable considerations did not support granting the parent's requested relief because there was no evidence in the hearing record that the parent was financially obligated to pay for the home-based services that Together They Grow provided to the student during the 2024-25 school year (IHO Decision at pp. 2, 6, 7).

[3] The exhibit containing the parent's June 2024 letter also included an email reflecting transmittal of a 10-day notice to the parent's attorney dated August 17, 2023 (Parent Ex. I at p. 2).

[4] Comparison of the program requested under pendency in the due process complaint notice with the pendency implementation form shows that the changes that the district made to the pendency implementation form modified the program to match the one described in the due process complaint notice (compare Parent Ex. A at pp. 1-2, with Aug. 26, 2024 Pendency Implementation Form).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in applying the Burlington/Carter standard to the parent's prospective funding request. The parent alleges that the IHO erred in denying her requested relief because there was no contract between the parent and Together They Grow and asserts that the reason why there was no contract was that Together They Grow was providing the student's services through pendency funded by the district.

In an answer with cross-appeal, the district argues that the parent's appeal should be dismissed for failure to comply with New York State practice regulations.[5] As for its cross-appeal, the district asserts that the IHO erred in finding that the parent established that services provided by Together They Grow were an appropriate unilateral placement for the student. The district alleges an additional equitable consideration that it argues should result in a denial of the parent's requested relief, namely that the parent's notice to the district of her intent to unilaterally obtain services was dated June 11, 2024, but was attached to an email dated August 17, 2023, almost a year prior to the purported date of the notice.

In an answer to the district's cross-appeal, the parent asserts that the district brought up the argument that the student did not make progress at home for the first time on appeal, and therefore the district's argument should be rejected. The parent argues that the IHO's determination that Together They Grow was an appropriate unilateral placement should be affirmed. The parent further submits that the equitable considerations favor awarding the parent her requested relief.

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]).

[5] The district argues that the parent's request for review should be rejected because "the verification submitted by [parent] appears to have been improperly signed and notarized one full week before the date on the [p]urported [request for review]" (Answer & Cr.-App. ¶ 11; see 8 NYCRR 279.7[b]). The parent filed with the Office of State Review an affidavit of verification signed by the parent, which was notarized March 3, 2025, whereas the request for review filed with the Office of State Review was dated March 10, 2025 (see Req. for Rev. at pp. 6-7; Parent Aff. of Verif.). This discrepancy calls into question what the parent verified, whether there was an earlier version of the request for review that the parent did properly verify, and whether that version was the same as what was ultimately filed in this matter. Given that the undersigned is dismissing the parent's appeal, it is not necessary to address this issue further. However, moving forward, counsel for the parent should ensure that he reviews Part 279 and conforms his practice accordingly, for while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after repeated failures to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 24-313; see also Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040).

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]).[6]

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

Here, the parties have not appealed from that portion of the IHO's decision that determined the district failed to provide the student with a FAPE for the 2024-25 school year (IHO Decision at pp. 2, 4). Accordingly, that finding has 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]). The issues remaining relate to the legal standard to apply to examine the relief sought and, if necessary, the appropriateness of the services provided to the student by Together They Grow and equitable considerations.

[6] 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).

A. Legal Standard

The parent contends that she is not required to demonstrate the appropriateness of the services provided to the student by Together They Grow under the Burlington/Carter framework because she was "requesting prospective funding rather than reimbursement" (Req. for Rev. ¶ 20).

In the parent's closing brief to the IHO, her attorney argued that the "IDEA has always specifically allowed prospective injunctive relief (in other words, relief that requires the school district to act in a certain way)" (IHO E. I at p. 4). However, the parent did not wait for an order for the district to act in a certain way and, instead, engaged in self-help by unilaterally arranging for Together They Grow to provide the student with special education services without the consent of the school district officials and then commenced due process to obtain renumeration thereof. Generally, districts that fail to comply with their statutory mandates to offer and provide special education can be made to pay for special education services privately obtained. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]).

To the extent the parent argues that, because no payments had been made by the parent, the relief was "prospective," a request for direct funding from the district to the provider would not alter the application of the Burlington/Carter standard.[7] Nor would the application of the stay put provision change the parent's burden of proof at the impartial hearing as a claim for public funding of a student's tuition pursuant to pendency must be evaluated separately from a claim for tuition funding on the basis that the district failed to offer the student an appropriate IEP (see Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 162 [2d Cir. 2004] [noting that "[a] claim for tuition reimbursement pursuant to the stay-put provision is evaluated independently from the evaluation of a claim for tuition reimbursement pursuant to the inadequacy of an IEP"]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459

[7] Rather, with regard to fashioning equitable relief under the IDEA for private school tuition, courts have determined that it may be appropriate to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

[S.D.N.Y. 2005] [finding that "pendency placement and appropriate placement are separate and distinct concepts"]).[8]

Thus, in light of the above, I find that the IHO correctly applied the Burlington/Carter legal standard in assessing whether the parent was entitled to the relief sought.

B. Unilaterally Obtained Services

Turning to a review of the appropriateness of the unilaterally-obtained services, 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

[8] The issue of whether or not the district's obligation to fund the student's services pursuant to pendency would relieve the parent of the obligation to prove that she incurred a financial obligation for the services need not be addressed in light of my determination that the parent did not meet her burden to prove the appropriateness of the services delivered to the student by Together They Grow for the 2024-25 school year.

> receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Prior to addressing the adequacy of the unilaterally-obtained services, a brief discussion of the evidence related to the student's needs leading up to the 2024-25 school year is necessary. As the hearing record does not include an IEP for the student for the 2024-25 school year, the most recent description of the student's needs at the time of the impartial hearing was found in the July 2023 IEP.

The July 2023 IEP incorporated findings from the April 2023 neuropsychological evaluation as well as the November 2022 speech and language evaluation, the November 2022 AAC evaluation and the January 2023 OT evaluation (see Dist. Ex. 1 at pp. 1-10).[9] The hearing record indicates that the student's cognitive functioning was in the impaired range and he presented with verbal and nonverbal processing deficits that limited his ability to understand and comprehend many ideas and concepts (Parent Ex. J ¶ 12; Dist. Ex. 1 at p. 2). Additionally, the student demonstrated borderline impaired verbal and language functioning (Dist. Ex. 1 at p. 2).

Academically, the student demonstrated challenges in reading, mathematics, and writing (Dist. Ex. 1 at pp. 4-5). The IEP noted that, in reading, the student could correctly decode both capital and lowercase letters and some sight words (id. at p. 5). However, he performed in the impaired range on a task that required him to read and identify isolated words (id. at p. 4). In mathematics, the IEP indicated the student could count items pictured on a page, identify shapes and colors and compare single digit integers to determine more or less; however, he had difficulty completing problems that required comprehension of language such as word problems (id.). Finally, the IEP indicated that writing was an area of "significant relative deficit," in that the student was resistant to writing or drawing tasks and demonstrated an immature pencil grip (id.).

The July 2023 IEP reported that administration of the Vineland Adaptive Behavior Scale, Third Edition, Parent/Caregiver Form, yielded an adaptive behavior composite score in the low range (Dist. Ex. 1 at p. 3). According to the IEP, the student demonstrated significantly underdeveloped receptive, expressive and communication skills; daily living skills; and socialization skills as compared to his age group in the normative sample (id. at pp. 5-6).

[9] Portions of the April 2023 neuropsychological evaluation appear verbatim in the present levels of performance of the July 2023 IEP (compare Dist. Ex. 1 at pp. 1-10, with Dist. Ex. 3 at pp. 1-12).

Socially, the July 2023 IEP reported that the student was friendly, but generally avoided interacting with others, specifically noting that he socialized with family and formed relationships with various providers, but he did not have any friends (Dist. Ex. 1 at p. 7). The student was verbal but limited in his ability to engage in pragmatic conversation (id. at p. 4). Additionally, it was reported that the student communicated primarily using one-to-two-word phrases, body language, and gestures (id.). The IEP further reported that the student could react strongly to a task he was uninterested in, had difficulty in new situations or when learning a new skill or task, and noted that when stressed he would project his voice loudly and engage in repetitive behaviors like stimming and echolalia (id. at pp. 4, 8). The July 2023 IEP reported that the student engaged in repetitive behaviors including stimming (e.g. finger movements or dance moves) and hand flapping, rubbed his eyes compulsively, occasionally hit himself on the side of his head when frustrated, and engaged in echolalia, scripting and repeating lines from videos (id.). Finally, the student exhibited significant levels of anxiety which contributed to the avoidance of activities and situations (id.).

The July 2023 IEP included a summary of a November 2022 speech and language evaluation which recommended a treatment plan that incorporated a behavioral reinforcement system to facilitate learning (Dist. Ex. 1 at p. 3). Additionally, due to substantial delays in the student's receptive, expressive, and pragmatic language, a revised speech mandate of five individual sessions per week was recommended, along with a proposed bank of compensatory hours for the years he did not receive services (id.).

The July 2023 IEP also included a summary of the November 2022 AAC evaluation that indicated the speech generating devices that were considered prior to the assessment included the use of actual photos as icons and text (Dist. Ex. 1 at p. 3). The evaluator opined that the use of text was not appropriate due to the severity of the deficit in the student's literacy skills (id. at pp. 3-4). The evaluator opined that an effective speech generation device would contain the following features: voice output, direct selection, photographs to be used initially, picture symbols and printed text, a horizontal QWERTY keyboard, text to speech functioning, numerous page sets/users or vocabulary files as a platform for communication development, independent navigation between page sets, messages to be stored for reuse at a later time, multiple symbol combinations to allow for sentence construction, sentence construction via message bar, language and vocabulary growth, communication across language environments and that it be durable, portable and lightweight (id. at p. 4).

The July 2023 IEP incorporated the results of a March 2023 OT evaluation that indicated the student's scores on measures of motor development and sensory regulation reflected significant delays in these areas and supported a recommendation of individualized OT five times per week to remediate delays and increase acquisition and generalization of functional skills (Dist. Ex. 1 at p. 3). The IEP also reported that the student required additional processing time and repeated exposure to instruction within the classroom setting, and that he would benefit from breaks between tasks; a quiet environment for optimal learning, comprehension, and attention; and multisensory instruction (both visual and verbal) (id.).

With regard to the student's physical development, the July 2023 IEP stated that the student presented with significant deficits in his fine motor functioning and noted that he was generally resistant to fine motor tasks (Dist. Ex. 1 at p. 9). Additionally, the student had a history of deficits with sequencing, and tasks that require motor planning, and noted that he was sensitive to loud noises (id.). The IEP indicated that the student ambulated independently (id. at p. 8).

The July 2023 IEP reflected that the student had received the diagnoses of autism spectrum disorder level 3 with language and intellectual impairment requiring very substantial support, unspecified anxiety disorder and developmental coordination disorder (Dist. Ex. 1 at p. 7).

2. Services from Together They Grow

The hearing record supports the district's argument that the parent did not meet her burden to prove that the unilaterally-obtained program was specially designed to meet the student's unique needs, and more specifically that the hearing record was devoid of documentary or testimonial evidence regarding the specific strategies and techniques used to address the student's needs.

It appears the IHO relied on the evaluations in the hearing record, as well as the testimony of the neuropsychologist, speech-language pathologist, and BCBA who evaluated the student, to reach her determination that the parent's home-based program was appropriate; however, her analysis was minimal (IHO Decision at pp. 5-6).

Review of the hearing record reveals scant evidence regarding the student's actual home-based program. Details about the program being provided to the student do not appear in the hearing record, rather pieces of the program are alluded to without explicitly stating the entirety of the program. In the parent's due process complaint notice, she requested pendency services consisting of six hours per day of ABA therapy; three hours per week of BCBA oversight supervision; two hours per day of ABA therapy in skill deficits in daily living; one hour per week of BCBA oversight supervision for an afterschool program; parent counseling and training for one hour per week; two and a half hours of speech-language therapy per week; two and a half hours of OT per week and a similar program can be found on the district's pendency implementation form (Parent Ex. A at pp. 1-2; see Aug. 26, 2024 Pendency Implementation Form).

In his written testimony, the neuropsychologist who completed the April 2023 neuropsychological evaluation reported that the student received six hours of ABA therapy daily (Parent Ex. J ¶¶ 7, 15; see Dist. Ex. 3).[10] Although the neuropsychologist made numerous recommendations regarding the services needed to address the student's needs, he did not provide any information regarding the actual program being provided to the student (see Tr. pp. 43-48; Parent Ex. J).

A licensed behavior analyst (behavior analyst), who conducted the October 2022 FBA of the student and "consult[ed] on the [student's] case," which entailed meeting with the student and providing behavioral services two to three hours per week, testified at the impartial hearing (Tr. pp. 10-11; see Parent Exs. C; K).[11] When asked how many hours of ABA therapy the student was

[10] The neuropsychologist testified that he had not had contact with the student since he evaluated him in April 2023 (Tr. p. 42).

[11] The behavior analyst reported that he observed the student in his home in September 2022 and collected behavioral data from the parent and the student's home instructor (Parent Ex. K at p. 2). He explained how he identified the student's target behaviors and developed a hypothesis regarding the primary functions of the target behaviors, and he opined that the student needed a formal BIP that included skills building and reactive strategies (Tr. p. 12; Parent Ex. K at pp. 2-4). In addition, the behavior analyst made recommendations for school- and home-based programs for the student (Parent Ex. K at pp. 4-5). The behavior analyst opined that the student required ongoing behavioral assessment, data collection, observation, and treatment across environments by a

receiving, the behavior analyst replied, "I believe the provider is there between six and eight hours a day" (Tr. p. 15). The behavior analyst reported that he met with the student regularly and updated his "behavior plan" as needed (Tr. pp. 10, 12-13). He indicated that he liked to see the student at variable times because sometimes a student's behavior could change based on the time of day (Tr. p. 11). He noted that he had gone out into the community with the student (id.). The behavior analyst reported that he was working on the skills outlined in the student's behavior plan including aggression, self-injury, tantrums, and task avoidance (id.). The behavior analyst testified that he was in the process of modifying the student's behavior plan with regard to the protocol for requesting a break and also with regard to a particular coping strategy (Tr. p. 13). In terms of the break protocol, the behavior analyst reported the student initially requested a break using a visual card but was now able to make the request verbally (id.). In addition, the behavior analyst explained that a coping strategy that involved counting was not working well with the student and the student did better with a fidget toy when he was frustrated (id.). The behavior analyst testified that as a result, staff was going to focus more on using the fidget toy because it was more successful (id.). Despite the behavior analyst's testimony that the student's behavior plan was updated regularly, the hearing does not include a copy of a behavior plan for the student. In addition, there is no evidence of the ongoing behavioral assessment or data collection the behavior analyst deemed necessary.

The parent also offered the testimony of the speech-language pathologist from Together They Grow who administered the November 2022 AAC and speech and language evaluations but did not provide services to the student during the 2024-25 school year (see Parent Tr. pp. 18-19; Ex. M ¶¶ 9, 21; Dist. Exs. 4, 6).[12]

In her June 2024 letter to the district, the parent indicated that she was going to "create an educational program which c[ould] better meet [the student's] needs" (Parent Ex. I at p. 1). In her written testimony, the parent discussed the progress the student had made in the home program including how ABA had helped to decrease the student's aggression and improve his academics; however, she discussed few details or elements of the home-based program (Parent Ex. L at ¶ 8). When asked what services the student was receiving, the parent responded, "he has gotten speech, he has ABA, and he had home instruction" (Tr. p. 50). The parent indicated that, since July 2024, ABA had focused on "everything" including ADLs, academics, and transitioning (Tr. p. 52). She further indicated that the student's "ABA" tried to get him into the community every day for an hour or two "for instance, going to the supermarket, learning to shop, getting his own things, [and] paying for his own things," which involved working math (Tr. p. 53). The parent reported that the community outings improved the student's tolerance for being around other people (Tr. p. 53).

While parents are not required to show that a unilateral placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65), the program as a whole must still be "reasonably calculated to enable the child to receive educational benefits" (Carter, 510 U.S. at 11, 13-14, quoting Rowley, 458 U.S. at 203-04) when considered under the

licensed professional (id. at p. 5).

[12] The speech-language pathologist who conducted the November 2022 speech-language evaluation and AAC evaluation testified that she had not seen the student or provided any services to him since that time (Tr. pp. 18-19).

totality of the circumstances. Here the record lacks specific information regarding the instructional content of the student's unilateral program and the provision of specially designed instruction to the student for the 2024-25 school year. The lack of attendance records, session notes, and progress reports, coupled with cursory witness testimony, supports the district's assertion that the parent failed to meet her burden of showing the services provided by Together They Grow were appropriate to meet the student's needs. Consequently, the IHO's determination that the parent met her burden to prove the appropriateness of the unilateral placement must be overturned.

VII. Conclusion

Having found that the parent failed to sustain her burden of establishing the appropriateness of the unilaterally-obtained services for the 2024-25 school year under the Burlington-Carter standard, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated February 11, 2025, is modified by reversing that portion which held that the parent met her burden of proving that the unliterally-obtained services provided to the student by Together They Grow for the 2024-25 school year program were appropriate to meet the student's unique needs under the Burlington-Carter standard.

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

CAROL H. HAUGE
STATE REVIEW OFFICER