



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-139

**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.

Law Offices of Adam Dayan, PLLC, attorneys for respondents, by Kelly Bronner, 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 respondents' (the parents') son and ordered it to partially reimburse the parents for their son's tuition costs at the Reach For the Stars Learning Center (RFTS-LC) for the 2022-23 school year. The parents cross-appeal from the IHO's determination which denied their request for full tuition reimbursement. 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 facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, a CSE convened on February 15, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Parent. Ex. E). The CSE found the student eligible for special education as a student with autism and recommended an educational program consisting of placement in a 6:1+1 special class for English language arts (ELA), math, social studies, and science, along with occupational therapy (OT) and speech-language therapy (id. at pp. 1, 16-17).

In a "Pendency Implementation Form," dated August 25, 2022, the district determined that the student's pendency program arose from an unappealed IHO decision dated April 21, 2020 and consisted of a 12-month program at RFTS-LC along with special transportation to and from school (Parent Ex. D).

The parent entered into an enrollment agreement with Reach for the Stars Learning and Developing, LLC (RFTS-LD) on September 9, 2022 for the provision of services to the student for the 2022-23 school year (see Parent Ex. F).¹ The agreement specified that it contained an Appendix A which was a proposed provision of services and an Appendix B which was a copy of a rate sheet (Parent Ex. F at p. 1).²

The parents disagreed with the recommendations contained in the February 2022 IEP, as well as with the particular public-school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at RFTS-LC (see Parent Ex. B). In a due process complaint notice, dated July 6, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A). The parents raised allegations relating to behavioral concerns including the need for a functional behavioral assessment (FBA) and a behavioral intervention plan (BIP), the 6:1+1 special class placement, and the assigned public school (Parent Ex. A at pp. 5-8). As a proposed resolution, the parents requested district funding for the student's placement at RFTS-LC (id. at pp. 8-9).³

An impartial hearing convened on August 30, 2022 and concluded on May 3, 2023 after nine days of proceedings (Tr. pp. 1-447). In a decision dated June 6, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year as the district presented no evidence to support its recommendation; that RFTS-LC was an appropriate unilateral placement for the student as it provided small class sizes, intensive behavioral support, 1:1 instruction, OT, and speech-language therapy and the student made progress; and that equitable considerations partially weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 14-18). With respect to equitable considerations, the IHO found that "the Billing entity never intended to enforce the Enrollment Agreement against the parents," that the parent was not provided with the rate sheet as part of the contract, and that the contract was vague and indefinite; accordingly, the IHO determined that the student's attendance at the school should only be funded at a reasonable rate (id. at pp. 15-16). With respect to the cost, the IHO found that the fee for services model presented by the parents was not credible or reasonable and based the award on the tuition based structure charged by RFTS-LC in a prior

¹ According to the RFTS-LD contract, RFTS-LD agreed to deliver special education and related services to the student at RFTS-LC (Parent Ex. F at p. 1).

² Appendix A was attached with the enrollment agreement and proposed a maximum amount of services per week of applied behavior analysis (ABA) direct, ABA supervision, related service supervision, OT, and speech-language therapy (Parent Ex. F at p. 5). Appendix B, the proposed rate sheet, was not attached to the enrollment agreement in the hearing record.

³ The parents also requested home-based services; however, they withdrew that request during the hearing (Tr. pp. 45-46; Parent Ex. A at p. 9).

school year with a cost of living adjustment (*id.* at pp. 16-18). As relief, the IHO ordered the district to fund the cost of the student's tuition at RFTS-LC at a specified amount for the 2022-23 school year (*id.* at p. 18).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer with cross-appeal thereto is also presumed and therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the unilateral placement at RFTS-LC was appropriate;
2. Whether equitable considerations weigh in favor of a bar or a reduction of an award of the costs of the student's tuition at RFTS-LC; and
3. Whether the student is entitled to an award for pendency for the 2022-23 school year in excess of any award for tuition on the merits.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an

administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Andrew 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 Andrew 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 chance to meet challenging objectives" (Andrew F., 580 U.S. at 402).

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. FAPE

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, it 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]).

B. Unilateral Placement

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 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).

1. Reach for the Stars Learning Center

According to its program description, RFTS-LC is a full time, independent, not-for-profit school dedicated to the education of children with autism spectrum disorders (Parent Ex. H). The program description states that, in order to address the unique needs of the students, RFTS-LC has "embraced a patented approach showing great success, The Integrated Model" (id.). The description notes that "[t]his model uses the best available teaching techniques," including ABA, speech-language therapy, OT, sensory integration training, music therapy, and play therapy (id.). According to the description, "[a]ll therapy is provided to the students on an intensive one to one basis" and the program "also develop[s] a close partnership with parents to help expand the skills" taught at school "to the world of home and community" (id.). According to the description each student at RFTS-LC is evaluated in 200 different areas and a program is developed targeting his/her specific areas of need (id.). Further, the program description states that features of the program include a greater than 1:1 teacher to student ratio, intensive speech, occupational, and sensory integration therapy with an emphasis on peer socialization, and customized, individual education plans for each student, beginning at age two years nine months and up (id.).

According to the RFTS-LC educational director, RFTS-LC contained approximately six classrooms, with no more than six students in any classroom, and the school functioned over a 12-month school year (Tr. pp. 52, 54-55). For the 2022-23 school year, RFTS-LC had an enrollment of 29 students (Tr. p. 55). The educational director indicated that based on assessments staff broke

down "the goals of what a [student] require[d]" and created a plan for how to teach it (Tr. p. 54). The plans were then used to "create smaller, more objective steps" (Tr. p.54). The plans included how data would be collected and materials used (Tr. p. 54). The educational director further indicated RFTS-LC was "a collaborative model of a school," in that in addition to conducting ABA and discrete trial teaching or task analyses, reinforcement, and error correction, the school program collaborated with OT and speech-language therapy to be sure there was "correlation between the disciplines on goals being targeted, as well as what acquisition[s] the students are making between the disciplines [], and how they're making it" (Tr. p. 55). She also noted that the ABA instructors cotreated with speech-language therapy and OT providers to make sure they were following the plans that had been implemented (Tr. p. 58). The educational director explained that, for example, if a student had a speech-generating device (SGD), the ABA instructors trained with the speech-language therapist during sessions on how to use the device and how to make sure they were prompting the student if needed (Tr. p. 58). The educational director stated there was "constant cotreatment," multiple times per week to ensure consistency of treatment among the ABA instructors and the OT and speech-language therapy related service providers (*id.*)

The educational director stated that each classroom had "a lead" behavior analyst in training—also known as a behavior analyst candidate (BAC), described as someone who either completed their coursework and were getting ready to "sit for the test" or were in the process of completing coursework— (Tr. pp. 55, 82). She also noted that each classroom had a lead teacher and, generally, each lead teacher had a degree in an area of education or psychology and was pursuing a master's in ABA or psychology or was going for their Board Certified Behavior Analyst (BCBA) certification (Tr. pp. 55-56, 111). Depending on the needs of the specific classroom, there was one additional teacher per student and possibly an assistant or additional teacher (Tr. p. 56). The educational director indicated, for example, that, in a classroom of five students, there would always be six instructors plus a speech-language pathologist and an occupational therapist responsible for working with all the students in that classroom (Tr. p. 56-57). According to the educational director, all staff, including speech-language therapy and OT staff, were trained upon hiring to understand ABA and each student's behavior plan, as well as how to implement each behavior plan and other protocols (i.e., work and reinforcement protocols) (Tr. pp. 57-58).

With regard to data collection, the educational director indicated RFTS-LC collected data on paper as well as via an online system (Tr. p. 59). According to the educational director, the online data system could be accessed via a website where you could see each student's data immediately (Tr. pp. 59-60).

2. Specially Designed Instruction

Turning to the student's experience at RFTS-LC, the educational director testified the student had been attending RFTS-LC since he was five years old (Tr. p. 60). She reported that at the start of the 2022-23 school year in July 2022, the student was "really, really delayed in all areas of his development" including communication, receptive language, expressive language, adaptive living skills, and behavioral skills (Tr. p. 61; see also Parent Ex. K). At the time of the impartial hearing, the educational director described the student as prompt dependent, non-verbal with some verbal ability (Tr. p. 61). She indicated that due to the student's inability to communicate effectively, he would elope from the classroom, hit, push, and scratch others, throw objects and furniture, and become disruptive to himself and others (Tr. pp. 61-62). The student would also

scream, yell, and cry out loud (Tr. p. 62). The educational director stated that the student always required one-to-one support, due to his aggressions (*id.*). In addition, the student exhibited self-stimulatory behaviors, poor hygiene, and poor self-care skills (*id.*). According to the educational director, the student also exhibited hoarding behaviors where he would bring personal belongings into school and become aggressive with teachers, therapists, and the environment if staff tried to take his things away (Tr. pp. 62-63). Further, going out in the community was difficult for the student as he would elope into the street, causing a potentially dangerous situation (Tr. p. 63). The educational director noted that a lot of times it was necessary to have more than one person with the student for safety purposes (*id.*). She also reported that the student even struggled sitting with peers and tended to become agitated and wanted to run out of the classroom and find his personal things (*id.*). The student did not generalize acquired skills well across environments and with different people (Tr. p. 64). The educational director indicated the student had a behavior plan and that the student required ABA, a high frequency of reinforcement, prompting, and to increase the time he spent on tasks without maladaptive behaviors (Tr. pp. 64-65; see Parent Ex. L).

The educational director testified that RFTS-LC created goals for the student each school year (Tr. p. 65). She reported RFTS-LC conducted assessments for all students (Tr. p. 66). For the student in this matter, she testified that RFTS-LC conducted an ACE assessment, which she described as the platform also used for data collection (Tr. p. 66; Parent Ex. S). Consistent with the testimony by the educational director, documentary evidence admitted into the hearing record and specifically created for the student at RFTS-LC for the 2022-23 school year included his detailed behavior plan, a curriculum plan/IEP with progress notes, and the student's work protocol (Parent Exs. K, L, M).⁵ Similar documentary evidence including a speech-language evaluation, speech-language curriculum plan, and OT progress report reflect the student's work with his related services providers (see Parent Exs. N, O, Q, R).

According to testimony by the RFTS-LC educational director, at the beginning of the 2022-23 school year, the student was in a classroom with three other students but at the time of the impartial hearing he was in a classroom with two other students (Tr. p. 70). The director testified there was a lead BAC and three additional teachers in his classroom, a speech-language pathologist and an occupational therapist who came in and out of the classroom (*id.*). Additionally, she indicated the student always had someone with him on a one-to-one basis, although depending on the schedule the person acting as the student's one-to-one changed (Tr. p. 83).

With regard to the hierarchy of how things worked throughout the school day at RFTS-LC, the educational director indicated that she oversaw all students and she tried to work with every student in every classroom, along with their teachers (Tr. p. 111). The educational director reported that each classroom had a classroom supervisor, and the educational director directly supervised all supervisors in each classroom (*id.*). She indicated the classroom supervisor was above the lead teacher in the classroom (*id.*). In the student's case, the educational director identified the RFTS staff who comprised the layers of supervision built into the school's ABA

⁵ The RFTS-LC educational plan for the 2022-23 school year included goals and objectives within the domains of language and communication (i.e., following directions, receptive identification skills, expressive and pragmatic language using his augmentative and alternative communication (AAC) device), group instruction, academics, social play and leisure skills, activities of daily living (ADL)/health and wellness, pre-vocational skills, vocational skills, community and safety, and behavior skills (see Parent Ex. K).

model for the student by name (Tr. p. 112). She stated the student's behavior plan was developed in May (2022) (*id.*). In response to the IHO's questions about why with all the layers of supervision RFTS did not review of the student's behavior plan at the start of the school year, the educational director indicated that it took a long time to reduce behaviors and that there was no direct answer as to how long it would take to change a behavior (*id.*). In the student's case, the educational director noted "100 percent the behavior plan [wa]s reviewed," and every teacher brought into the classroom received training regarding the plan (*id.*). She reported that if data showed the student was not making progress with the behavior plan, the behavior plan would have been changed (Tr. pp. 112-13). The educational director testified that when the student's behavior plan was updated in May 2022, his hoarding behavior was added to his then-existing behavior plan as a proactive measure because his hoarding of his belongings in school was starting to become an interference (Tr. p. 114). The educational director opined that a functional analysis of the student's hoarding behavior was not necessary because after consultation with the parent, the student's teachers, and his BCBA, it was easy to observe the student's behavior and what functions it played (Tr. pp. 114-15). However, according to the educational director's testimony, if functions of a behavior were not evident, an FBA would be conducted (Tr. p. 115).

With regard to the student, the educational director indicated RFTS-LC used proactive strategies built into the student's schedule to support him (Tr. pp. 115-16). Everything was prepared for him prior to the start of the school day so that the student did not need to wait for things to happen and therefore he had no opportunity to throw things or become more aggravated (Tr. p. 115). The educational director reported that the student was given a lot of reinforcement when he demonstrated correct behavior as opposed to reinforcing the function of an inappropriate behavior (i.e., gaining access to attention through spitting in order to escape from demand put on him) (Tr. p. 116). She indicated that much of the student's behavior was reflected his weak communication skills and the goal was to ignore the student's behavior while keeping the demand to continue working in place and providing the student with a functional means of communication (Tr. pp. 116-17; *see also* Tr. pp. 118-19). The educational director reported that in addition to behaviors, the speech-language therapy and OT related service providers consulted with the BCBA on the ABA programs addressing skills related to the student's use of the communication device as well as his ability to safely enter the community (i.e., stop at a crosswalk) (Tr. p. 118-19).

As noted previously, evidence admitted into the hearing record included documents created by RFTS-LC for the student for the 2022-23 school year, specifically a behavior intervention plan, a curriculum plan with progress notes, student work protocol, a speech-language curriculum plan, an OT plan for the 2022-23 school year, and December 2022 speech-language and OT progress reports (Parent Exs. K, L, M; O; P; Q; R). Consistent with the educational director's testimony, review of the student's behavior plan written by a BCBA identified targeted behaviors to decrease (aggression, throwing objects, and elopement) a data collection method for each behavior, reinforcers, a proactive plan for morning transition along with steps to gain instructional control, and reactive strategies to be used when the student bit his AAC device case, spit, engaged in aggression, threw objects, or eloped) (Parent Ex. L). The student's work protocol included instructions aligned with his behavior plan and/or indicated "See Behavior Plan" with regard to behavior management strategies (Parent Ex. M).

Testimony by RFTS-LC's sole BCBA supervisor who developed the student's behavior plan in May 2022 indicated the behavior plan had not changed due to the student's low rates of

challenging behaviors (Tr. pp. 163-64, 211). She reported that since July 2022, the student made progress in his communication skills (i.e., verbal-vocal communication increased significantly; using one to two-word phrases, generalizing skills to home), which resulted in a reduction of his challenging behaviors (Tr. pp. 165-66). The BCBA supervisor indicated the student's academic program focused on his daily life skills such as identifying his name and other sight words, and shopping in a simulated supermarket using a list and pictures (Tr. pp. 167-68). At the time of the hearing, the student had progressed to where the BCBA supervisor noted there could be more focus on the student's independence and communication skills (Tr. pp. 169-70). The BCBA supervisor also testified she developed daily data sheets for each student's behavioral plan to collect data, and which were intended to be filled out immediately after each session, then she reviewed the collected data regularly and modified student's behavior plans as necessary (Tr. pp. 172-73, 181). The BCBA supervisor reported the BAC in the classroom assured that data was collected (Tr. pp. 175-76, 181).⁶ Data on more novel behaviors, which were not reflected on the data sheets were collected separately on ABC (antecedent, behavior, and consequence) sheets, so that a plan could be developed. (Tr. pp. 176-77). She further indicated gaps in data collection might occur when the student was out in the community for a trip. (Tr. pp. 186, 200). When asked to review the data sheets included in the hearing record, the BCBA supervisor acknowledged that there were significant gaps in documentation, with no explanation. (Tr. pp. 204, 206-209).⁷ According to the BCBA supervisor, while the student had made significant growth behaviorally; his rate of academic acquisition was slow and he continued to require one-to-one ABA programming to make progress. (Tr. pp. 167-70).

The hearing record also includes an "ACE Skills Assessment" that listed numerous skills and indicated which skills were mastered, emerging, or that the student demonstrated no mastery (Parent Ex. S). The hearing record also includes an "ACE Progress Snapshot" consisting of ABA data graphs for skills addressed with the student (see Parent Ex. T).

Based on the above, RFTS-LC documentation and staff testimony show that between July 2022 and early February 2023 RFTS-LC provided the student with specially designed instruction targeted to meet his unique needs (see Parent Exs. K at pp. 3-11; M; O; P; Q; R; T).⁸

⁶ The BCBA supervisor testified that in certain situations, data could be reported either the same day or the next day (Tr. p. 181).

⁷ During cross-examination, the BCBA supervisor was questioned about the lack of data collection on various dates (Tr. pp. 204, 206-09). During the impartial hearing the district's attorney referred to the daily data sheets as District Exhibit 1, which was marked for identification; however, the document was subsequently entered into the hearing record as District Exhibit 2 (Tr. pp. 197, 216-18; see Dist. Ex. 2).

⁸ The student's ACE Progress Snapshot indicated the report range was from, July 2, 2022 to February 12, 2023 (Parent Ex. T). However, the student's RTFS-LD attendance record and the RFTS-LD services affidavits reflect the cost for services provided for the time period between July 2022 and December 2022 (Parent Exs. G; J). Documentation reflecting student progress did not include information beyond the second quarter of the 2022-23 school year (see Parent Exs. K at pp. 3-11; P; Q; T).

3. Services Delivered

Testimony by the educational director indicated she was involved in creating each classes' daily schedule (Tr. pp. 127-28, 130). The educational director reported she made sure students received ABA therapy all day and that they received their OT and speech-language sessions (Tr. p. 127). She noted that she told the supervisors in each classroom to plug themselves into the daily schedule for that day and the supervisors and/or BCBA would tell her what they needed for a student in the next day's schedule (Tr. pp. 127-28). According to the educational director, once her schedules were done for the day, she never looked at them again (Tr. p. 128). She testified that she did not know what the various student contracts indicated with regard to what services students were to receive, as she did not look at any contracts (Tr. p. 130). She further testified that she was "never going to not give what a child need[ed] based on anything. [She was] going to give it based upon what they're demonstrating" (*id.*). The educational director testified she did not count hours of time; instead, she provided a student with what they needed at the moment "versus what a paper [wa]s going to demonstrate" (*id.*).

The hearing record includes a general weekly schedule for the student showing the student's schedule at RFTS-LC from 8:30 a.m. to 3:00 p.m. on Monday to Thursday and from 8:30 a.m. to 1:30 p.m. on Friday, for the 2022-23 school year (Tr. p. 86; Parent Ex. I). The schedule included the student's ABA sessions and five sessions per week for both OT and speech-language therapy (Parent Ex. I). The educational director indicated that although she had seen documents like the one included in the hearing record, she had not seen that exact document (Tr. p. 81). She noted that all the teachers indicated on the schedule were still in the student's classroom, except for one who was moved to a different classroom when the enrollment in the student's classroom went down by one student (Tr. pp. 81-82). The educational director reported that the schedule was "just a snapshot" of what the student's day looked like "service provision wise" (Tr. p. 83). She explained that the schedule did not accurately include actual cotreats or more supervision or time with the BCBA or any other supervisors that might be added based on the needs of the day/week; (Tr. pp. 83-85).⁹

The September 2022 enrollment agreement between the parents and RFTS-LD, included an addendum indicating the services the parents agreed to for the student for the 2022-23 school year (Parent Ex. F at p. 1). The addendum indicated that the student would receive up to 25 hours per week of direct ABA special education services; up to 10 hours per week of ABA supervision; up to 2.25 hours per week of related services supervision; 3.75 hours per week of OT; and per week of speech-language therapy, with all services being provided five days per week (*id.* at p. 5).

A services affidavit for the 2022-23 school year, signed by an RFTS-LD financial administrator, indicated that, after beginning the program on July 6, 2022, the student received 70.25 hours of direct teacher support services using ABA Analysis, 7.0 hours of ABA supervision, 7.5 hours of speech-language therapy services, and 4.25 hours of OT services in total for July 2022 (Parent Ex. G at p. 1; *see* Tr. pp. 246-47). The August 2022 services affidavit indicated that the

⁹ During the hearing the educational director was asked what she meant by supervision and she testified "supervision would be cotreat" (Tr. p. 84).

student received 64.25 hours of direct teacher support services using ABA, 0.50 hours of related service supervision, 6.0 hours of speech-language therapy services, and 6.5 hours of OT services (id. at p. 2). The September 2022 services affidavit indicated that the student received 52.25 hours of direct teacher support services using ABA, 19 hours of ABA supervision, 3.25 hours of related service supervision, 9.75 hours of speech-language therapy services, and 6.75 hours of OT services (id. at p. 3). The October 2022 services affidavit indicated that the student received 59.75 hours of direct teacher support services using ABA, 4.25 hours of ABA supervision, 0.50 hours of related service supervision, 10.50 hours of speech-language therapy services, and 10.50 hours of OT services (id. at p. 4). The November 2022 services affidavit indicated that the student received 101.25 hours of direct teacher support services using ABA, 11.75 hours of ABA supervision, 1.50 hours of related service supervision, 11.75 hours of speech-language therapy services, and 11.50 hours of OT services (id. at p. 5). The December 2022 services affidavit indicated that the student received 69.58 hours of direct teacher support services using ABA, 9.25 hours of ABA supervision, 10.33 hours of speech-language therapy services, and 10.00 hours of OT services (id. at p. 6).

Reviewing the service affidavits, the amount of ABA services the student received monthly varied greatly, with the student receiving approximately 50-60 hours per month of ABA services from July 2022 through October 2022, compared with November 2022, when the student received over 100 hours of ABA services (see Parent Ex. F). Further review of the student's attendance record shows that the differences in hours the student received for ABA services cannot be attributed solely to the student's attendance, for example in August 2022, the student was present for 11 days of school and received 64.25 hours of direct teacher support services using ABA and 12.5 hours of related services; however, in October 2022, the student was present for 14 school days but only received 59.75 hours of direct teacher support services using ABA and 21 hours of related services (compare Parent Ex. J, with Parent Ex. F at pp. 2, 4). As discussed above, the education director at RFTS-LC determined the actual services the student would receive on a daily basis (Tr. pp. 127-30, 248-49). She also testified that she ensured the student would receive ABA services for the entire time he was in school and that direct ABA services were based on whatever hours the student was not receiving the related services of speech-language therapy and OT (Tr. p. 68). However, based on the hours bills and the student's attendance sheet, there must be some other explanation for the variations in services and although the hearing record indicated that the school maintained easily accessible session logs showing what sessions the student had each day, those logs were not included in the hearing record. Considering the above, the variation in services is sufficient to raise questions as to whether the program provided at RFTS-LC was minimally appropriate to provide the student with an educational benefit, especially when a comparison of the student's attendance records with the hours billed for services makes it appear as though the student may have been in school without services for some portion of the school day.

Nevertheless, while a finding of progress would not in itself be dispositive, it could be sufficient to overcome the evidence noted above regarding the variations in the delivery of the student's special education and related services.

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 364.¹⁰ 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]).

With respect to progress, mid-year progress notes included in the RFTS-LC curriculum plan indicated that the student made progress in his receptive language goals (Parent Ex. K at p. 4). He had displayed mastery in identifying various named actions within pictures (id.). These actions included but were not limited to reading, watching videos, and cutting (id.). According to the mid-year progress notes, the student had also made significant progress in identifying functions when presented with an object (id.). He had "mastered out" of several target functions (play, wear, tooth brushing, etc.) (id. at pp. 4-5). He had also made significant progress with indicating various community locations (supermarket, restaurant, and clothing store) (id. at p. 4). With regard to his ability to follow directions, the curriculum plan indicated that the student made significant progress in following instructions to retrieve single named items. (id.). The RFTS-LC curriculum plan also indicated that the student had made significant progress in his expressive language goals (id. at p. 6). He displayed mastery utilizing his AAC device to name several community locations (supermarket, restaurant, doctors office etc.) (id. at pp. 5-6). He had also made significant progress in naming actions occurring within a natural setting (eating, sleeping, jumping etc.) (id.). The curriculum plan noted that the student sometimes required support to attend to the person performing the action within varied natural settings (id.). The student had significantly improved his ability to label several body parts (neck, chin, forehead etc.) (id.). In addition, the curriculum plan indicated that he student had recently started working on accepting and rejecting items, using his AAC device (id.). Although he still required high levels of support to follow through with the response, the student showed the ability to independently reject non-preferred items using his AAC device (id.). With regard to pragmatic language, the curriculum plan stated that the student had made progress using his AAC device to respond to greetings (id.). He had shown ability to pick up and carry his AAC device when transitioning between locations as he spontaneously did so on his own, although he often required verbal cues to take the device with him (id. at p. 7). According to the curriculum plan the student responded to nonverbal cues such as gestures (id.). With respect to group instruction, the student improved his ability to participate within group activities such as morning meeting, as he increased his attention and responded when called upon, responded to simple questions, used his AAC device to respond to greetings, and sat within group for over ten

¹⁰ Conversely, the Second Circuit has also noted that progress made in a unilateral placement, although "relevant to the court's review" of whether a unilateral placement was appropriate, is not sufficient in itself to determine that the unilateral placement offered an appropriate education (Gagliardo, 489 F.3d at 115; see Frank G., 459 F.3d at 364 [holding that although a student's "[g]rades, test scores, and regular advancement [at a private placement] may constitute evidence that a child is receiving educational benefit, . . . 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"]; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]).

minutes (*id.*). The student made additional progress involving time/schedule skills, self-care skills, pre-vocational skills, community and safety goals, and demonstrated a decrease in his frequency of problem behavior (*id.* at pp. 8-11).

Based on a review of the services delivered to the student during the 2022-23 school year and the evidence of the student's progress while receiving those services, the hearing record supports finding that RFTS-LC provided the student with special education specially designed to meet his unique needs. However, 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 remainder of the 2022-23 school year. Although the impartial hearing took place over the course of and a bit beyond the 2022-23 school year, affidavits of services delivered are only included in the hearing record for July 2022 through December 2022 (Parent Ex. G). Given the fluidity of the services delivered and relative variability of service levels as explained by the director of educational services, it is not possible to find that services provided to the student beyond these dates were appropriate (Tr. pp. 127-28, 130). 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 employed by the student's unilateral placement 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 recommend service (Parent Ex. F at p. 5), there was no guaranteed minimum of services that the student would receive. Thus, as there is no evidence of services delivered from January 2023 through the end of the school year, the parents have not met their burden to prove that services delivered to the student after December 2022 were sufficient to meet the student's special education needs and could therefore be deemed appropriate.

C. Equitable Considerations

The district appeals from the IHO's findings as to equitable considerations, asserting that the IHO should have denied funding altogether. The parents' cross-appeal from the IHO's determination that RFTS-LD never intended to enforce the enrollment agreement and that the contract was likely unenforceable asserting that the IHO erred in reducing the relief awarded.

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

tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]]).

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).

Turning to the parties' disagreement over equitable considerations in this case, the hearing record supports the IHO's decision to reduce the award for tuition on equitable grounds. The IHO found that the enrollment contract was vague and indefinite and it did not appear that RFTS-LD ever intended to enforce it, noting that the parents were not provided with the rate schedule (IHO Decision at pp. 15-16). In addition, in addressing the rates charged by RFTS-LD, the IHO found that the fee for services model was not credible or reasonable because the student did not consistently receive ABA therapy, the "unlicensed and uncertified 'ABA therapists'" were not consistently supervised by licensed providers, the student's programs were not modified or updated based on data collection, and there was no justification for billing separately for related services supervision when the related services providers were licensed (IHO Decision at pp. 16-18). Finally, the IHO noted that prior to changing its billing model, RFTS-LC used a tuition based model, and finding no change in the manner in which services were delivered between the two models, the IHO awarded the cost of the student's tuition based on the tuition charged for the student's attendance at RFTS-LC during the 2020-21 school year with a 14.6 percent cost of living adjustment (id. at p. 18).

In reviewing the IHO's findings and the hearing record, as a whole, there was sufficient basis for the IHO to call into question the propriety of the contract between the parents and RFTS-LD and the rates charged by RFTS-LD. For instance, as discussed in more detail above, all of the student's services were arranged for and provided by RFTS-LC, yet the parents entered into a contract with another entity, RFTS-LD, which indicated that RFTS-LD would provide services to the student at RFTS-LC (Parent Ex. F at p. 1).¹¹ Testimony indicated that RFTS-LD fund the

¹¹ The hearing record shows that RFTS-LC and RFTS-LD are two different entities with two different sets of employees (Tr. p. 256).

services provided at RFTS-LC (Tr. pp. 378-81). The only change between the student's programming at RFTS-LC, when the school last operated under a tuition based model, and the program the student received during the 2022-23 school year was an increase in the cost of the student's educational programming, more than doubling it (see Tr. p. 289, 378-79; Parent Ex. G).¹² Additionally, RFTS-LD did not include the rate sheet as part of the 2022-23 school year enrollment contract and there is no indication in the hearing record that the parents knew the cost of the student's educational program (see Tr. pp. 288, 319, 327-30; Parent Ex. F). The parent testified that she did not know what the cost of attendance for the student would be or how much was going to be charged per hour for any of the services (Tr. pp. 319, 327-28). The parent also testified that she had yet to receive any monthly invoice (Tr. pp. 329-30).¹³ The RFTS-LD financial administrator testified that he did not discuss the terms of the enrollment contract or the contract at all with the parent (Tr. p. 288).¹⁴ Based on this testimony, the IHO was correct to question whether the parent fully understood the costs for services, and this supports the IHO's suspicions regarding the excessiveness of cost for the fee-for-service model used in the enrollment agreement.

Additionally, the IHO correctly found that the hearing record does not include thorough ABA data sheets beyond those regarding the student's behaviors (see Dist. Ex. 2); that the ABA supervision received by the student varied from month to month with virtually no supervision provided in August 2022 (see Parent Ex. G)..

Insomuch as the IHO determined that the evidence in support of the rates charged by RFTS-LD, which necessarily included the testimony of the RFTS-LD administrator, was not credible, the evidence in the hearing does not support overturning the IHO's finding. Regarding the IHO's credibility findings, 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

¹² The finance and operations administrator at RFTS-LD testified that the tuition based rate did not reflect the true cost of students' programming at RFTS-LC because the school "fundraise[ed] the remaining cost of the program from different sources" (Tr. pp. 432-33). However, in explaining how RFTS-LD determined the rate for the student's program, the administrator indicated it was "based on market rates," considering what the district has been ordered to pay for similar services as well as the costs in administering the educational program (Tr. p. 382). Additionally, the administrator testified that RFTS-LD relied on decisions issued by the Office of State Review in order to determine market rates (Tr. pp. 393-95). To the extent the administrator testified that the rates charged by RFTS-LD are based in whole or in part on rates identified in decisions issued by the Office of State Review, that is not a sufficient basis for establishing an appropriate market rate for a service, especially as the administrator appears to assume that all ABA services are the same and he is admittedly not qualified to compare one special education service to another (see Tr. pp. 389-90, 394-95). Additionally, when asked if he could identify any other school that charges a similar rate for services as RFTS-LD, the administrator avoided the question (Tr. pp. 400-01). Accordingly, the hearing record is not clear as to the actual cost associated with providing the student's educational program during the 2022-23 school year.

¹³ The administrator testified that the parents were not billed monthly because RFTS-LD was billing the district directly as the student was entitled to services under pendency for the 2022-23 school year (Tr. pp. 385).

¹⁴ There was testimony that an employee of RFTS-LD is supposed to discuss the terms of the contract with parents; however, there is no clear indication from this hearing record that such a conversation occurred for this school year in this case (Tr. pp. 288, 292, 295, 344-45).

*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]). However, in addressing credibility determinations made in other administrative settings, the Second Circuit Court of Appeals has pointed out that an assessment of a witness' credibility should provide specific reasons for the adverse credibility determination (see Zhang v. U.S. I.N.S., 386 F.3d 66, 74 [2d Cir. 2004] [2d Cir. 2007] [noting that court looks to see if the trial judge "provided 'specific, cogent' reasons for the adverse credibility finding and whether those reasons bear a 'legitimate nexus' to the finding"]; Williams v. Bowen, 859 F.2d 255, 260–61 [2d Cir. 1988] ["A finding that the witness is not credible must nevertheless be set forth with sufficient specificity to permit intelligible plenary review of the record"]).

Accordingly, based on the above, the IHO did not err in her findings related to equitable considerations and a reduction in the rate charged for the student's tuition appears to have appropriately balanced the equities in this matter.

D. Pendency

As a final matter, in this instance, the district's argument that pendency is not warranted is without merit due the district's own actions during the pendency of this proceeding. On August 25, 2022, the district agreed to fund pendency services at RFTS-LC (see Parent Ex. D). This was based on an April 21, 2020 finding of fact, which neither party asserted was appealed (see Parent Ex. D; see also Req. for Rev. Ex. V).¹⁵ The unappealed decision found that RFTS-LC was an appropriate program for the student for the 2018-19 school year and ordered the district to fund the student's attendance at RFTS-LC for the 2018-19 school year (Req. for Rev. Ex. V at pp. 8-9). The hearing record shows that RFTS-LD was not created until the 2021-22 school year when the educational programming at RFTS-LC switched to a fee for services program (Tr. pp. 260, 378-79). Accordingly, the student's pendency placement for the pendency of this proceeding was appropriately determined to be RFTS-LC.¹⁶ It is noted that the district agreed to fund pendency services at RFTS-LC and as such, that is the student's pendency placement. While the district contends that there is no contract with RFTS-LC, and the only contract in the hearing record is between the parents and RFTS-LD and the parents, as discussed in detail above, all of the student's educational services were provided by RFTS-LC during the 2022-23 school year and RFTS-LC is

¹⁵ The parent submitted a copy of the April 21, 2020 IHO decision as a proposed exhibit with the request for review (Req. for Rev. Ex. V). The hearing record demonstrates that the parent initially proposed to enter the exhibit into the hearing record as Parent Exhibit C (Tr. pp. 34, 38). The parent withdrew the exhibit after the district objected to its entrance and since pendency was not at issue (Tr. pp. 34-36). Since, the district is now appealing the issue of pendency, I will accept the proposed exhibit into the hearing record as the exhibit is pertinent to the issue of pendency.

¹⁶ In Application of Student with a Disability, Appeal No. 23-064, this SRO found that the switch from RFTS-LC to RFTS-LD barred pendency services because by switching to the rate-based model the parent rejected the pendency placement of the tuition-based model. It is noted that this holding stands and would have been the proper rationale regarding pendency services, had the district not entered into a signed order to fund pendency services at RFTS-LC.

the student's placement for the pendency of the proceeding. Accordingly, the IHO's award of funding to RFTS-LC will not be changed on appeal.

VII. Conclusion

As discussed above, the hearing record supports the IHO's determinations that the parents' unilateral placement of the student at RFTS-LC was appropriate for the portion of the 2022-23 school year for which the parents' presented evidence of the student's attendance. In addition, the hearing record supports the IHO's reduction of the award for funding of the services delivered to the student by RFTS-LC under equitable considerations. Accordingly, the award by the IHO to fund the cost of the student's services at the specified amount to be paid to RFTS-LC is affirmed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: Albany, New York
September 11, 2023

STEVEN KROLAK
STATE REVIEW OFFICER