The University of the State of New York

The State Education Department
State Review Officer
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No. 23-134

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Michael Gindi, Esq.

Thrive Advocacy, LLC, attorneys for respondent, by Raquel Gordon, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to pay, in part, the parent's son's tuition costs at Reach for the Stars (RFTS) for the 2021-22 school year.[1] The parent cross-appeals from the IHO's determination which denied her request for full payment

[1] The name of the school is redacted in IHO II's decision submitted with the hearing record, so it is not entirely clear whether IHO II awarded tuition at Reach for the Stars Learning Center (RFTS-LC) or Reach for the Stars Learning and Developing LLC (RFTS-LD); however, IHO II's decision acknowledges a difference between RFTS-LC and RFTS-LD (see IHO Decision at p. 15 n. 7, 8). Generally, documentation in the hearing record regarding the student's education was produced by RFTS-LC, while the contract for the student's education services was entered into between the parent and RFTS-LD (see Parent Exs. E-G; I-J; L). 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).

of the cost of her son's tuition at RFTS. The appeal must be dismissed. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

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

During the 2020-21 school year the student was 15 years old and attended RFTS in an ungraded classroom (Dist. Ex. 1 at p. 2). The CSE convened on April 13, 2021, to formulate the student's IEP for the 2021-22 school year and, finding that he was eligible for special education programming as a student with autism, recommended a 6:1+1 special class placement in math, English-language Arts, social studies, and science, with related services of five 30-minute sessions of individual occupational therapy (OT) per week, and five 30-minute sessions of individual speech-language therapy per week (id. at pp. 19, 27).[2] Additionally, the district recommended full-time, individual health paraprofessional services, an individual assistive technology device, a 12-month program, and five 60-minute sessions per year of parent counseling and training (id. at pp. 19-20).

The parent disagreed with the recommendations contained in the April 2021 IEP and, as a result, in a letter dated June 17, 2021, notified the district of her intent to unilaterally place the student at RFTS (see Parent Ex. C). On July 9, 2021, the parent signed a contract with RFTS-LD for the student to receive educational services in collaboration with RFTS-LC for the 2021-22 school year (Parent Ex. L).

In a due process complaint notice, dated September 20, 2021, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (see Parent Ex. A). The parent made many arguments asserting both procedural and substantive problems with the April 2021 IEP including an assertion that the district failed to offer the student full-time individual nursing services and that without such services no program would be appropriate for the student, as well as allegations related to the composition of the CSE, the sufficiency of district evaluations, the student's management needs and annual goals, the appropriateness of a behavioral intervention plan (BIP), the appropriateness of the 6:1+1 special class recommendation, a lack of 1:1 services or applied behavior analysis (ABA) services, behavioral supports, the sufficiency of the recommendation for parent counseling and training, predetermination, and the district's ability to implement the student's IEP (see id.).

An impartial hearing convened on March 30, 2022 before an IHO (IHO I) and, while it was pending, the matter was reassigned to another hearing officer (IHO II) before the Office of Administrative Trials and Hearings (OATH) and concluded on March 15, 2023 after eighteen days of proceedings (see Tr.-1 pp. 1-260; Tr.-2 pp. 1-241).[3] In a decision dated May 30, 2023, IHO II

[2] The district also recommended five 60-minute sessions of parent counseling and training per year (Dist. Ex. 1 at p. 19).

[3] IHO I presided over the impartial hearing for all but the last four of the proceeding (see Tr.-1 pp. 1-260; Tr.-2 pp. 1-96). For reasons that are unclear, the consecutive pagination of the hearing transcripts was restarted while the matter was before IHO I on the twelfth day of proceedings thus resulting in two groups of multi-day transcripts

determined that the district failed to offer the student a FAPE for the 2021-22 school year, that RFTS was an appropriate unilateral placement, and that equitable considerations, in part, weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 18-24). As relief, IHO II ordered the district to fund the student's placement at RFTS in the total amount not to exceed $128,000 for the 2021-22 school year (id. at p. 24).

IV. Appeal for State-Level Review

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

1. whether the unilateral placement at RFTS was appropriate for the student; and

2. whether equitable considerations favor 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]).

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

with duplicate pagination. Accordingly, IHO II referenced the two sets of consecutively paginated transcripts as "Tr.-1" and "Tr.-2" (see IHO Decision at p. 5). For the sake of clarity, the undersigned will continue to use the same convention to reference the transcripts.

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]).[4]

[4] 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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

Initially, the district did not appeal IHO II's finding that it failed to offer the student a FAPE for the 2021-22 school year (see IHO Decision at pp. 18-20). As such, this 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]).

Turning to the parent's request for consideration of the additional evidence submitted with the Answer with Cross Appeal, the parent presents an undated addendum to the enrollment contract and session logs for the services the student received during the 12-month 2021-22 school year through June 24, 2022 (see Answer with Cross Appeal; Proposed Parent Exs. II; JJ). In general, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Here, there is no indication that these exhibits were not available at the time of the impartial hearing beyond the assertion that the addendum to the enrollment agreement was not placed into the hearing record due to an administrative error (see Answer with Cross Appeal at p. 4). The hearing record supports a finding that these records were available at the time of the impartial hearing. The financial witness testified that the second proposed document was created during the 2021-22 school year to properly maintain administrative records (Tr.-2 pp. 177-79, 181, 184, 202-05). As the hearing mostly took place during the 2022-23 school year, the student's session logs

chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

for the prior school year were available for the parent to present as evidence.[5] According to the parent's arguments on appeal, the addendum to the service agreement was originally a part of the July 2021 contract with RFTS-LD (Parent Ex. L); however, it was not included as part of the exhibit due to an administrative error. In review of the parent's arguments, there is no evidence submitted to support the assertion on appeal, such as an affidavit from the parent or the administrative staff at RFTS-LD. This is especially concerning as, there is a question as to whether the parent had such information at the time she signed the agreement because the RFTS-LD administrator testified there were no addendums to the agreement in the hearing record or any other agreements that provide specifics as to what services were to be provided to the student (Tr.-2 pp. 196-97).[6] As such, the parent failed to present sufficient reason as to why these documents were not presented during the impartial hearing or with respect to the proposed addendum that it would be a reliable piece of evidence. Therefore, I decline to review the substance of the additional documents submitted by the parent.

B. Unilateral Placement

On appeal the district argues that IHO II erred in finding that the student's unilateral placement at RFTS was appropriate because the ABA services the student received "fluctuated from month-to-month without explanation." The parent asserts that IHO II correctly found that there was "ample evidence" that RFTS provided specially designed instruction to meet the student's needs and that she met her burden to show that RFTS was an appropriate unilateral placement for the student for the 2021-22 school year.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). 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]

[5] The impartial hearing was held over the course of an entire year with eighteen hearings (see Tr.-1 pp. 1-260; Tr.-2 pp. 1-241).

[6] Moreover, the parent testified that she knew the fee model changed, but she did not know the details of that change (Tr.-1 p. 222-23).

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

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

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

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

Although not in dispute, a brief discussion of the student's needs is warranted. The student has attended RFTS-LC since November 2013 and received diagnoses of autism, epilepsy, a thyroid disorder, and several severe food allergies (Parent Ex. E at p. 1; Dist. Ex. 3). According to evidence in the hearing record, the student was nonverbal and primarily used a speech generating device to communicate; he presented with deficits in functional, academic, communication, social/emotional, motor, and adaptive living skills (see Parent Ex. E; Dist. Exs. 3; 4). Additionally, the hearing record reflects that the student "ha[d] a history of non-compliant behaviors that include[d] vocal protesting, crying, self-injurious behaviors (hitting his head repeatedly and pulling out hair), aggressions (pushing, grabbing forcefully, hitting) and refusal to physically move and comply with demands" (Parent Ex. D at p. 1). The student also displayed tantrum behavior if something in the environment was too loud, characterized by very loud, unintelligible verbal protesting that was not understood by the listener, screaming, yelling, and throwing his body around (Tr.-2 p. 41).

1. RFTS

The RFTS-LC educational director testified that RFTS-LC was a private school that offered a 12-month program and where all students received 1:1 instruction using ABA methodology (Tr.-2 pp. 25, 27-28). Further, the educational director described RFTS-LC as a

school with "20-something" students, all with a primary diagnosis of autism (Tr.-2 pp. 28, 81). Each classroom had a "lead" who was usually a candidate for Board Certified Behavior Analyst (BCBA) certification, as well as a speech-language pathologist who was part of the classroom, and an occupational therapist oversaw specific students in each classroom (Tr.-2 p. 28). She testified that all of the students at the school receive 45 minutes of speech-language therapy and 45 minutes of OT each day (id.). The educational director testified that RFTS-LC used a collaborative model in which speech-language pathology and OT was used to help guide goals for each student within each discipline and focus on a skill that each student could use within natural, home, and community environments (Tr.-2 pp. 27-28). According to the educational director, 1:1 ABA instruction occurred during the rest of the school day "because that's what the children [who attended RFTS-LC] require to learn" (id.). She also indicated that RTFS took "data on our assessments" and was "data driven" (Tr.-2 pp. 28-29).

During the 2021-22 school year, the student received in-person, home-based ABA services from RFTS-LC and related services from RFTS-LC remotely due to COVID-19 related health risks and his seizure disorder (Tr.-2 p. 30; Parent Exs. D at p. 1; F at p. 1; G at p. 1).[7] According to the educational director, the student received 100 percent of his instruction at home from March 2020 to June 2022 (Tr.-2 pp. 70-71). Once weekly, a supervisor went to the student's home to "supervise the case" and spent approximately 1.5 hours there (Tr.-2 pp. 30-31; Parent Ex. K). RFTS-LC reports included in the hearing record reflected that an RFTS-LC "ABA technician" or teacher who provided ABA services went into the student's home to "assist with his schooling and online therapy sessions" (Parent Exs. D at p. 1; E at p. 1; F at p. 1; G at p. 1; K). The educational director testified that a teacher who had a background in ABA instruction was at the student's house for the "full school day" (Tr.-2 pp. 32-33, 63). The teacher was supervised in multiple ways, including via Zoom and in-person, and the supervisors helped support the student's programs and decisions regarding what the student was being taught (Tr.-2 p. 33).

Regarding related services, the educational director testified that RFTS-LC was able to accommodate the wishes of the parent and the student's medical providers to educate the student at home, and still have the student reach his speech-language and OT goals (Tr.-2 pp. 30, 63-64). The student received five 45-minute sessions per week of OT and speech-language therapy remotely via Zoom (Tr.-2 pp. 34, 49-50; Parent Exs. E at p. 1; F at p. 1; G at p. 1; I at p. 1; J at p. 1; K). According to the educational director, the student's program was written through collaboration among the speech-language, OT, and ABA providers (Tr.-2 pp. 33-34). The related service supervisors went into the home every few weeks to make sure the right equipment was in the house, set up correctly and ready to use, particularly for OT (Tr.-2 p. 34). The speech-language supervisor updated the student's communication device and returned it to the student the same day (Tr.-2 pp. 34-35).

The educational director testified that in consideration of the student's age, and level of communication and academic skills, the student needed to acquire independent daily living skills such as how to wake up in the morning and toilet himself without assistance, as well as dressing

[7] The student received his education at home due to "severe issues with his medical needs" related to his family's and doctors' concerns with regard to COVID-19 and the student being in the school building (Tr.-2 pp. 30-32). The student had epilepsy and his seizures, which were not fully controlled by medication, could occur multiple times a day (Tr.-2 p. 31). The student also received medication for a thyroid disorder (Tr.-2 p. 31).

for the day, brushing his teeth, and washing his hands; these were all activities he worked on during OT sessions (Tr.-2 pp. 35-36). He also worked on "meal prep" and sitting down and feeding himself instead of having a family member do everything for him (Tr.-2 p. 39). Instruction also focused on increasing the student's vocabulary and ability to use his speech-generating device, and also completing physical activities and learning safety techniques for when seizures occurred (Tr.-2 pp. 38-39). To address reducing the student's maladaptive behaviors, including arguing, getting loud, or being self-injurious or aggressive, the student worked on functional communication, often using discrete trial training and his communication device, conducted by the ABA teacher and the speech-language provider (Tr.-2 pp. 39-42).[8] The educational director reported the student needed a lot of repetition, high rates of reinforcement, and visual schedules to have predictability of routines including the sequence and length of events (Tr.-2 pp. 36-37). She indicated that teaching the student to follow a visual schedule also worked on reducing the student's problematic behavior (Tr.-2 p. 37). The educational director reported that RFTS-LC staff also worked with the student to do things at home, not just for the ABA teacher, but also for the parents and for the grandparent (Tr.-2 p. 46; see Parent Ex. D at p. 1). According to the educational director, the student "[o]ne hundred percent" received appropriate special education services at RFTS-LC for the 2021-22 school year (Tr.-2 p. 50).

Turning to the district's argument on appeal, that the ABA services the student received at RFTS-LC "fluctuated from month-to-month without explanation," which rendered the unilateral placement inappropriate, the student's daily schedule indicated that he was scheduled to receive one 45-minute session per day each of OT and speech-language therapy (in conjunction with the ABA provider), and six 45-minute sessions of 1:1 ABA instruction per day separate from other services (Parent Ex. K). In the request for review, the district cites to "Parents Ex. M" as purportedly showing the specific amount of ABA service hours the student received from RFTS-LD on a monthly basis (Req. for Rev. ¶ 34); however, Parent Exhibit M, the affidavit testimony of "an administrator overseeing the operations" at RFTS-LD, was entered into the hearing record on March 15, 2023 and only identifies the total services invoiced for the student for the 2021-22 school year (Tr.-2 pp. 159-60; Parent Ex. M). Review of the RFTS-LD administrator's affidavit shows that it does not include breakdowns of the monthly services the student received from RFTS-LD (see Parent Ex. M).[9] However, even if the district is correct that the amount of services the student received from RFTS-LD fluctuated over the course of the 2021-22 school year, that in

[8] According to the educational director, discrete trial training involved breaking down the steps to the smallest step that you could teach in a single round of instruction (Tr.-2 pp. 43, 45-46). The response to the stimulus is either reinforced or prompted based upon the response (Tr.-2 pp. 43-44). Repetition occurs until a skill is mastered and prompts are faded out as quickly as possible (Tr.-2 p. 44).

[9] It is noted that IHO II gave a description regarding potential service affidavits which were identified as Parent Exhibit M while IHO I was presiding over the hearing (IHO Decision at pp. 6-7). However, as IHO II pointed out, that parent exhibit was never formally presented to either IHO to be marked for identification or admitted into the hearing record (see id.; see also Tr.-1 p. 16, Tr.-2 p. 17). IHO II requested the parties resend any exhibits submitted under the prior IHO (Tr.-2 p. 116). At the next hearing on March 1, 2023, IHO II noted that the parent submitted exhibits A-M; however, the parent's attorney indicated that the parent only wished to have exhibits A-K entered into the hearing record (Tr.-2 pp. 138). IHO II admitted Parent Exhibits A-K into the hearing record (Tr.-2 pp. 139). Notably, at the March 15, 2023 hearing, the parent did enter into the hearing record Parent Exhibit M as an affidavit of the RFTS-LD administrator, this exhibit was a different exhibit than what was previously sent to IHO II (Tr.-2 pp. 159-60). It is possible that the district was citing to the exhibit that was not entered into the hearing record.

and of itself is not a bar to reimbursement nor does it necessarily lead to the conclusion, without other evidence, that the student's programming as delivered by RFTS-LC was inappropriate. Rather, the evidence in the hearing record shows that the student made progress during the 2021-22 school year with the services he did receive, such that it supports IHO II's finding that the unilateral placement was appropriate.

The educational director testified that the RFTS-LC program was data driven, and ABA, speech-language, and OT assessments were conducted to determine what progress had been made (Tr.-2 p. 46). The hearing record included an undated portion of the student's RFTS-LC education plan that contained his long-term objectives, and educational, speech-language, and OT progress reports dated December 2021 (Parent Exs. D; F; G; H; J).[10] Specific to the district's argument on appeal regarding the amount of ABA services the student received, review of the educational progress report shows that the ABA provider identified individualized teaching methods, non-compliant behaviors, and specific skills that needed to be addressed (Parent Ex. D at pp. 1-2). In the area of communication, the ABA provider described the goals the student was working toward, the level of prompting required, and that he had made progress identifying common objects, rooms, and colors (id. at p. 2). He exhibited emerging skills to follow one and two-step directions during structured activities and responding to greetings (id. at pp. 2-3). According to the report, the student also demonstrated progress with functional pre-vocational skills such as folding and sorting clothing, and cleaning surfaces (id. at p. 3). Additionally, the report indicated that the student had made "considerable progress" in dressing skills, and progress was also observed in his ability to complete personal hygiene routines including toileting, preparing meals, and extending the time participating in community and leisure activities (id. at pp. 3-4).

Further, the educational director testified that, during the 2021-22 school year, the student learned how to follow a schedule, started doing things more independently, built up his vocabulary, improved categorization skills, followed more directions without becoming upset or displaying interfering behaviors, and was more motivated to get up and move around (Tr.-2 pp. 84-85). The parent testified that the student had made "a big, big major advance" in that he displayed spontaneous communication using his communication device to ask for things that he needed (Tr.-1 at pp. 221-22).

Therefore, the evidence in the hearing record does not support the district's contention that the amount of ABA services the student received "fluctuated" such that his unilateral placement at RFTS was not appropriate to meet his special education needs, and IHO II's finding that RFTS provided the student with appropriate programming is upheld (IHO Decision at p. 21).

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and

[10] Review of the student's December 2021 OT and speech-language progress reports show that the student made progress in these related service areas (see Parent Exs. F; J).

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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The district argues that equitable considerations disfavor any funding because the parent did not cooperate with the CSE, the contract between the parent and RFTS-LD was not enforceable, and the cost of the services provided to the student by RFTS was excessive. The parent counters that IHO II should have granted funding for the full cost of the services provided to the student by RFTS during the 2021-22 school year.

The hearing record reflects that IHO II conducted a thorough review of the equitable considerations in this matter. IHO II correctly determined that the parent cooperated with the district, did nothing to impede the district in developing an IEP for the student for the 2021-22 school year, and provided timely notice of her intent to unilaterally enroll the student at RFTS (IHO Decision at p. 22).[11]

[11] The district's allegation that the parent failed to cooperate by not providing medical information about the student is without merit. Notably, the hearing record shows that the parent participated in the CSE meeting and visited the proposed public-school placement (Tr.-1 p. 216-17; Dist. Ex. 1 at p. 30;). The district school

Turning to the district's assertion that all relief should be denied because the contract between RFTS-LD and the parent is unenforceable, there is insufficient basis to find 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. Initially, IHO II noted a number of valid concerns regarding the contract, specifically that the contract is with RFTS-LD and requires collaboration with a separate entity, RFTS-LC, that the frequency of services was not specifically identified in the contract, and that RFTS-LD did not intend to bind the parent to pay for services as the parent did not discuss the cost of the student's program with RFTS staff and the RFTS-LC educational director had no idea as to the cost of the student's program, as well as additional inconsistencies in the hearing record regarding the total cost of the student's education programming at RFTS (IHO Decision at pp. 22-23). However, 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 and RFTS-LC in "formulating the child's special education services and service plans" and that the parent consented to the provision of services and that if the services were not funded by the district, the parent would "work with RFTS-LD to arrange a mutually acceptable payment schedule" (Parent Ex. L at pp. 1-2). The contract also included an appendix listing available services and the hourly fee for each service (id. at pp. 2-3). Additionally, the parent testified that she was "responsible for everything . . . the contract says," although, as discussed in more detail below, it's not clear that she was aware of what the said at the time she signed it or how much she owed RFTS-LD (Tr. pp. 222-23). Accordingly, while the contract is not specific with respect to the exact services the student would receive and there are valid questions regarding the circumstances surrounding the execution of the agreement, 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]).

Nevertheless, although the hearing record does not provide sufficient basis for finding that the contract between the parent and RFTS-LD was not enforceable, IHO II's finding that the cost of the services provided to the student was unreasonable was based on information contained within the hearing record warranted a reduction in tuition funding (IHO Decision at pp. 16, 23-24). Specifically, IHO II noted that the cost of the student's tuition at RFTS increased from $128,000 for the prior two school years to $366,180 for the 2021-22 school year without any changes to the student's educational program with the exception of OT services and the reasoning provided by the RFTS-LD administrator did not justify the change in costs (id. at pp. 23-24).In reviewing IHO II's determination that RFTS-LC unreasonably increased its tuition, the hearing record, as a whole, includes a sufficient basis for calling the rates charged by RFTS-LD into question. 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

psychologist testified that the parent requested the medical forms needed for 1:1 nursing services, that they were given to the parent, and the forms were not returned because, according to the school psychologist if she had received them, the student's IEP would have been amended (Tr.-1 p. 94). However, the district did not question the parent about these forms during her cross-examination (see Tr.-1 pp. 224-47). The hearing record does not support the district's assertion that the parent did not cooperate with the CSE by failing to provide the forms, as there is no evidence the district attempted to obtain the completed forms from the parent.

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).

As noted above, the parent signed a contract with RFTS-LD in July 2021 (Parent Ex. L). According to the parent, the student attended RFTS for approximately nine years and she has never paid for tuition at RFTS (Tr-1 p. 225). For the 2019-20 school year, the parent testified the total cost of the student's tuition at RFTS was $128,000 (Tr-1 p. 227-28; see Parent Ex. B at p. 9).[12] However, when she signed the contract with RFTS-LD for the 2021-22 school year, the parent testified that she knew there was "different billing" indicating it was "a new way that they were going to do things" (Tr.-1 pp. 222-23). Additionally, during the parent's testimony it appeared that she was not aware of the particular amount of tuition she was responsible for (Tr.-1 pp. 228-29).[13] When questioned about the cost of the student's tuition for the 2021-22 school year, the parent testified that she could not remember and would have to look at the contract (Tr.-1 p. 228). However, as discussed above, the contract does not provide a set amount for tuition for the 2021-22 school year, only hourly rates for various services (see Parent Ex. L). Accordingly, as determined by IHO II, the parent's testimony indicates that she was not aware of the cost of the student's tuition at the time she signed the contract.

Additionally, the parent's appeal from IHO II's finding that the cost of the services provided by RFTS was unreasonable; however, the parent's appeal is based on an assertion that the district did not present any evidence to establish the unreasonableness of the fees (Answer and Cross-Appeal ¶24). In this instance, such an argument is problematic as the only evidence of the total cost of the student's programming at RFTS was presented by the RFTS-LD administrator (Parent Ex. M at ¶ 9). RFTS-LD operates on a fee for service basis, accordingly, "services are billed according to what the child received" (Tr.-2 p. 182). However, no invoices were presented into evidence during the hearing and although the RFTS-LD administrator testified that monthly invoices were produced for the student, the administrator did not identify any details regarding those invoices or whether they were ever delivered to the parent (see Tr.-2 pp. 175-77, 184, 219-22). Additionally, IHO-II found that the RFTS-LD administrator's testimony regarding the cost of the student's services at RFTS was not credible due to concerns about his candor and his lack of knowledge regarding the information included in his affidavit testimony (IHO Decision at pp. 8, 15-17).

[12] The RFTS-LD administrator testified that the cost of tuition at RFTS-LC for the 2020-21 school year was also $128,000 (Tr-2 pp. 224-25).

[13] During the parent's testimony she was questioned regarding a tuition amount based on affidavits produced by RFTS-LD; however, as noted above and as discussed by IHO II, those affidavits were not included in the hearing record (see IHO Decision at p. 7). Additionally, as discussed by IHO II, the total tuition amount for the 2021-22 school year, as initially represented at the hearing, differed by approximately $60,000 from the total tuition amount identified in the affidavit of the RFTS-LD administrator (IHO Decision at p. 23; see Tr-1 pp. 228-29; Parent Ex. M at ¶9).

Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the hearing record lacks a compelling reason to reverse IHO II's determination on credibility. Accordingly, there is no reliable evidence included in the hearing record to determine an accurate cost of the student's services at RFTS-LD for the 2021-22 school year.

In consideration of the above, the hearing record supports the finding by IHO II that the program provided to the student was the same program as what was provided in prior school years before the switch in fee model, with the main difference being the change in fee structure (IHO Decision at p. 24; see Tr.-1 at pp. 231, 237, 255-56; Tr.-2 at pp. 73, 76).[14] Overall, the hearing record supports IHO II's decision to reduce funding due the excessiveness of costs.[15]

As one final point, 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). Accordingly, although I do not address it in this matter, the frequency and duration for which RFTS chose to deliver services, and

[14] The student received home-based instruction for the entire school year (Tr.-1 at p. 233). The student's ABA services were provided in person in the home, but most of the related services were provided remotely (Tr.-1 at pp. 219-20, 237-40, 242-43).

[15] It is noted that the additional evidence submitted by the parent would not have altered this finding.

particularly ABA services, to the student, could also warrant a reduction based on equitable considerations.

VII. Conclusion

The evidence in the hearing record supports IHO II's finding that the student's unilateral placement at RFTS was appropriate for the 2021-22 school year, and IHO II's determination to reduce the amount of tuition awarded on equitable consideration grounds.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 5, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER