The University of the State of New York

The State Education Department
State Review Officer
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No. 23-151

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 Brian J. Reimels, 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 an interim decision of an impartial hearing officer (IHO I) related to the student's placement during the pendency of this proceeding, as well as from those portions of the decision of an IHO (IHO II) which found that Reach for the Stars Learning Center (RFTS-LC) was an appropriate unilateral placement for the student and awarded direct funding to Reach for the Stars Learning and Developing, LLC (RFTS-LD) for the costs of the student's private services at RFTS-LC for the 2022-23 school year.[1] Respondents (the parents) cross-appeal from those portions of IHO II's decision which denied on equitable grounds direct funding for the total costs of their son's private services provided at RFTS-LC. The appeal must be sustained in part. The cross-appeal must be dismissed.

[1] According to the hearing record, RFTS-LD worked in conjunction with RFTS-LC to provide services to students (see Parent Ex. K). For purposes of this decision, when described collectively or when not specified which entity was referenced, RFTS-LD and/or RFTS-LC will be referred to simply as RFTS. Neither RFTS-LD nor RFTS-LC has been approved by the Commissioner of Education as a school or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

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 will not be recited. Briefly, a CSE convened on April 4, 2022, to formulate the student's IEP for the 2022-23 school year, with an implementation date of July 6, 2022 (see generally Dist. Ex. 5). Finding that the student remained eligible for special education as a student with autism, the April 2022 CSE recommended a 12-month school year program in a specialized school, consisting of the following: a 6:1+1 special class for instruction in mathematics, English language arts (ELA), social studies, and sciences; five 30-minute sessions per week of individual occupational therapy (OT); five 30-minute sessions per week of individual speech-language therapy; the services of a fulltime individual health paraprofessional (noting seizures on the IEP); and four 60-minute sessions per year of group parent counseling and training (Dist. Ex. 5 at pp. 1, 15-16, 20).[2]

The parents disagreed with the recommendations contained in the April 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, on June 21, 2022, the parents notified the district of their intent to unilaterally place the student at RFTS-LC (Parent Ex. C).

A. Due Process Complaint Notice

By 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 (Parent Ex. A at p. 6). The due process complaint notice raised allegations related to the special class and related services recommendations included in the April 2022 IEP, the lack of recommendations for applied behavior analysis (ABA) or other behavior interventions, the parents participation in the special education process, and the assigned public school site (id. at pp. 6-8). As relief, the parents sought tuition reimbursement, direct and/or prospective funding of the costs of the student's attendance, provision or funding of after school instruction and services consisting of 10-14 hours per week of home-based ABA services, and appropriate transportation to and from RFTS-LC (id. at pp. 8-10).[3] The parents also invoked pendency at RFTS-LC based on a prior unappealed IHO decision (id. at pp. 1-2, 11).

B. Impartial Hearing Officer Decision

The hearing record reflects that a status conference was held on September 13, 2022 before IHO I (Tr. p. 4). The district did not appear at the status conference and a pendency hearing was scheduled (Tr. pp. 1-7). The parties appeared on October 6, 2022 for a pendency hearing before IHO I (Tr. pp. 8-18). During the pendency hearing, the district raised the issue of a change in the

[2] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

[3] During the impartial hearing, the parents explained that the student was not receiving the 10-14 hours per week of home-based ABA services during the 2022-23 school year and that the request was for prospective funding for ABA services going forward (Tr. pp. 338-39). The parents withdrew their requests for relief related to additional expenses during the impartial hearing (Tr. p. 340).

tuition model for RFTS-LC, which was confirmed by the parents (Tr. pp. 14-15). IHO I requested that the parents' attorney provide a "breakdown of the cost" of the student's attendance from July 2022 through September 2022 for the next hearing date and indicated she would prepare a pendency order (Tr. pp. 16-17). Notwithstanding the discussion during the pendency hearing, IHO I issued an interim decision on pendency dated October 6, 2022 (IHO I Interim Decision at p. 4). IHO I determined that the student's pendency services were based on an unappealed IHO decision dated January 19, 2021 (id. at p. 2; see Parent Ex. B).[4] IHO I ordered the district to "continue to fund placement at [RFTS] until a final [d]ecision and [o]rder [wa]s issued in this matter" without further addressing the change in tuition model at RFTS (IHO I Interim Decision at p. 4).

On November 2, 2022, a paralegal from the law firm representing the parents appeared before IHO I (Tr. pp. 19-22). IHO I indicated that she had expected the parents to provide evidence on this hearing date; however, the district did not appear and the paralegal was not aware that evidence was supposed to be presented (Tr. pp. 19, 20). IHO I adjourned the hearing date and stated that she wanted evidence on the next hearing date (Tr. p. 20).

On January 24, 2023, the parties reconvened for a status conference before a new IHO (IHO II) (Jan. 24, 2023 Tr. pp. 1-15).[5] During the status conference, the district again noted the change in the tuition model for RFTS, but did not indicate that the district objected to the wording of IHO I's pendency order or request that IHO II reconsider the prior pendency order (Jan. 24, 2023 Tr. pp. 4-5, 13). The parties reconvened for another status conference at which a subpoena was discussed (Feb. 2, 2023 Tr. pp. 1-15). The parties then reconvened on four dates between March 2, 2023 and April 18, 2023 for the substantive portion of the impartial hearing devoted to addressing the merits of the parents' claims (Tr. pp. 53-373).[6]

In a final decision dated June 15, 2023, IHO II found that the district failed to offer the student a FAPE for the 2022-23 school year because the management needs on the April 2022 IEP were not detailed enough to address the student's highly inappropriate and interfering behaviors,

[4] The unappealed January 19, 2021 IHO decision was admitted to the hearing record during the October 6, 2022 pendency hearing as parent exhibit B by IHO I (Tr. pp. 9, 12). The January 2021 IHO decision ordered the district to fund the student's tuition at RFTS-LC for the 2019-20 school year (Parent Ex. B at p. 9).

[5] The January 24, 2023 transcript and the February 2, 2023 transcript were not paginated consecutively. The prior transcripts for the hearings presided over by IHO I and the subsequent transcripts beginning with March 2, 2023 were paginated consecutively (see Tr. pp. 1-22, 53-373). The two transcripts that were not paginated consecutively will be cited by date and corresponding page number in this decision (Jan. 24, 2023 Tr. pp. 1-15; Feb. 2, 2023 Tr. pp. 1-15).

[6] During the March 2, 2023 hearing date, the parties offered evidence into the hearing record (Tr. pp. 70, 77). The parents' pre-marked exhibits and exhibit list were not consistent with evidence admitted during the pendency hearing before IHO I. Parents' proposed exhibit B (June 21, 2022 ten-day notice letter) was entered into the hearing record by IHO II as exhibit C (Tr. pp. 72, 77). The hearing record on appeal includes these exhibits marked with the exhibit designations originally assigned by the parents. IHO II's written clarification of the hearing record and the exhibit list attached to IHO II's decision are consistent with the discussion on the record (compare Tr. pp. 72, 77, with IHO Decision at p. 25). For purposes of this decision, the exhibits will be cited as entered, notwithstanding the incorrect exhibit designations on the face of the exhibits; as such, parents' exhibit B is the January 19, 2021 unappealed IHO decision and parents' exhibit C is a June 21, 2022 ten-day notice letter in accordance with IHO II's decision and the transcript.

the district failed to develop a behavioral intervention plan (BIP) for the student or to detail the types of classroom-wide behavioral strategies that would have addressed the student's behaviors, failed to consider home-based services for the student denying the parent participation in the process, did not meet its burden of proving that the recommended parent counseling and training was appropriate, and failed to explain how the recommendation for a paraprofessional would have ensured a safe environment for the student in light of his seizure disorder (IHO Decision at pp. 17-18).[7]

Turning to the appropriateness of the parents' unilateral placement of the student at RFTS, IHO II found that the student received instruction specifically designed to meet his unique needs, which included related services and 1:1 instruction using ABA (IHO Decision at p. 19). IHO II further found that RFTS utilized ABA methodologies and a detailed BIP to target the behaviors impeding the student's learning, such biting, hitting, and resistance to transitions and further that RFTS developed a detailed seizure intervention plan to ensure the student's safety (id.). IHO II also determined that the student made progress in activities of daily living (ADL) and that the student's maladaptive behaviors decreased as his communication skills improved (id.).

With regard to equitable considerations, IHO II found that the parents did not impede the district's ability to offer the student a FAPE and provided the district with timely ten-day written notice of their intention to unilaterally enroll the student at RFTS and seek public funding (IHO Decision at p. 20). IHO II further found that the parents had entered into a binding agreement with RFTS (id. at p. 21). However, IHO II found that RFTS's billing practices were "highly unusual and result[ed] in a total cost that shock[ed] the conscience" (id.). IHO II determined that the student's program during the 2022-23 school year was identical to the educational program delivered to the student during the 2020-21 school year at RFTS but for the addition of a paraprofessional but that the cost had tripled (id.). The IHO noted other concerns with the billing practices at RFTS, including that, despite indicating the school charged market rates, the RFTS administrators were unable to provide examples of programs that charged comparable tuition amounts, that the costs charged were many times the cost of the school's identified expenses for the services, and that RFTS billed for multiple services delivered simultaneously (id. at pp. 21-22). Overall, IHO II found that RFTS "unreasonably inflated the cost of [the s]tudent's attendance in the program" and reduced the amount of relief awarded on equitable grounds (id. at p. 22).

As relief, IHO II ordered direct payment to RFTS "in an amount equal to the cost of [the s]tudent's attendance there during the last year in which [RFTS] charged flat tuition, which . . . was roughly $130,000, plus the cost of a paraprofessional for the 41-week period described in the Enrollment Agreement" (IHO Decision at p. 22). In addition, IHO II ordered direct payment for the service of a paraprofessional in an amount not to exceed $31,775, which represented 31 hours per week for 41 weeks equal to the rate the paraprofessional was paid by RFTS (id.). With regard to the parents' request for home-based services, IHO II found that the hearing record was insufficient to determine an award, but as relief for the failure to consider home-based services, IHO II awarded funding for a comprehensive, independent neuropsychological evaluation to be conducted by an evaluator of the parents' choosing (id.). Lastly, IHO II ordered the district to

[7] Although the IHO found a denial of FAPE, the IHO noted that the April 2022 CSE was not required to identify ABA as a methodology in the student's programming and that the district met its burden to prove that the assigned school could have implemented the April 2022 IEP (IHO Decision at pp. 17-18).

provide the student with transportation to and from RFTS for the remainder of the school year (id.).

IV. Appeal for State-Level Review

The following issues presented on appeal[8] must be resolved in order to render a decision in this matter:

1. whether IHO I erred in determining that RFTS was the student's pendency placement;

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

3. whether the IHO II erred in determining that equitable considerations favored partial funding of the total costs of the student's attendance at RFTS-LC; and

4. whether the IHO erred in awarding the parent an independent neuropsychological evaluation.

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

[8] In their answer and cross-appeal, the parents alleged that the district's notice of intention to seek review was untimely. In its answer to the cross-appeal, the district concedes that the notice was two days late and argues that the delay should be excused as the parents were not prejudiced and the district timely filed the certified hearing record. In this matter, the parents sought and were granted extensions of their time to serve the answer and cross-appeal (see 8 NYCRR 279.10[e]); therefore, the parents had sufficient time to articulate their position in an answer and cross-appeal to the request for review. Further, the parents did not assert that they were unable to properly respond to the district's request for review or that they were otherwise prejudiced by the district's untimely service of the notice of intention to seek review. Accordingly, in my discretion, I will review the determinations of IHO I and IHO II, notwithstanding that the district failed to timely serve the parents with a notice of intention to seek review.

in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR

300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[9]

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

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

A. Pendency

The district appeals from IHO I's interim decision on pendency, which found that the district was required to fund the student's placement at "Reach for The Stars" (IHO I Interim Decision at p. 4). The district argues that the change from a tuition-based program at RFTS-LC to a fee-for-services model at RFTS-LD constituted a unilateral change in pendency. In addition, the district argues that the addition of a 1:1 paraprofessional to the student's program at RFTS-LD changed the student's pendency services. The parents allege that the district lacks standing to appeal IHO I's interim decision on pendency because the district did not ask to reopen pendency during the impartial hearing on the merits and should be precluded from raising the issue on appeal. The parents also argue that, with the exception of the addition of the paraprofessional, the student's

[9] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

program remained substantially similar to the one he received in prior years. The parents further contend that RFTS created invoices for direct submission to the district and that the parents were not required to prove they had paid or been billed for pendency services.

Initially, the district's appeal of IHO I's interim decision as part of the district's appeal from IHO II's final determination is permissible. While parties have the option of interposing an interlocutory appeal of an interim decision on pendency, State regulation also permits an appeal of any interim decisions in an appeal from the final determination of an IHO (8 NYCRR 279.10[d]). Accordingly, the parents' contention to the contrary is without merit.

Turning to the pendency dispute, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]); M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[10] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (T.M., 752 F.3d at 170-71; Concerned Parents and Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi

[10] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see 959 F.3d at 532-36).

D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

In this matter, IHO I determined that the student's pendency placement for the duration of this proceeding was based on a prior IHO decision dated January 19, 2021 which concerned the student's 2019-20 school year (IHO I Interim Decision at p. 2; Parent Ex. B). In the January 2021 decision, an IHO awarded the parents tuition at RFTS-LC for the 2019-20 school year totaling $128,000 (Parent Ex. B at p. 9). A review of the student's program at RFTS-LC for the 2019-20 school year, as described in the January 2019 decision, consisted of remote learning, with the IHO finding that the student required a small, structured classroom setting and intense 1:1 support throughout the school day (id. at p. 8).

In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36). The Court further stated that "what the parent cannot do is determine that the child's pendency placement would be better provided somewhere else, enroll the child in a new school, and then invoke the stay-put provision to force the school district to pay for the new school's services on a pendency basis" (id. at 534). The Court found that when a parent does so they "effectively 'seek a "veto" over school choice rather than "input"—a power the IDEA clearly does not grant them'"(id.).

As previously addressed by an SRO, the connection between RFTS-LC and RFTS-LD creates a somewhat unique situation under pendency, as the parents do not appear to have been seeking a change in the student's school placement (Application of a Student with a Disability, Appeal No. 23-064).

According to the testimony of the educational director of RFTS-LC, the student began attending RFTS-LC when he was five years old and had attended for approximately 12 years (Tr. pp. 87, 92). The parent testified that prior to the 2022-23 school year, the student received remote instruction due to COVID-19 (Parent Ex. BB at ¶ 17). At the beginning of the 2022-23 school year, the student continued to receive instruction in the home to increase his tolerance of instruction at school; however, as of September 2022, the student was fully receiving instruction at school (id.).

The parent testified that when she signed an enrollment contract, she understood that she was contracting with RFTS-LC to provide services to the student during the 2022-23 school year, and that tuition was based on monthly invoices (Parent Ex. BB at ¶ 21). The parent further testified that she understood that she was contracting for daily ABA, speech-language therapy, and OT, as well as ABA supervision and that she knew the student would have a paraprofessional (id.).

An administrator (administrator 1) for RFTS-LD testified that, since July 2021, RFTS-LC operated on a service-based model instead of charging a flat tuition rate (Parent Ex. DD at ¶¶ 1, 2). Administrator 1 further testified that RFTS-LC was the school and was tasked with hiring staff and that RFTS-LD provided the services at the school and billed for the services (Tr. p. 235). Administrator 1 explained that, in providing services, he meant that RFTS-LD provided administrative oversight, funding for the program, and billing for the program (id.). Administrator 1 also testified that RFTS-LD began operating on a fee-for-services model in July 2021 and billed separately for 1:1 ABA instruction, BCBA supervision, speech-language therapy, and other related services (Parent Ex. DD at ¶ 2). According to his testimony, parents contracted with RFTS-LD to provide the specific combination of services needed by their child and the frequency of services to be provided on a weekly basis as specified in an addendum to the enrollment contract (id.).

IHO II found, based on the testimony of witnesses from RFTS-LD, that the costs of the student's programming from July 2022 through April 20, 2023, equaled in excess of $250,000, which IHO II found "startling in light of [the e]ducation [d]irector's testimony that [the s]tudent's program in 2022-23 [wa]s identical to his program under the tuition model, except that [the s]tudent now ha[d] a paraprofessional" (IHO Decision at p. 21).

Considering the above, the change from RFTS-LC to RFTS-LD—with the exception of the addition of a 1:1 paraprofessional—appears to have been more of a shift in the way the school charged for services, inflating costs from $130,000.00 per year for the entire 2021-22 school year to $259,474.17 for a portion of the 2022-23 school year from July 2022 through April 20, 2023, rather than a change in the educational program being provided to the student (Parent Exs. DD at ¶ 11; FF at ¶ 6; GG at ¶ 6; HH at ¶ 6). However, in reviewing the Second Circuit's decision in Ventura de Paulino, one of the reasons the Court found that the district was authorized to decide how (and where) the students' pendency services were to be provided, instead of the parents, was the potential difference in the costs of educational services between schools (Ventura de Paulino, 959 F.3d at 533-35). The Court specifically noted that "[d]ramatically different costs may be presented when parents unilaterally choose to enroll their child in a new school" and that the IDEA did not to permit parents of students with disabilities to utilize the stay-put provision to frustrate State fiscal policies (id. at p. 535). Thus, when the parents contracted with RFTS-LD for a services-based program provided by RFTS-LD, at a substantially higher cost than the student's

prior program delivered by RFTS-LC, the parents rejected the pendency placement at RFTS-LC and the program provided by RFTS-LD was not required to be funded through pendency.

B. Unilateral Placement

Next the district alleges that the parents did not demonstrate that RFTS-LC was an appropriate unilateral placement. The district argues that the student's services fluctuated widely on a month-to-month basis without explanation and there was no evidence that RFTS-LC offered make up services. The district further contends that IHO II's finding of progress was contradicted by other evidence in the hearing record.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison, 773 F.3d at 386; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA,

> parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

1. Student's Needs

Although the student's needs are not in dispute, a discussion thereof provides context for the resolution of the issue on appeal regarding whether the ABA and related services provided by RFTS-LC met those needs. As previously noted, at the time of the April 2022 CSE meeting, the student had been attending RFTS-LC, in an ungraded class remotely with all special education services being provided at the student's home (Dist. Ex. 5 at p. 2).

As part of the student's mandated triennial review, a district psychoeducational evaluation of the student was conducted in March 2020 (Parent Ex. F). The evaluator noted that the student had "an educational classification of Autism" and was nonverbal (id. at p. 1). Administration of the Wechsler Individual Achievement Test-Third Edition (WIAT-III), the Wechsler Intelligence Scale for Children–Fifth Edition (WISC-V), and the Test of Nonverbal Intelligence Fourth Edition (TONI-4) were attempted but the student was unable to respond, and the formal subtests were abandoned (id. at pp. 2-3). Parent responses on the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) yielded scores at the "[l]ow [a]daptive [l]evel (percentile rank less than 1) in communication, daily living and socialization (id. at p. 2).

In a December 2021 educational progress report, the student's ABA provider at RFTS-LC stated that the student "require[d] individualized instruction to acquire, maintain, and generalize new skills, and to continuously follow a [BIP] that [wa]s effective in reducing problem behavior" (Dist. Ex. 11 at p. 1; see Parent Ex. DD at ¶ 9[a]). She indicated that the student was receiving instruction using ABA and that the individualized teaching methods employed with the student focused on "fast-paced instruction, continuous positive reinforcement, predictable routines, and visual schedules and supports, implemented throughout the day to address self-care, educational, social, and behavioral goals" (Dist. Ex. 11 at p. 1). Academically, the provider indicated that the student continued to work on prevocational skills functional to the home setting such as folding and putting away clothing correctly, cleaning a table, and attending to a task without distractibility (id. at p. 3). The ABA provider also noted that the student was working on tasks "such as sorting, matching a pattern, puzzles and other tasks that ha[d] a beginning and end" and on typing his name and identifying his name in print (id.). The April 2022 IEP stated that the student "d[id] not know letters of the alphabet" but was able to type his name when provided with a visual model (Dist. Ex. 5 at p. 2). The IEP indicated that the student "[would] be taught the letters of the alphabet" and "to identify the letters in his name" (id.). Further, the IEP proposed that the student would improve his identification of letter sounds, blend initial sounds, and read basic sight words (id.). Although the IEP did not describe the student's then-current functioning in math, it indicated that

he would "learn to identify numbers 1-20 and w[ould] rote count with 1:1 correspondence up to the number 20" (id.). In addition, the student would use manipulatives to add single digits (id.).

With regard to the student's speech-language development, the December 2021 educational progress report indicated that the student was a "multimodal communicator, using verbal, nonverbal, and [a] S[peech] G[enerating] D[evice] with familiar and nonfamiliar communication partners" (Dist. Ex. 11 at p. 2). The report reflected that the student most often used nonverbal gestures to initiate communication and needed reminders to use his speech generating device but that he did use his device more frequently for preferred items such as food, drink, or to use the bathroom (id.). According to the educational progress report, the student was working on "I want + action + label" and was expanding the labels he was pairing with actions, (id.). The report indicated that the student was working on using the "quick-fire buttons" on his speech generating device homepage "for urgent needs and for functional communication, especially related to behavior" (id.). The report noted that the student had demonstrated "emerging progress" in his ability to identify common objects, household rooms, and novel colors (id.). In addition, the report indicated that the student's ability to follow one- and two-step directions during highly structured activities was emerging, although the student was hesitant to initiate movement beyond his immediate environment, and therefore instruction needed to be for actions or objects "within arm's length" (id.). According to the report, the student benefited from "moderate multimodal support such as modeling, verbal, and gestural cues to complete tasks" and required "consistent indirect verbal cueing" to greet communication partners (id.).

Turning to the student's social development, the December 2021 educational progress report indicated that the student had a history of non-compliant behaviors, including vocal protesting, crying, self-injurious behaviors, aggression toward others, and refusal to move or comply when demands were placed on him (Dist. Ex. 11 at p. 1). The report indicated that the main function of the student's behavior was to escape demands and the student's non-compliant behaviors occurred most frequently during transitions or when asked to perform a task, such as ADL skills, independently (id. at pp. 1-2). When asked to transition, the student would, at times, refuse to stand; the report characterized this as the student's "most effective escape behavior because no physical prompting c[ould] be applied for compliance due to his size" (id.). The educational progress report identified some supports used to reduce these behaviors, such as a visual schedule which reminded the student that a preferred activity was coming after an unpreferred activity (id. at p. 2). The educational progress report also indicated that the student exhibited "OCD-like" behaviors and that changes to his routine or environment could cause the student to tantrum and these tantrums could last "anywhere from [five] minutes to over an hour" (id.). The educational progress report indicated that the student used a token board to gage the end of an unpreferred work activity and had been able to extend his variable rate of reinforcement (id.).

The December 2021 educational progress report detailed the student's adaptive behavior and the student's continued work toward "achieving the highest levels of independence" (Dist. Ex. 11 at p. 3). The report indicated that the student was dependent on prompts and that teaching tasks in chains was a challenge as the student often stopped mid-task to request assistance or refused to continue (id.). The student worked on dressing, washing, brushing teeth, and other hygiene

routines with varying degrees of prompting and supervision (id.). According to the educational progress report, the student's "community" goals included getting dressed and leaving in a reasonable time, walking around his neighborhood, and tolerating flexibility with regard to the route and to unexpected noises during the walks (id. at p. 4). The student was also working on leisure goals (id.).

In terms of the student's physical development, in a December 2021 OT progress report, the student's occupational therapist indicated that the student continued to present with "significant deficits in the area of sensory processing, gross motor, fine motor, and visual-motor skills which impact[ed] his ability to participate in academic related tasks and complete his daily routines" (Dist. Ex. 10 at p. 3). The OT progress report noted that the student demonstrated steady progress toward his motor planning and endurance goals but that he was often resistant to "performing exercises and gross motor movements and often refuse[d] to stand up from his chair in order to participate" (id. at p. 1). The OT progress report also indicated that the student required tactile prompts or maximum assistance to complete some exercises from in person staff and he struggled to attend exercise videos on his monitor (id.). According to the OT progress report, the student demonstrated moderate progress in his visual perceptual and cognitive perceptual skills and significant gains in typing his name on a computer (id. at p. 2). The report indicated that the student could type his name with 70-85 percent accuracy when a visual model was on the screen (id. at p. 2). Further, the report noted that the student needed minimal to moderate assistance to perform ADLs such as folding clothes, tooth brushing, or cleaning his workstation (id. at pp. 2-3).

In summary, the student was functioning at a "[m]oderately impaired level of intelligence," was unable to participate in formal academic testing, exhibited "severe" expressive and receptive language delays, and was nonverbal (Parent Ex. F at p. 1). The student was ambulatory, demonstrated low adaptive functioning skills and had a history of non-compliant behaviors (Dist. Ex. 11). The student was working on "self-care and daily routines" as the "dominant focus of his ABA sessions while in the home setting" in a 1:1 or 2:1 learning setting (id. at p. 1).

2. Reach for the Stars-Learning Center

A program description, entered into evidence, stated that RFTS-LC employed "The Integrated Model" which used "the best available teaching techniques, including Applied Behavior Analysis, speech and language therapy, occupational therapy, sensory integration training, music therapy, and play therapy" and that all therapy at the program was provided to the students "on an intensive one to one basis" (Parent Ex. L). At the impartial hearing, the educational director for RFTS-LC (director) stated that the students enrolled at RFTS-LC had received diagnoses of autism spectrum disorder, and the program's criteria for enrollment included students "who would benefit number one, primarily from 1:1 teaching, because that [wa]s the model of [the] school" (Tr. pp. 87-88). According to the director, the school also considered whether ABA would be effective for the student, whether there was space available, and whether there was "another student that they . . . would benefit from" (Tr. p. 88). The director indicated that the school had approximately 29 students, who were broken down into six classrooms with five students per classroom (Tr. pp. 88-89). With regard to staffing, the director testified that, in each classroom of five students, there

would be a lead teacher, who was someone who had either completed their board certified behavior analyst (BCBA) coursework or who was sitting for the BCBA exam (Tr. p. 89). There would also be "four additional teachers that ha[d] some sort of ABA experience behind them, some schooling behind them, either bachelor[']s and going towards a master's degree" (Tr. p. 89). The director indicated that there was a speech-language pathologist in every classroom and an occupational therapist, who, although not directly in the classroom, worked with students in the classroom (id.). She stated that there was an assistant teacher in some of the classrooms as well, which allowed for "co treats" and "training on the spot" (id.). The director indicated that each student had their own "individualized curriculum that data [wa]s taken on daily, or actually session by session by each individual provider" and that the school used an online database program for data collection (Tr. p. 90).

Turning more specifically to the student in this case, the educational director testified that the student had been enrolled at RFTS-LC since "about [five] years old" and at the beginning of the 2022-23 school year (July 2022) his greatest needs were "[b]ehavioral, transitional, communicative, receptive" (Tr. p. 92). She explained that due to COVID the student had been receiving remote instruction at his home for two years and he demonstrated great difficulty transitioning back to in-person instruction (Tr. p. 93). The director stated that "being able to even leave his house was a struggle. . . to come to another environment, with new people, with new sounds, with the unexpected" (Tr. p. 93). She noted that during the transition, the student exhibited rigid, obsessive-compulsive, aggressive or self-injurious behaviors and he was slowly transitioned back to in-person instruction by September 2022 (Tr. pp. 93-95). The director testified that the school increased the student's in-person instruction at school slowly and "systematically" so as to assist him with his organization and reduce his anxiety level as staff "[did not] want those high levels of anxiety to bring on seizures" (Tr. p. 95).

The hearing record includes a copy of the student's weekly schedule which indicated, in addition to an individualized special education curriculum, the student received related services of speech-language therapy, OT, and the services of a 1:1 paraprofessional (Parent. Ex. O). The student's class schedule indicated that the student's school day began at 8:30 a.m. and ended at 3:00 p.m. except on Fridays, when his day ended at 1:30 p.m. (id.). The student's day was scheduled in 45-minute periods (id.) The majority of the periods were designated as "ABA," with no further distinction, and the remaining periods were designated as"[s]upervision," "[s]peech," and "OT (id.).[11]

The hearing record includes an education plan for the student developed by RFTS-LC for the 2022-23 school year (Parent Ex. U). The educational plan included goals across eight domains: language and communication, ADL skills, leisure skills, health and wellness, pre-vocational skills, community and safety, group skills and behavior skills (id. at pp. 2-10). The language and communication goals targeted the student's receptive language, specifically his ability to follow

[11] In some instances, the schedule indicated that ABA and supervision were provided at the same time (Parent Ex. O).

directions and identify common objects, colors, rooms by their function, places in his community, and clean versus soiled items in his environment (id. at pp. 1-2). Expressive language goals included in the RFTS-LC educational plan focused on improving the student's ability to answer questions, manding skills, use of his speech generating device, and labeling skills (id. at pp. 3-4). The educational plan also included pragmatic language goals designed to improve the student's pragmatic language skills, specifically his ability to respond to greetings from adults and gain the attention of others (id. at p. 5). The educational plan also included daily living goals that addressed the student's dressing skills, ability to follow three-step directions related to vocational skills independence during mealtime preparation and clean up, and independence with grooming and hygiene (id. at pp. 5-6, 8). To improve the student's leisure skills, the educational plan included goals related to propelling a standing scooter, dribbling a basketball around obstacles, catching a baseball with a mitt, dribbling and shooting a soccer ball, copying a five-step Lego structure, increasing independence playing iPad games, and,, completing a five-step craft with visual directives (id. at p. 7). With regard to health and wellness, the educational plan also included exercise goals; with regard to pre-vocational skills the educational plan targeted the student's ability to fold and sort clothes, sort and organize food, and place books on a shelf (id. at pp. 7-9). The educational plan included community and safety goals that addressed the student's need to improve his navigation in the community, with a focus on reducing adverse reactions to noise (id. at pp. 8-9). Lastly, the educational plan contained goals that targeted the student's ability to attend during group instruction and transition appropriately and goals aimed at decreasing the student's maladaptive behaviors including aggression and self-injurious behaviors (id. at pp. 10-11).

The impartial hearing record includes a document that described how to set up the student's sessions using a daily visual schedule, use of the student's personal binder with a session schedule with staff photos and activities, and how to review reinforcer choices on a PowerPoint choice board (Parent Ex. R). The document also identified a work protocol and target behavior (id.). Also included in the hearing record was a seizure protocol specific to the student with step-by-step procedures to follow when he presented with a seizure (Parent Ex. S). In addition, RFTS-LC developed a BIP for the student which indicated the need for his 1:1 paraprofessional to be present with him at all times, included a description of his targeted self-injurious behaviors, identified reinforcers, provided a "proactive plan" and directions on how to implement it during different activities, and listed "reactive strategies" such as redirection, nonverbal demands, and planned ignoring to be used in response to specific student behaviors (Parent Ex. T). While the behavior plan addressed the student's self-injurious behavior and refusal to get up or walk, it did not address the student's aggression toward others (id.).

RFTS-LC's focus on teaching the student functional skills while reducing his maladaptive behaviors, coupled with its plan to provide the student with related services of speech-language therapy and OT, show that the parent's unilateral placement designed an educational plan that would provide the student with instruction specially designed to meet his educational needs.

3. Delivery of 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). However, a finding of progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

A review of the evidence in the hearing record shows that the student made progress at RFTS-LC during the 2022-23 school year. Specifically, the educational director testified that the student had transitioned to the school building, noting that the student initially had great difficulty getting out of his parent's vehicle when he had arrived at school and was now asking to take off his seatbelt when he arrived (Tr. pp. 108-09). She also noted that the student was able to transition more quickly between activities and the student was more independent with his ADLs (id.). According to the director, the student had improved his receptive language and built his vocabulary and over time used his speech generating device more "frequently and fluently at school . . . to communicate his needs and wants" (Tr. pp. 110-11). The director also noted that the student's behaviors were still present but reduced, and his ability to tolerate peers near him and within the classroom had increased (Tr. p. 111). The parent indicated that she had seen an increase in the student's motivation and activity, and also noted progress in his expression of "wants and needs more specifically[,] as well as things he [did] not want, resulting in a decrease of some meltdown behaviors" (Parent Ex. BB at ¶ 19).

A 2022-23 educational curriculum report showed that the student had increased his independence at mealtime, improved his grooming and hygiene skills, and had increased his group attention skills (Parent Ex. U at pp. 6, 8, 10). The speech-language portion of the report reflected that the student had made progress in receptive and expressive language skills, including his ability to identify common objects and request items and he had mastered using his device to reject items (id. at pp. 2-5). Although she gave few specific examples, the student's occupational therapist reported that the student was demonstrating steady progress toward his sensory modulation and regulations skills, functional performance and independence in health and wellness and leisure activities,, independence in vocational activities, and participation and independence in ADL skills (Parent Ex. Z at p. 2). The occupational therapist noted that certain skills would not be addressed until the second half of the school year due to the student's frequent absences (id. at pp. 2-4). However, she also noted that the student was working on dribbling a soccer and basketball, learning to hang shirts and sort clothing items by size, and learning to organize food items on a shelf with some prompting, and that he could place books on a shelf without prompting (id. at pp.

3-4). The student's speech therapist reported that, expressively, the student continued to expand his lexicon to include verbs, nouns, and varied requests; receptively, the student's language had grown to include new linguistic concepts and following directions; and he continued to develop independence when using his speech generating device strategically (Parent Ex. W at p. 3)

A review of the hearing record supports a finding that the student was making progress at RFTS-LC during the 2022-23 school year. Therefore, while the district is correct that review of the evidence shows that the student may not have received all of the related services on a monthly basis as envisioned by the RFTS-LC schedule (compare Parent Ex. O, with Parent Exs. EE-HH), it also shows that the program addressed the student's needs typically addressed by related services through its ABA programming (compare Parent Ex. U, with Parent Exs. W-AA), such that the reduction of related service sessions did not render the RFTS-LC program inappropriate. Rather, the evidence supports IHO II's finding that "the weight of the evidence establishe[d] that the [s]tudent's individual special education needs [we]re addressed by [RFTS-LC] and that the instruction offered [wa]s 'reasonably calculated to enable the child to receive educational benefits'" (IHO Decision at p. 19).

In addition, as a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS-LC—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Carter, 510 U.S. at 13-14). Here, RFTS-LC developed an educational plan for the student with goals in the areas of language and communication, ADL, leisure skills, health and wellness, pre-vocational skills, community and safety, group skills, and behavior skills; additionally, RFTS-LC produced the student's schedule and a services plan appended to the enrollment contract, as well as a work protocol and a seizure protocol, and a BIP for the student (see Parent Exs. K at p. 6; O; R-U; X; AA). Furthermore, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

Based on the above, while a private placement that provided related services which fluctuated dramatically or were altogether missing for prolonged periods of time without adequate explanation might contribute to a finding of inappropriateness, the hearing record in this case, provides detailed testimony from the educational director, and supporting documents, describing how the educational program offered by RFTS-LC operated on a day-to-day basis with respect to providing the student with ABA instruction, related services, and multiple levels of support from a variety of providers, including supervisory support utilized continually to assess the student's progress, current functioning, and any needed adjustments to the student's program. Moreover, the student demonstrated progress while attending RFTS-LC. As a result, the hearing record supports IHO II's finding that the weight of the evidence established that the student received

specially designed instruction to address his special education needs at RFTS-LC during the 2022-23 school year.

C. Equitable Considerations

The district appeals IHO II's finding that the parents incurred a financial obligation to RFTS-LC and that the parents' contract with RFTS-LD contained enough essential terms to be enforceable. The district further appeals IHO II's partial award of tuition funding, arguing that IHO II should have denied all funding based on the excessive and unreasonable cost of the student's services provided by RFTS-LD and received at RFTS-LC. The parents cross-appeal from IHO II's partial award of tuition funding and assert that IHO II should have awarded full funding for the cost of the student's attendance at RFTS-LC.

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

The hearing record reflects that IHO II conducted a thorough review of the equitable considerations in this matter. IHO II correctly determined that the parents cooperated with the district, did nothing to impede the district in developing an IEP for the student for the 2022-23 school year, and provided timely notice of their intent to unilaterally enroll the student at RFTS-LC (IHO Decision at p. 20). IHO II further determined correctly that the parents had incurred a financial obligation to RFTS-LD by enrolling the student at RFTS-LC because the enrollment agreement identified sufficient essential terms (id.; see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]). The hearing record also includes service affidavits and session logs outlining what services were delivered to the student and the amount purportedly due for those services under the contract from September 2022 through April 20, 2023, further demonstrating the parent's financial obligation (Parent Exs. M; Q; EE-HH).

However, although the hearing record does not provide sufficient basis for finding that the contract between the parent and RFTS-LC was enforceable, IHO II's finding that the cost of the services provided to the student were excessive was also based on information contained within the hearing record and warranted a reduction in tuition funding (IHO Decision at pp. 21-22).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

As indicated above, IHO II found, based on the testimony of witnesses from RFTS-LD, that the costs of the student's programming from July 2022 through April 20, 2023, equaled in excess of $250,000, which IHO II found "startling in light of [the e]ducation [d]irector's testimony that [the s]tudent's program in 2022-23 [wa]s identical to his program under the tuition model, except that [the s]tudent now ha[d] a paraprofessional" (IHO Decision at p. 21). The IHO also noted other concerns with the billing practices at RFTS, including that the RFTS administrators could not provide examples of programs that charged comparable amounts of tuition, the costs charged were many times the cost the administrators identified for the RFTS-LC staff, and RFTS-LD billed for multiple services delivered simultaneously (id. at pp. 21-22).

In reviewing the IHO's findings and the hearing record, the increase in the tuition amount from when RFTS-LC operated on a tuition-based model to the fee-for-services model utilized by RFTS-LD was a sufficient basis for the IHO to call into question the propriety of the RFTS-LD billing practices and the excessiveness of the costs of the student's programming. For example, an administrator (administrator 2) was called to testify about the relationship between RFTS-LC and RFTS-LD billing practices (Tr. pp. 276-77, 280-81). Administrator 2 testified that RFTS-LD was "running the operation RFTS as the, as the general name" (Tr. p. 190). He further explained that RFTS-LC was running at a deficit when it was using a tuition-based model and that the school had to fundraise for the difference (Tr. pp. 308-09). He testified that RFTS-LD began funding the operations of RFTS-LC and RFTS-LC continued to operate as it had been operating previously (Tr. p. 317). He then indicated RFTS-LC was more like "an employment agency or a staffing agency for [RFTS-]LD" (Tr. p. 318). With respect to money paid by the families of students attending RFTS-LC, administrator 2 testified that the school was set up so that "families would pay what they're able to towards tuition. So they always worked with the families on their financial obligations to the school" (Tr. p. 331).

Administrator 2 testified that the rates charged by RFTS-LD were "market rates" (Tr. pp. 291-92). During cross-examination, the witness explained that RFTS-LD determined market rates by researching "what . . . similar programs advertised as ads" and he identified one agency that charged a similar rate for ABA supervision noting that there were other programs (Tr. pp. 303-04). He then indicated the "market rates" meant "other comparable programs that the Department of Education is funding and paying for are paying those rates or higher than them, for programs that are much less severe behavioral situations than in our program" (Tr. p. 305). When the IHO

asked the witness if he was aware of any other similar programs that might charge between similar rates to the maximum rate the student's program at RFTS-LD could cost, he gave one school as an example (Tr. pp. 325-26). However, he later testified there are no comparable schools because RFTS-LC was unique (Tr. p. 328).

Review of IHO II's decision shows that IHO II considered the testimony of administrator 2 and found that the administrator's testimony suggested that RFTS-LD was charging rates higher than what the market would bear and that overall, it shows that RFTS-LD "unreasonably inflated the cost of the Student's attendance" (IHO Decision at pp. 21-22). In particular, IHO II noted the testimony of administrator 2 that indicated the school was set up so that families only paid the cost of tuition to the extent that they were able (id. at p. 22); such an expectation supports the IHO's findings that the costs associated with the student's education as chargeable to the district were excessive or collusive. Additionally, the parents do not directly challenge the IHO's specific findings on these points; rather, in cross-appealing from the IHO's reasoned decision, the parents do not point to any factual errors on the IHO's part and only contend that the district failed to present any alternative rates that would have been appropriate for the program delivered by RFTS-LD at RFTS-LC (Req. for Rev. ¶ 21).[12] However, in this instance, the IHO identified an alternative rate as the rate charged by RFTS-LC during the 2020-21 school year, the last year RFTS-LC charged tuition as a flat rate instead of as a fee-for-services program (see IHO Decision at pp. 13, 21-22). Accordingly, it appears that the IHO appropriately balanced equitable considerations in reducing the costs of the student's programming chargeable to the district to what she determined was a reasonable rate based on the provision of the same program to the student in the past.

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

[12] The parents appeal from the IHO II's finding generally and do not separate IHO II's findings that a reasonable cost for the student's overall program at RFTS-LC should have been $130,000 for the 2022-23 school year from IHO II's finding that a reasonable cost for the student's the 1:1 aide should have been an amount not to exceed $31,775 for the 2022-23 school year. Although there could have been a different argument made as IHO II used different methods for calculating the costs of those two parts of the student's programming, there is no reason to go into further detail, having found no basis to disturb the IHO's determination that RFTS-LD unreasonably inflated the costs of its tuition and thus warranted a reduction in the costs of the services awarded.

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-LC chose to deliver services, and particularly ABA services, to the student, could also warrant a reduction based on equitable considerations.

Based on the foregoing equitable factors related to excessiveness of the services delivered and the inflated cost of the tuition and billing practices employed by RFTS-LD, I find no basis to disturb IHO II's reduction in the amount of funding awarded.

D. Relief-Independent Neuropsychological Evaluation

Finally, the district also appeals IHO II's award of an independent neuropsychological evaluation, as the parents never requested such relief, and requests that the order to reconvene the CSE also be annulled.

Specifically, after finding that the hearing record was insufficient to determine the need for home-based ABA services, IHO II ordered the district to fund a comprehensive neuropsychological evaluation by a provider of the parents' choosing at a market rate and to convene the CSE within 30 days of receipt of the completed evaluation report to review the results and to consider whether the student requires home-based services in addition to school-based services (IHO Decision at p. 24).

An IHO generally has broad authority to fashion appropriate equitable relief (see, e.g., Mr. and Mrs. A v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 422-23, 427-30 [S.D.N.Y. 2011]; see Forest Grove v. T.A., 129 S.Ct. 2484 [2009]); however, an IHO may not use this authority to order relief to remedy an issue that was not raised. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Moreover, it is essential that an IHO disclose his or her intention to reach an issue which the parties have not raised as a matter of basic fairness and due process of law (Application of a Child with a Handicapping Condition, Appeal No. 91-40; see John M. v. Bd. of Educ., 502 F.3d 708 [7th Cir. 2007]).

Review of the parents' July 6, 2022 due process complaint notice reveals that the parents did not request an independent neuropsychological evaluation and further that the parents have not disagreed with any district evaluations (see generally Parent Ex. A).

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). As the hearing record does not indicate that the parents expressed disagreement with any evaluation conducted by the district, the parents were not entitled to an IEE at public expense.

Based on the foregoing, as there is no evidence that IHO II's award addressed issues raised in the present matter and the parents have not established an entitlement to an IEE at public expense; IHO II's award of an independent neuropsychological evaluation must be vacated.

VII. Conclusion

The evidence in the hearing record supports IHO II's finding that the services delivered to the student at RFTS-LC constituted an appropriate unilateral placement and that equitable considerations supported a reduction in the amount of tuition funding awarded. In addition, IHO II erred in awarding an independent neuropsychological evaluation to the parents. Finally, with respect to the student's pendency program, IHO I's finding that the student's pendency program was the program provided by RFTS-LD is reversed.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that IHO I's decision, dated October 6, 2022, is modified by reversing that portion which determined the services-based program provided by RFTS-LD constituted the student's placement for the pendency of this proceeding; and

IT IS FURTHER ORDERED that IHO II's decision dated June 15, 2023, is modified by reversing those portions which awarded the parents an independent neuropsychological evaluation and ordered the district's CSE to convene to consider the results.

Dated: **Albany, New York**
September 21, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER