The University of the State of New York

The State Education Department
State Review Officer
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No. 23-130

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 Adam Dayan, PLLC, attorneys for petitioner, by Kelly Bronner, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied on equitable grounds tuition reimbursement or direct funding for costs of her son's private services at Reach for the Stars Learning Center (RFTS-LC) for the 2022-23 school year. Respondent (the district) cross-appeals from those portions of the IHO's decision which found that RFTS-LC was an appropriate unilateral placement for the student and awarded direct funding of the costs of roundtrip transportation for the student's attendance at RFTS-LC. The appeal must be sustained in part. The cross-appeal must be sustained in part.

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 received special instruction services, occupational therapy (OT), physical therapy (PT), and speech-language therapy through the Early Intervention Program (EIP) as a young child (Parent Exs. G at p. 1; H at p. 1; I at p. 1; J at p. 1). On August 16, 2022, the Committee on Preschool Special Education (CPSE) convened for an initial CPSE meeting to determine the student's eligibility for special education services (Parent Ex. D). Finding the student eligible for special education programming as a preschool student with a disability, the CPSE developed an

IEP with a projected implementation date of January 2, 2023, which recommended a 12-month 8:1+2 special class placement together with individual speech-language therapy, OT, and PT to be provided at an early childhood program (id. at pp. 1, 15, 16).[1] In a letter dated September 2, 2022, the parent notified the district of her disagreement with the August 2022 IEP as well as with the particular preschool location at which the IEP would be implemented and stated her intent to enroll the student at RFTS-LC for the 2022-23 school year and seek district funding for the cost of that placement (Parent Ex. B). On September 10, 2022, the parent signed an enrollment agreement with Reach for the Stars Learning and Developing, LLC (RFTS-LD) for the provision of services to the student for the 2022-23 school year (Parent Ex. K).[2] The student received special instruction using applied behavior analysis (ABA), as well as related services including OT and speech-language therapy, at RFTS-LC during fall 2022 (see Parent Exs. L at pp. 1-3; O; Z ¶ 10).

On November 30, 2022, the CPSE reconvened and recommended a 6:1+2 special class placement in an early childhood program and added one session per week of individual speech-language therapy to the student's IEP (compare Parent Ex. D at p. 15, with Parent Ex. E at p. 13).[3] The student continued to receive special instruction and related services at RFTS-LC during the 2022-23 school year (see Parent Exs. L at pp. 4-6; O; Z ¶ 10).

The parent filed an amended due process complaint notice dated January 20, 2023, alleging that the district failed to offer the student a FAPE for the 2022-23 school year (Parent Ex. A).[4] As relief, the parent sought an order directing the district to reimburse the parent for or provide direct funding of the costs of the student's attendance at RFTS-LC, including the costs of all special education services the student received at RFTS-LC and the costs of roundtrip transportation (id. at pp. 7-8). The parent also sought an order directing the district to fund an independent, comprehensive neuropsychological evaluation of the student or reimburse the parent for the costs of obtaining a neuropsychological evaluation privately (id. at p. 8).

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[1] According to the IEP, the parent elected for the student to continue receiving services through the EIP until an appropriate preschool location could be secured (Parent Ex. D at p. 1). Generally, a student's eligibility for early intervention services ends as of his or her third birthday (see 20 U.S.C. § 1432[5][A]; 34 CFR 303.211[a]); however, State law provides that children in EIPs who are evaluated by the district's CPSE before their third birthday and found to be eligible for preschool educational services under the IDEA, and turn three years of age on or after the first day of September, are eligible to continue receiving early intervention services until the second day of January of the following calendar year if their parents so elect (see Pub. Health Law § 2541[8][a][ii]).

[2] According to the hearing record, RFTS-LD worked in conjunction with RFTS-LC to provide services to students (see Parent Ex. K). For purposes of this decision, when described collectively or when not specified which entity was referenced, RFTS-LD and/or RFTS-LC will be referred to simply as RFTS. Neither RFTS-LD nor RFTS-LC has 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).

[3] As with the August 2022 IEP, the November 2022 IEP had a projected implementation date of January 2023 (compare Parent Ex. D at pp. 1, 15, with Parent Ex. E at p. 3, 13). A prior written notice issued December 7, 2022, indicated that the student had continued to receive early intervention services and that CPSE services were expected to being as of January 3, 2023 (Parent Ex. F). However, other evidence in the hearing record indicates that the student stopped received early intervention services on or around September 19, 2022 (Parent Ex. C).

[4] The original due process complaint notice was dated October 5, 2022 (Oct. 5, 2022 Due Process Compl. Not.).

Thereafter the parties appeared at two pre-hearing conferences held on January 19, 2023, and February 28, 2023, respectively (Jan. 19, 2023 Tr. pp. 1-8; Feb. 28, 2023 Tr. pp. 1-10), and also appeared at a status conference held on April 3, 2023.[5] The matter proceeded to an impartial hearing on April 19, 2023 (Apr. 19, 2023 Tr. pp. 1-106). In a decision dated May 25, 2023, the IHO found that the district failed to meet its burden to show that it offered the student a FAPE for the 2022-23 school year (IHO Decision at pp. 3, 26). The IHO further found that, although the parent had met her burden to demonstrate that RFTS-LC provided the student with specially designed instruction sufficient to meet his needs, "the equities d[id] not support all of [p]arent's requested relief" (id. at p. 3). As a result, the IHO denied the parent's request for direct funding for the costs of student's attendance at RFTS-LC, with the exception of roundtrip transportation costs for which the IHO ordered the district to provide direct funding in an amount not to exceed $500.00 per month (id. at p. 26).

IV. Appeal for State-Level Review

The following issues presented on appeal must be resolved in order to render a decision in this case:

1. whether the IHO erred in determining that RFTS-LC was an appropriate unilateral placement that provided specialized instruction sufficient to address the student's needs;

2. whether the IHO erred in determining that equitable considerations did not favor the parent's claim for direct funding of the costs of the student's attendance at RFTS-LC;

3. whether the IHO erred in determining that the parent should be awarded direct funding for the student's roundtrip transportation costs to attend RFTS-LC for the 2022-23 school year

V. Applicable Standards

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

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,

[5] The transcripts from the impartial hearing in this matter were not consecutively paginated; for clarity, transcript citations in this decision will refer to the date of the proceeding and the page number, such as "Jan. 19, 2023 Tr. p. 1." Additionally, according to the IHO's written clarification of the hearing record, the April 3, 2023 "status conference was on the record but ministerial in nature and, therefore, not transcribed."

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

The IHO found that the district did not offer the student a FAPE for the 2022-23 school year and the district did not appeal this finding; as such, the IHO's determination is final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilateral Placement

In its cross-appeal, the district asserts that the IHO erred in finding that the parent sustained her burden with respect to the appropriateness of the student's program at RFTS-LC. Specifically, the district argues that the student exhibited significant fine motor, sensory regulation, language,

[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).

and gross motor needs, yet RFTS-LC did not provide sufficient OT and speech-language therapy and did not provide any PT services. Further, the district asserts that the parent failed to explain how the student's needs were addressed given that he did not receive "related services in the quantities recommended by RFTS[-LC]."[7] The district contends that the fluctuations in the provision of the student's related services reflected in the hearing record demonstrate that RFTS-LC did not provide specially designed instruction sufficient to meet the student's unique needs.

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). 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 (Carter, 510 U.S. 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. v. Bd. of Educ. of Hyde Park, 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). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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, 773 F.3d at 386; 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,

[7] The district does not make any allegations on appeal regarding the portion of the student's programming related to the ABA services he received.

> 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).

Although the student's needs are not in dispute, a discussion thereof provides context for the resolution of the issue on appeal regarding whether the related services provided by RFTS-LC met those needs.

The evidence in the hearing record reflects that at the start of the 2022-23 school year, the student presented with "significant fine motor and visual motor delays as well as sensory processing difficulties" (Parent Ex. H at pp. 1, 4). The student also exhibited significant difficulties in the areas of modulation and sensory integration (id. at p. 4). Additionally, the student was distractible, presented with a short attention span, appeared unfocused, and required constant prompts and cuing to focus (id.). Further, the student demonstrated disorganized upper extremity motor planning skills, poor grasping skills, low tone, overall weakness, poor bilateral coordination, and decreased upper body and core strength (id.). The student was not toilet trained, required assistance with dressing, and exhibited some spillage when drinking from a cup or feeding himself with a spoon (Parent Ex. D at p. 5).

Regarding gross motor skills, the student was ambulatory and able to navigate his environment independently, although he presented with "deficits in graded muscle strength, balance and coordination" (Parent Ex. D at p. 5). The student required adult supervision when negotiating stairs due to poor postural control, he was unable to jump, and exhibited limited ball skills (id.).

At the start of the 2022-23 school year the student exhibited "severely limited" receptive and expressive language skills (Parent Ex. I at pp. 1, 3). The student did not play functionally with objects other than stacking cups, follow directions other than a few simple commands, or demonstrate comprehension of "non-rote language" (id. at p. 3). The student pointed to pictures and labeled pictures with reinforcement and "babbled," but did not "use language on his own accord" or produce short phrases (id.). Additionally, the student's ability to generalize what he had learned was restricted (id.).

The educational director of RFTS-LC (director) testified that she was responsible for, among other things, overseeing new student initial assessments, classroom placements, and goal development; observing and working with students in the classroom, reviewing data and ensuring goals were being met and students were making progress; and overseeing progress reports and behavior plans (Apr. 19, 2023 Tr. pp. 63-66). The director also testified that she participated in "scheduling," which she described as "what it look[ed] like for the kids on a daily basis to make sure that . . . they [were] working with various providers throughout the school day" (Apr. 19, 2023 Tr. p. 66). According to the director, the student's classroom was composed of staff including an OT supervisor and a speech-language supervisor, and a speech-language pathologist was "part

of every classroom," together with an occupational therapist "who [was] responsible for . . . classroom interventions in each classroom as well" (Apr. 19, 2023 Tr. pp. 67-68).

Because RFTS-LC used "verbal behavior" ABA, the student's ABA programming was based on "looking at . . . language and communication throughout all the disciplines" (Apr. 19, 2023 Tr. p. 74). The student's 2022-23 educational curriculum plan provided an overview of the student's needs, description of "maladaptive behaviors that interfere[d] with his daily activity," and goals targeting receptive language, expressive language, imitation, visual performance, group, play, activities of daily living (ADL), community and safety, and behavior skills (Parent Ex. P). According to the director, at RFTS-LC the student worked on goals targeting "pre-requisites to language skills" such as understanding directions, matching, and vocabulary (Apr. 19, 2023 Tr. pp. 72-74). The student also worked on sitting at a table and focusing; imitating gross, fine, and "play" motor skills; ADL skills such as toileting; and reducing "problem behavior" (Apr. 19, 2023 Tr. pp. 72-74). Further, the student worked on visual performance skills such as block building and completing puzzles (Apr. 19, 2023 Tr. pp. 74-75). Review of the student's RFTS-LC speech and language treatment plan shows that it targeted skills similar to those related to language from the educational curriculum plan (compare Parent Ex. P at pp. 2-3, with Parent Ex. W). Additionally, review of the RFTS-LC OT IEP goals reflects that it targeted skills such as attending to a tabletop activity, imitating gross motor movements, completing puzzles, and putting on his shoes, skills similar to those in the student's educational curriculum plan (compare Parent Ex. P at pp. 4-6, with Parent Ex. X).

The student's RFTS-LC schedule reflects that OT and speech-language therapy were scheduled to occur on a daily basis, consistent with the director's testimony (Apr. 19, 2023 Tr. p. 82; Parent Ex. N). She further testified that daily services were appropriate due to the student's level of deficit, and "because of the repetition he require[d] in order to achieve goals" (Apr. 19, 2023 Tr. p. 82). According to the director, students have a "base schedule" with OT and speech-language therapy being a "constant" in that those related services are always provided once daily for 45 minutes (Apr. 19, 2023 Tr. pp. 83-84). However, as described above, the 45-minute related service sessions were not the only time during the school day where the student worked on OT and speech-language skills. The director testified that the student's classroom schedule "generally incorporate[d] all of the goals from [the student's IEP" within different ABA sessions during the day (Apr. 19, 2023 Tr. p. 85). For example, the director testified that the student received OT at home prior to the school day to work on dressing and hygiene, but that when he went to school, he still worked on taking off his jacket, hanging it in his cubby, using the bathroom, and washing his hands (Apr. 19, 2023 Tr. pp. 83, 85).

Related to the delivery of services during the 2022-23 school year, is the student's progress at the unilateral placement. 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). However, a finding of progress is, nevertheless, 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])

A review of the evidence in the hearing record shows that the student made progress at RFTS-LC during the 2022-23 school year. Specifically, the director testified that the student had reduced the behaviors that interfered with his learning; increased his understanding of directions, imitation skills, and expressive language, as well as his ability to tolerate being in a group (Apr. 19, 2023 Tr. pp. 85-88). Review of the student's educational curriculum report reflecting term one and two (out of three) shows that the student was making progress toward and had mastered some of the goals attempted (Parent Ex. P at pp. 2-6). The report also provided narrative mid-year progress notes reflecting that the student had made progress in receptive language skills, ability to make requests, complete puzzles, imitate gross motor movements, sit appropriately in a group, don and doff his shoes, and reduce tantrum behavior (id. at pp. 3, 5, 6, 7).

Therefore, while the district is correct that review of the evidence shows that the student may not have received all of the related services on a monthly basis as envisioned by the RFTS-LC schedule (compare Parent Ex. N, with Parent Ex. L), it also shows that the program addressed the student's needs typically addressed by related services through its ABA programming (compare Parent Ex. P, with Parent Ex. W, and Parent Ex. X), such that the reduction of related service sessions did not render the RFTS-LC program inappropriate. Rather, the evidence supports the IHO's finding that "the totality of the evidence, the weight of the evidence establishe[d] that [the student's] individual special education needs [were] addressed by [RFTS-LC] and that the instruction offered [was] 'reasonably calculated to enable the child to receive educational benefits'" (IHO Decision at p. 16).

In addition, as a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS-LC—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Carter, 510 U.S. at 13-14). Here, RFTS-LC developed a learning plan for the student as described in the testimony of the educational director, the student's schedule, the curriculum plans, and the demand fading protocol and toileting protocol, as well as in the services plan appended to the enrollment contract for the 2022-23 school year. Furthermore, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

Based on the above, while a private placement that provided related services which fluctuated dramatically or were altogether missing for prolonged periods of time without adequate explanation might contribute to a finding of inappropriateness, the hearing record in this case, provides detailed testimony from the educational director, and supporting documents, describing how the educational program offered by RFTS-LC operated on a day-to-day basis with respect to

providing the student with ABA instruction, related services and multiple levels of support from a variety of providers, including supervisory support utilized continually to assess the student's progress, current functioning and any needed adjustments to the student's program. Moreover, the student demonstrated progress while attending RFTS-LC. As a result, the hearing record supports the IHO's finding that the totality of the services the student received at RFTS-LC constituted specially designed instruction to address his special education needs.

Although the hearing record supports finding that the services that were delivered to the student were appropriate, given the structure of the unilateral placement, this evidence does not support a finding that the unilateral placement would have provided an appropriate educational program to the student for the entirety of the 2022-23 school year. The impartial hearing took place in the spring of the 2022-23 school year; therefore, affidavits of services delivered demonstrating the amounts of each service that the student received each month that were initially included in the hearing record covered the time period commencing when the student began attending RFTS-LC in September 2022 through February 2023 (Parent Ex. L). The affidavits for March and April 2023 became available during the impartial hearing and the IHO accepted them into evidence as an IHO exhibit (IHO Ex. II). However, because the IHO issued her decision on May 25, 2023, there is no evidence in the hearing record pertaining to any services provided to the student during May or June 2023, the final two months covered by the enrollment contract. Given the fluidity of the services delivered and relative unpredictability of service levels from month to month, it is not possible to find that services beyond these dates are appropriate. Unlike a contract for tuition that implies a minimum amount of educational programming for the entirety of a school year, the fee-for-service structure of RTFS-LC makes no such guarantee. While the services plan for the student appended to the enrollment contract for the 2022-23 school year sets forth maximum frequencies for each recommended service (Parent Ex. K at p. 6), there was no guaranteed minimum of services that the student would receive, and without affidavits of services provided for that time period there is no evidence of which services were provided in what amount or the fees charged for same. Thus, the parent has not met her burden to prove that services delivered to the student after April 2023 were sufficient to meet the student's special education needs and could therefore be deemed appropriate for purposes of direct funding by the district.

B. Equitable Considerations

The parent argues that the IHO erred by determining that an enforceable contract did not exist between the parent and RFTS-LD because the contract did not contain the total estimated costs of the student's educational program, the parent did not pay the enrollment deposit, and the potential costs of the student's educational services were so excessive that the parent could not have intended to obligate herself to be responsible for payment. The parent contends that the contract contained the "essential terms of the agreement including the educational services agreed to and the costs of those services." The parent asserts that the total costs of the educational services to be provided could not be contained in the contract because "RFTS only charges for services actually supplied to the student." The parent argues that, to the extent the IHO found that the hourly rates charged were excessive and the fee-for-services plan was unreasonable in light of the full-day school-based nature of the RFTS program, such findings were not supported by the hearing record and, even if they were, a reduction of the fee-for-services award would be warranted instead of the total denial of payment as found by the IHO. Finally, the parent also asserts that there is no basis in the record to support the IHO's finding that the contract between the parent and

RFTS reflected the possibility of collusion to charge excessive rates or her finding that the co-treating model used by RFTS was not beneficial to the student and resulted in excessive hourly costs.

The final criterion for a reimbursement award is that the parent's 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"]).

The IHO's finding that the contract was not enforceable and therefore did not financially obligate the parent to pay for the costs of her son's attendance at RFTS-LC is not supported by the hearing record. The enrollment agreement between the parents and RFTS-LD for the 2021-22 school year indicated that the parent would collaborate and coordinate with RFTS-LD in developing a services plan for the student and that services were billed on a fee-for-service basis (Parent Ex. K at pp. 1-2). While the contract is not specific with respect to the exact services the student would receive, there is insufficient basis to controvert the executed enrollment contract, which obligated the parent to pay RFTS-LD for the costs of services delivered to the student and identified essential terms of the agreement, such as the types of services that could be provided to the student (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]). The hearing record also includes service affidavits outlining what services were delivered to the student and the amount purportedly due for those services under the contract from September 2022 through April 2023, further demonstrating the parent's financial obligation (Parent Ex. L; IHO Ex. II). As for the parent's failure to pay a registration fee referenced in the contract with RFTS-LD for the 2022-23 school year, this nonpayment would not make the contract unenforceable or effect a finding that the parent did not have a financial obligation to RFTS-LD for the costs of the registration fee and for the services delivered pursuant to the contract. Accordingly, as to the enforceability of the contract, because its express terms create a financial obligation for the parent to pay the costs of the student's attendance and receipt of services at RFTS-LC, the evidence in the hearing record does not support the IHO's finding that the enrollment contract was not enforceable.

In finding the terms of the contract "outrageous"; however, the IHO clearly was not only concerned with the nature of the agreement between the parties but also with the actual costs of the services provided.

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]). The 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).

While the IHO may understandably have found the costs billed by RFTS-LD to be excessive on their face, particularly given the potential for a total maximum cost of over $500,000 for a year of preschool, she was nonetheless obligated to ground her finding in evidence contained in the hearing record. In support of her determination that the costs charged by RFTS- LD were excessive, the IHO stated "[t]hese rates seem to have no relation to actual market rates" in the district and, "[e]ven if they were comparable to hourly rates charged by other providers, it is not reasonable to base the cost of a full-time day program on comparable hourly rates. It is highly unusual for a full-time day program, such as this, to charge by the hour instead of just charging a flat tuition for the entire school year" (IHO Decision at p. 22). However, the district did not provide any evidence either of its own rates for such services or of market rates for the services provided to the student. Without such evidence, I find that the hearing record was insufficiently developed with regard to costs of comparable services available elsewhere to support the IHO's determination that the costs of services charged by RFTS-LD were excessive in comparison; accordingly, to the extent the IHO determined that equitable considerations weighed against the parent based on the comparison of the rate charged for the services provided by RFTS-LD, the hearing record is not sufficiently developed to sustain such a finding.

On the other hand, the IHO raised a question about whether the rates sheet was in fact incorporated into the contract when the parent signed the agreement. The IHO noted that the exhibit in evidence that contained the contract included a page which set forth rates but noted that the rate sheet was not labeled appendix B as referenced in the contract and the contract also did not include pages labeled appendix A (a service plan) or C (purportedly a payment schedule) despite references thereto in the contract (IHO Decision at p. 19). The hearing record supports the IHO's finding on this point. The contract without appendices is four pages long (Parent Ex. K at pp. 1-4). The copy of the contract in the hearing record is followed by the service plan for the student identifying maximum frequencies of weekly services (id. at p. 5). At the top of the contract and the service plan is a unique "DocuSign" number, which mirrors the number identified on documentation confirming the electronic signatures of the parties to the contract (id. at p. 7). The documentation of the parties' electronic signature specifies that the document consisted of five total pages (id.). The rate sheet, included in the hearing record with the contract does not have the "DocuSign" number at the top of the page, which indicates that it was not among the pages included with the contract when the parent signed (id. at p. 6). Moreover, to the extent the parent or her attorney attempted to include this page as part the exhibit with the intent of representing that it was part of the original agreement is problematic and does raise significant equitable concerns

about the veracity of the representations made by the parent, her attorney, and/or RTFS regarding the costs of services. Along these same lines, the IHO weighed the parent's testimony which demonstrated a lack of knowledge about the services the student would receive once enrolled at RTFS or the costs thereof (IHO Decision at pp. 19-20; see Apr. 19, 2023 Tr. pp. 54-55).

Under the circumstances, I find that the IHO correctly considered these equitable factors; however, I find that these factors warrant a reduction, but not a complete denial, of relief. Given the equitable concerns raised about the RFTS-LD services contract, I find that a twenty-five percent reduction in the costs of services is equitable and warranted.

In addition, there is another equitable basis for further reduction of the services costs based on the excessiveness of the services. 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"]).

The fee-for-service model leaves itself particularly vulnerable to the argument that segregable services exceed the level that the student required to receive a FAPE (see L.K., 2016 WL 899321, at *7). Here, the IHO raised the issue of the co-treatment model utilized by RFTS-LC and found that this model of service delivery could also potentially result in excessive per-hour costs (IHO Decision at p. 23). The RTFS educational director and behavioral supervisor testified about the "cotreat" model utilized at RFTS wherein the behavior supervisor and the lead teacher or other "behavioral therapists" would both be scheduled to work with the student and the supervisor would observe and give "direct feedback" about the student's plan (April 19, 2023 Tr. pp. 20, 79-81). Thus, there is some testimony to explain why there was billing for two providers contemporaneously when one of the providers was a supervisor (see generally Parent Ex. L at pp. 7-19). However, there is no similar explanation in the hearing record for those instances where two providers, neither of which was a supervisor, delivered services to the student contemporaneously. A review of the session logs for the period of September 2022 through January 2023 reflects close to five percent of the student's sessions consisted of more than one

service provider delivering services directly to the student, neither of which was a supervisor (see generally Parent Ex. L at pp. 7-19). As there are not similar service records included in the hearing record for the period of February 2023 through April 2023, I will apply the five percent reduction for the entire period for which district funding will be ordered.

Accordingly, based on equitable factors related to the contract between RFTS-LD and the parent and the excessiveness of the services delivered, I find that the hearing record warrants a thirty percent reduction in the amount charged for services from September through April 2023.

C. Transportation

The district also argues that the IHO erred by directing it to fund the student's round trip transportation costs to RFTS-LC in the amount of $500 per month. The district contends that, although the transportation is provided by RFTS-LC, the RFTS-LD enrollment contract does not include transportation costs and there is no evidence that the parent is financially obligated for the transportation costs. The IHO found that although the hearing record was "devoid of any evidence" concerning how the student was transported to the private school in September 2022, the parent did inform the district in her 10-day notice that she intended to seek funding for any private transportation costs she accrued (IHO Decision at p. 25). Having determined that the district was "on notice" of the parent's "intent to seek funding for necessary transportation," the IHO granted the parent's request that the district directly fund the student's private transportation to and from RFTS-LC starting in October 2022 through the end of the 2022-23 school year, at a rate of $500.00 per month.

Here, the contract with RFTS-LD does not mention transportation (Parent Ex. K). During the impartial hearing, the parent testified that the student needs special transportation accommodations including not sitting near a door, child locks, being monitored very closely, and a short ride with pick up last and drop off first because of the student's lack of safety awareness and his seizure disorder. (Apr. 19, 2023 Tr. pp. 57-58). The parent further testified that RFTS-LC arranged roundtrip private transportation to the school by car for the student and the student was taken to and from school in a car (Apr. 19, 2023 Tr. pp. 57-59). The financial officer for RFTS-LD also testified that RFTS-LC had provided transportation for the student since October 2022 at a rate of $500 per month and that this service would be billed for at the conclusion of the 2022-23 school year (Apr. 19, 2023 Tr. pp. 39-40).

Under different circumstances, a school's provision of transportation may be deemed reimbursable without separate evidence about the arrangements or costs thereof because, as a general matter, a traditional application of the Burlington/Carter framework may result in an order for tuition reimbursement to include the costs of the transportation (see Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir 1994] [finding "that the language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]; Ne. Cent. Sch. Dist. v. Sobol, 79 N.Y.2d 598, 608 [1992] [finding that, since a FAPE included related services such as transportation, an order of reimbursement for transportation was an appropriate remedy for a denial of a FAPE]). However, here, where the private school has elected to charge for its related services on a fee-for-service basis rather than on a tuition model, and have listed discrete services available from the school not including transportation, the hearing record must be further developed on the provision of transportation services and the costs thereof in order to

allow for an award of funding for private transportation services. Accordingly, the hearing record does not support the IHO's award of district funding of transportation costs.

VII. Conclusion

The evidence in the hearing record supports the IHO's finding that the services delivered to the student at RFTS-LC constituted an appropriate unilateral placement. Nevertheless, as the contract for services did not provide for a tuition-based program with a guaranteed minimum amount of services or a set educational program, the evidence in the hearing record is insufficient to support a finding that the unilateral placement was appropriate for May and June 2023. Further, as detailed above, equitable considerations warrant a thirty percent reduction of the costs to be funded by the district for the student's attendance at RFTS-LC for the period of September 2022 through April 2023. Finally, the hearing record does not support the IHO's finding that the parent is entitled to direct funding of the roundtrip transportation costs.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 25, 2023, is modified by reversing those portions of the decision which found that the parent's unilateral placement was appropriate for the period of May and June 2023; that equitable considerations warranted a complete denial of relief in the form of district funding for the costs of services delivered by RFTS-LC; and that the student was entitled to district funding of private roundtrip transportation costs; and

IT IS FURTHER ORDERED that the district shall fund the costs of the services the student received at RFTS-LC during the 2022-23 school year through April 2023 at the amounts set forth in the services affidavits, reduced by thirty percent.

Dated: **Albany, New York**
August 17, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER