



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-215

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the costs of the student's tuition at Reach for the Stars Learning Center (RFTS-LC) during the 2022-23 school year.¹ The appeal must be dismissed.

¹ According to the hearing record, RFTS-LC worked in conjunction with Reach for the Stars Learning and Developing, LLC (RFTS-LD) to provide services to students (see Parent Ex. K at p. 1). Evidence in the hearing record reflects that the owners of RFTS-LD owned another agency—Special Edge Support—that also provides special education services (see Tr. p. 168). In addition, the evidence reflects that while RFTS-LC had operated for approximately two decades, RFTS-LD "took over" RFTS-LC in 2021 (see Tr. p. 159). 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[a]). 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

Given the limited issues raised on appeal, a full recitation of the student's educational history is not necessary. Briefly, however, the student in this matter attended RFTS-LC during the 2021-22 school year in a classroom with "two other students of similar ages with a one-to-one teacher to student ratio with a focus on applied behavior analysis (ABA)" (Parent Ex. U at p. 1).² In addition, the student received daily, individual speech-language therapy and daily, individual occupational therapy (OT) at RFTS-LC during the 2021-22 school year (*id.*).³ On June 16, 2022, a CSE convened to conduct the student's annual review and developed an IEP for the student for the 2022-23 school year (*see generally* Parent Ex. C).⁴ In a letter dated June 21, 2022, the parent advised the district of her intentions to unilaterally place the student at RFTS-LC in a 12-month school year program for the 2022-23 school year and to seek funding for the costs of the student's program from the district (*see* Parent Ex. B at pp. 1-2; *see also* Parent Ex. F at pp. 1-2 [reflecting concerns with the assigned public school site]).

In a due process complaint notice dated August 5, 2022, the parent 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 at p. 1). The parent indicated that the student's placement at RFTS-LC was appropriate and that equitable considerations did not bar an award of direct or prospective funding for the costs of the student's tuition at RFTS-LC for the 2022-23 school year (*id.* at p. 7). As relief, the parent sought an order directing the district to fund the costs of the student's tuition, either directly or prospectively, at RFTS-LC (*id.*).

On December 22, 2022, the parties proceeded to an impartial hearing, which concluded on June 20, 2023, after six total days of proceedings (*see* Tr. pp. 1-301). In a decision dated September 1, 2023, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year, the parent failed to sustain her burden to establish that RFTS-LC was an appropriate unilateral placement for the student, and equitable considerations did not weigh in favor of the parent's requested relief (*see* IHO Decision at pp. 8-29).⁵ As a result, the IHO denied the parent's request for tuition funding at RFTS-LC for the 2022-23 school year (*id.* at p. 31).

In finding that the parent failed to sustain her burden to establish that RFTS-LC was an appropriate unilateral placement for the student, the IHO initially reviewed evidence of the student's daily schedule at RFTS-LC, which demonstrated that the student "received services Monday through Thursday, from 8:30 a.m. [through] 3:00 p.m. and on Friday from 8:30 a.m.

² Evidence reflects that the student began attending RFTS-LC during the 2021-22 school year on or about November 2021 (*see* Parent Ex. S at p. 1).

³ Prior to attending RFTS-LC, the student had attended a different program where he had also received ABA services (*see* Parent Ex. U at p. 1).

⁴ The student's eligibility for special education and related services as a student with autism is not in dispute (*see* 34 CFR 300.8[a][1]; 8 NYCRR 200.1[zz][1]).

⁵ The district did not defend the CSE's recommendations in the June 2022 IEP for the 2022-23 school year and did not present any testimonial or documentary evidence at the impartial hearing (*see* IHO Decision at pp. 10, 12).

through 1:30 p.m." (IHO Decision at p. 13). The IHO noted that, according to the schedule, the student received "ABA in the afternoons" on Monday through Thursday from 3:00 p.m. to 5:00 p.m., and the education director at RFTS-LC (director) had testified that the "afternoon program [wa]s 'optional' depending upon whether the parents request[ed] the after-school program" (*id.*). In addition, the IHO noted that the student received services from 11 different providers during the week, and the sessions were delivered in 45-minute periods (*id.*). The IHO described the student's classroom at RFTS-LC as consisting of "four peers," with a "teacher for each student in addition to a speech therapist working in the classroom throughout the day" (*id.*). In addition, the IHO indicated that the student received related services of OT, speech-language therapy, and music therapy (*id.*). Reviewing the student's educational plan developed by RFTS-LC, the IHO found that the student was described therein as a "verbal communicator with a large vocabulary of nouns, verbs, adjectives, places, adverbs, location/direction, quantity, time concepts and prepositions" (*id.* at pp. 13-14).⁶ The IHO further noted that the student's educational plan reflected that he had "well developed" grammar and "regularly incorporate[d] adjectives, tenses, possession, plurals, most pronouns and adverbs into his language"; moreover, the educational plan indicated that the student could "express a variety of communicative intents, and his articulation [wa]s judged to be intelligible to unfamiliar listeners" (*id.* at p. 14). As noted by the IHO, the student's behaviors targeted at RFTS "include[d] eloping, aggression (severe), self-injurious behaviors (mild), and breaks taken" (*id.*).

To describe the student's educational program at RFTS-LC, the director testified at the impartial hearing (*see* IHO Decision at p. 14; Tr. pp. 180-251). As noted by the IHO, the director explained that she supervised both the staff and students at RFTS-LC, which included duties such as evaluating new students to determine their needs and to determine staffing to pair with the students (IHO Decision at p. 14). According to the director, after completing the evaluation process, an educational plan "or curriculum plan with goals" would be developed (*id.*). The IHO recounted the director's testimony that she supervised "all classrooms and in that role, she ma[de] sure the student's goals [we]re being worked on," and relatedly, she ensured that "all lessons that [we]re created [we]re put into their database system" (*id.*). According to the IHO, the director testified that she also reviewed "each student's data to make sure that learning [wa]s occurring" (*id.*). With respect to her supervision of staff, the director indicated that she was responsible for "hiring and staff training," and she conducted "professional evaluations of staff and parent training" (*id.*).

The director described RFTS-LC as primarily serving students on the "autism spectrum" and as using ABA as a "methodology for teaching all curriculums" (IHO Decision at p. 14). The IHO noted that, according to the director, each classroom included staff of a "lead teacher, a speech

⁶ Although the IHO refers to the RFTS-LC educational plan as an "IEP," an IEP, as used in this decision, is "a written statement for each child with a disability that is developed, reviewed, and revised in accordance" with the process established under the IDEA (20 U.S.C. § 1414[d][1][A][1]). The educational plan developed by RFTS-LC does not contain the same information as required for a district in developing an IEP; however, as a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS—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). Accordingly, in order to avoid confusion, the RFTS-LC document will be referred to herein as an educational plan, rather than as an IEP.

pathologist and an occupational therapist that may push in or pull-out of the classroom" (*id.* at pp. 14-15). In addition, the IHO observed that the director testified that "each student ha[d] a one-to-one instructor at all times that provide[d] instruction through the ABA" (*id.* at p. 15). She also testified that each student's "program [wa]s also supervised by a Board-Certified-Behavior-Analyst ('BCBA')" (*id.*).

Next, the IHO reviewed the director's testimony about the student and his program at RFTS-LC (*see* IHO Decision at pp. 15-16). Based on the director's testimony, the IHO found that the student was an "active learner" with a steady rate of acquisition (*id.* at p. 15). With regard to his ABA instruction, the director explained that "[e]ach lesson [wa]s broken down to the core skills" and targeted "more of the skill being taught with the antecedent" (*id.*). The director also testified that the student was expected to "understand the language being used, the behavior expected and the response he should be providing" (*id.*). The IHO reported that the director further explained that the "ABA provider t[ought] it by finding what the student's highest level of reinforcement [was]—what [wa]s motivating the student to learn" (*id.*). According to the director, the student made "'very significant progress' in some areas and [his progress] was slow and steady in others" (*id.* at p. 16).

With regard to staff at RFTS-LC, the IHO noted the director's testimony that the "'classroom lead' who supervise[d] the student's instruction [wa]s a 'behavior analyst candidate' not a BCBA" (IHO Decision at p. 16). As further noted by the IHO, the director was unsure whether "any of [the student's] ABA providers had certification to teach" but noted that all of the student's related services' providers were "licensed in their respective fields" (*id.*). As to the decisions to "admit students," the director explained that those decisions were exclusive to the "executive administrators who [we]re employed by RFTS-LC," and moreover, no one from "RFTS-LD" was involved with the "admissions decisions" or with respect to decisions concerning the "frequency of sessions [the student] [wa]s to have in the various disciplines" (*id.*).

In addition to reviewing testimonial evidence, the IHO also reviewed some of the parent's documentary evidence entered into the hearing record in support of her claims (*see* IHO Decision at pp. 16-17). First, the IHO examined a "skills assessment" record, which reflected the skills the student worked on during the 2021-22 school year (*id.* at p. 16, citing Parent Ex. S). Notably, the IHO found that the hearing record did not include a skills assessment record for the 2022-23 school year to "determine whether there was progress from what the student was able to do during the prior school year or to demonstrate what areas were being worked on during the 2022/2023 school year" (IHO Decision at pp. 16-17).

Next, the IHO examined the student's educational plan from RFTS-LC for the 2022-23 school year and the student's progress reported therein (*see* IHO Decision at p. 17, citing Parent Ex. T). The IHO indicated that, according to the educational plan, the student needed to "continuously follow a behavior intervention plan [BIP] to reduce problem behavior"; he had "made progress"; and the student responded "well to systematic teaching with positive reinforcement to learn new skills and [had] broken down his programs into short attainable steps" (IHO Decision at p. 17). In addition, the IHO found that the evidence reflected that the student's "aggressive behavior was increasing throughout the day," and he "relied heavily on teacher support, schedules and verbal cues" (*id.*). When exhibiting "aggressive behaviors," the IHO noted that the student would "drop to the floor in school and in the community and it bec[a]me[] more

difficult for him to get regulated" (id.). According to the student's "mid-year report," the student had a "difficult time remaining in his seat and staying on task to complete work given" due to his "maladaptive behaviors," which included "hitting, swiping and crying" (id.). The IHO further noted that, based on the "report," staff would begin to "work on remaining on topic for up to [four] exchanges" when the student's "'behaviors minimize[d]'" (id.). However, the IHO indicated that the "report" did not include "anything past March 2023, so it [wa]s not possible to determine if the student's progress improved" and moreover, "[m]any of the goals included in the [educational plan] state[d] that they were 'not yet targeted'" (id.). With respect to the student's OT and speech-language therapy, the IHO found that the progress reports "demonstrate[d] the student was making progress" (id., citing Parent Exs. X-Z).

After reviewing this evidence, the IHO noted that none of the student's providers testified at the impartial hearing (see IHO Decision at p. 17). In addition, the IHO indicated that "[n]one" of the student's providers "appeared to be trained teachers," and although the providers delivered ABA to the student, the evidence "demonstrate[d] that the student's behavior continued to interfere with his learning, to an extent that made accessing his education limited" (id.). According to the IHO, the hearing record lacked evidence "demonstrat[ing] that the student made significant progress during the 2022/2023 school year" and was devoid of evidence about the student's program post-dating March 2023 to the conclusion of the school year (id. at pp. 17-18).

Overall, the IHO concluded that the parent failed to establish that the student's unilateral placement at RFTS-LC was appropriate to meet his needs during the 2022-23 school year (see IHO Decision at p. 18). The IHO noted, in particular, that the "confusion over the two entities RFTS-LC and RFTS-LD" affected the parent's "ability to demonstrate that the student was receiving an appropriate education at RFTS-LC" (id.). Significantly, the IHO found that the parent "failed to demonstrate that the program for which they were seeking tuition funding was the same program where the student was being educated" (id.). The IHO also concluded that, "[u]nder the circumstances of this case," equitable considerations did not weigh in favor of the parent's requested relief, noting that the "vague explanation of the arrangement for services, the exorbitant cost for services and inconsistencies in the presentation of evidence le[d] to a conclusion that the parent[was] not entitled to tuition funding for the student's education during the 2022/2023 school year" (id.).

Regarding equitable considerations, the IHO primarily focused her analysis on the relationship between the two entities discussed at the impartial hearing, namely, RFTS-LC and RFTS-LD, as well as the cost of the student's program (see IHO Decision at pp. 18-29). However, initially, the IHO noted the parent's testimony indicating that she spoke with RFTS-LC staff "at least once a week," she received "weekly summaries" from the student's related service providers and classroom teacher and "daily progress reports," and she "received an IEP detailing the student's goals for the school year" (id. at p. 18). In addition, the parent testified that ABA was used to deliver the student's "education, including core subjects like reading and math" (id. at pp. 18-19).

Next, the IHO noted that although the student was educated at RFTS-LC, the "parent had no enrollment contract with that school" (IHO Decision at p. 19). Instead, the IHO found that the parent contracted with RFTS-LD through an enrollment contract, which she executed on September 22, 2022 (id.). According to the enrollment contract, the "agreement [wa]s valid for services beginning on July 6, 2022, and continu[ed] through June 30, 2023" (id.). The IHO also

found that the total cost of the student's education—based on rates set by RFTS-LD—for the 2022-23 school year was \$320,331.67 (*id.*). The IHO indicated, however, that the parent contracted with an entity that did not provide the educational services to the student, noting further that the two entities—RFTS-LC and RFTS-LD—had two distinct addresses (*id.*). In addition, the IHO noted that while the enrollment contract reflected that the "educational services w[ould] be provided at RFTS-LC," there was no "relationship or evidence of any contracts between RFTS-LC and RFTS-LD which explained the funding" for the student's education (*id.* [emphasis in original]).

Reviewing the enrollment contract itself, the IHO indicated that RFTS-LD was the "signatory party" to the contract, not RFTS-LC where the student was educated (IHO Decision at p. 19). The IHO further indicated that RFTS-LD was "not a school," and contrary to the contract provisions, the hearing record did not support a finding that "RFTS-LD actually provide[d] any services or ha[d] any involvement in the education of the student in any fashion" (*id.*). As noted by the IHO, the "only role apparent by RFTS-LD [wa]s that of paying for the student's education at RFTS-LC" and the hearing record did not include any evidence describing the "amount RFTS-LD paid to RFTS-LC to 'fund' [the student's] education" (*id.* at pp. 19-20). The IHO opined that the "arrangement [wa]s suspect and fertile ground for what [wa]s obvious—that RFTS-LD [wa]s billing at an excessive rate not in line with the true value of the services delivered to the student" (*id.* at p. 20). Additionally, the IHO indicated that the hearing record lacked evidence to substantiate that "what RFTS-LD pa[id] to RFTS-LC for [the student's] education [wa]s the same as what they invoiced to the [district] in the hearing," noting that the hearing record did not include any "bills or description of expenses paid by RFTS-LD to RFTS-LC" and similarly did not include any "invoices from RFTS-LC to RFTS-LD for the cost of that education" (*id.*). The IHO also noted that the hearing record did not include the "actual cost of the services being provided by RFTS-LC" and "no record of what RFTS-LC, or any of their staff, received for the education of [the student]" (*id.*). Rather, the IHO found that the "presentation of evidence attempt[ed] to obfuscate the arrangement by claiming a relationship between the two entities that d[id] not exist" (*id.*).

Next, the IHO noted that the hearing record also lacked evidence to support the parent's claims that RFTS-LD "'funded' the [student's] education" because "what was paid to 'fund' [the student's] education was not included in the evidence" (IHO Decision at p. 20). The IHO also noted that the only evidence in the hearing record reflected "what RFTS-LD [wa]s billing the [district] (or in theory the parent) in the hearing" (*id.*). According to the testimony of the RFTS-LD administrator (administrator) who "overs[aw] the operations of RFTS-LD," RFTS-LD "fund[ed] the services while a parent attempt[ed] to secure funding from the [district]" (*id.*).

Turning to the administrator's testimony, the IHO found that he described the RFTS-LD program as providing students with "ABA; speech-language therapy, and occupational therapy [OT] at RFTS-LC" (IHO Decision at p. 20). The administrator explained that the director of RFTS-LC determined the "frequency and duration of services" delivered to a student and that RFTS-LC "employ[ed] the student's providers" (*id.* at pp. 20-21). He further testified that the providers input service hours into a "computerized system," and at the end of each month, the providers' entries were submitted to RFTS-LD, who then generated invoices to submit to the district (*id.* at p. 21).

The IHO found that, although the enrollment contract indicated that the parent would be sent a "monthly billing statement, in this case, the parent testified that she ha[d] never received any bills for services from RFTS-LD" (IHO Decision at p. 21). The IHO also found that the parent had "no idea" of the actual cost for services and moreover, that the "arrangement ma[de] it quite clear that the parent was not at all concerned about the cost of the services because if she knew she would be responsible for paying RFTS-LD \$320,000.00, she may have expressed some concern," as the family's yearly income was approximately one-third of the total cost (id.).

During cross-examination, the RFTS-LD administrator testified that RFTS-LD and RFTS-LC were two separate entities and that RFTS-LC employees were not employed by RFTS-LD (see IHO Decision at pp. 21-22). In addition, the IHO opined that the administrator "attempted, unconvincingly, to link the two entities together by stating that the program [the student] receive[d] [wa]s RFTS-LD and the RFTS-LC [wa]s the physical location where the services [we]re provided" (id. at p. 22). Next, the IHO noted that although the administrator testified that the "providers [we]re employed by RFTS-LC 'technically,' . . . [w]hat this meant was never explained during the hearing" (id.). The IHO also noted that the administrator further attempted to link the two entities by testifying that "'[a]ll of the employees of the [RFTS-LC] [we]re working for [RFTS-LD], and it's just like a staffing agency'"—however, the IHO found this statement was inconsistent with the administrator's previous testimony and evidence in the hearing record that RFTS-LC and RFTS-LD were two separate entities (id.). The IHO determined that, based on the evidence in the hearing record, the providers from RFTS-LC did not work for RFTS-LD, and the administrator never stated "how much" it cost RFTS-LD to fund the student's program (id. at pp. 22-23).

Next, the IHO indicated that, based on the administrator's testimony, RFTS-LD set the rates for services delivered at RFTS-LC, and the rates included "overhead costs such as recruiting, hiring, and retaining staff, maintaining the program site, software, and equipment for the program staff" (IHO Decision at p. 23). The IHO opined that this statement, however, was "disingenuous" as the evidence revealed that RFTS-LD had "no oversight, supervisory or any administrative role in the program being provided to the student at RFTS-LC" and moreover, that RFTS-LD played no role in the "hiring" or "actual education of the student" (id.). The IHO found that the "entity providing the education [wa]s not setting the rates" and that, based on the administrator's testimony, rates for services were set at a meeting prior to the start of the school year by a group, which consisted solely of RFTS-LD administrators—some of whom had "conducted prior research about rates, about comparable schools, [and] similar services" (id.). The administrator identified one person specifically who participated in this group, and then generally described other participants as "members of the financial team and members of the operating team and administrative staff"—all of whom were employed by RFTS-LD (id.). As noted by the IHO, the director of RFTS-LC was not included in this group to set rates although the director was responsible for developing the students' educational plans and supervising the RFTS-LC program in its entirety (id. at pp. 23-24). The administrator also testified that the director was responsible "'in part" for hiring service providers at RFTS-LC and "'technically' ha[d] the sole authority to terminate the employment of RFTS-LC providers" (id. at p. 24).⁷

⁷ The administrator employed by RFTS-LD was also employed by Special Edge, a special education services agency sharing the same ownership as RFTS-LD (see IHO Decision at p. 24).

Resuming her review of the enrollment contract, the IHO noted that it included an attached rate sheet, which reflected that "each service [wa]s billed at [30]-minute session fees" (IHO Decision at p. 24). According to the contract language, parents understood and agreed that "service and service hours listed . . . [we]re subject to change based upon any changes in the Student's needs as assessed by the Student's teachers, service providers and/or the educational director at RFTS-LD" (*id.* at pp. 24-25). The enrollment contract identified the "Service Plan" for the student (*id.* at p. 25). At the impartial hearing, the director of RFTS-LC testified that she was not familiar with the "rates per session that were listed on the parents' contract" and had not seen the rates prior to her involvement in impartial hearings, but she was aware that RFTS-LD set the rates (*id.*). She also testified that she was informed about the number of sessions provided to students by RFTS-LC "executive administration" (*id.*). The director also testified that she— together with a "team"—was responsible for hiring and firing RFTS-LC staff (*id.*).

The IHO indicated that with respect to the student's program, the enrollment contract reflected RFTS-LD would be "paid for a [12]-month program" and that the "service plan was developed by RFTS-LD in collaboration with the parents" (IHO Decision at p. 25). However, as previously noted, the evidence demonstrates that RFTS-LC delivered the services to the student (*id.* at pp. 25-26). According to the IHO, RFTS-LC was described as a "full time, independent, not-for-profit school dedicated to the education of children with autism spectrum disorders," which used "The Integrated Model" (*id.* at p. 26). In addition, the evidence demonstrated that RFTS-LC delivered "[a]ll therapy" on an "intensive one-to-one basis" and that each student was "evaluated in '200 different areas and a program [wa]s developed targeting his/her specific needs" (*id.*).

As noted by the IHO, the parent testified at the impartial hearing and "had no understanding of the two entities involved in the child's education" (IHO Decision at p. 26). For example, the IHO found that although the parent executed the enrollment contract and understood that "she was financially responsible for payments, she did not know the actual cost of those services" (*id.*). When asked at the impartial hearing about the total cost of the student's program, the parent responded that she did not know, but she had been given a list of services with prices and was aware of the "cost per service" (*id.*). The parent had not, to date, received any bills from the "school or from RFTS-LD" and had not made any payments toward the tuition costs (*id.*). Based on affidavits entered into the hearing record, the IHO found that the total amount of the student's tuition sought was \$320,333.67, which the IHO found to be "exorbitant" and without evidence reflecting "what RFTS-LD was actually paying to RFTS-LC for the student's education" (*id.* at pp. 26-27). The IHO also found the "arrangement [wa]s untenable," noting that "not only ha[d] the parent failed to have taken the financial risk necessary in a tuition reimbursement case, and been truly responsible," but that the entity was profiting (*id.* at p. 27).

In addition, the IHO determined that the evidence reflected that services had been "delivered when the student was not in school" (IHO Decision at p. 27). The IHO noted that on December 21, 2022, the district received a letter from RFTS-LC, which documented the student's late arrival "every morning" and the affect it had on the student's ability to settle down for a "few hours"—making him unavailable for learning (*id.* at pp. 27-28). In the same letter to the district, the RFTS-LC staff member noted that data demonstrated the student's regression in behavior from September through December (*id.* at p. 28). Nevertheless, the providers' service logs did not

similarly reflect the student's late arrivals, but instead, documented the delivery of services at 8:30 a.m. when the student was reportedly not at RFTS-LC (id.).

In light of the foregoing evidence—and noting in particular the "exorbitant cost" of the student's program "in conjunction with the unorthodox arrangement between RFTS-LD and RFTS-LC" and the parent's contract with an entity that was not educating the student—the IHO denied the parent's request for funding of the student's tuition costs for the 2022-23 school year (IHO Decision at pp. 28-29).

Finally, the IHO addressed the parent's request for an independent educational evaluation (IEE) at public expense (see IHO Decision at pp. 29-30). After reviewing the evidence related to the parties' attempts to schedule and complete a reevaluation of the student (psychoeducational evaluation), and the district's agreement in February 2023 to change the reevaluation from a psychoeducational evaluation to a neuropsychological evaluation of the student, the IHO concluded that the parent was not entitled to an IEE at public expense (id. at p. 30).

In summary, having found that the district failed to offer the student a FAPE, that the student's unilateral placement at RFTS-LC was not appropriate, and that equitable considerations did not weigh in favor of the parent's requested relief, the IHO denied the parent's request for funding of the student's tuition costs at RFTS-LC for the 2022-23 school year (see IHO Decision at pp. 30-31).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO misapplied legal standards and improperly determined that the student was not making sufficient progress to find RFTS-LC was an appropriate unilateral placement, and therefore, erred by finding that the parent was not entitled to an award of funding for the costs of the student's tuition at RFTS-LC for the 2022-23 school year. Relatedly, the parent asserts that the IHO erred by finding that RFTS-LC was not an appropriate unilateral placement due to the IHO's misunderstanding of the relationship between RFTS-LC and RFTS-LD. The parent also contends that the IHO erred by finding that equitable considerations did not weigh in favor of her requested relief. In support of her contentions, the parent attaches additional documentary evidence for consideration on appeal. As relief, the parent seeks to reverse the IHO's findings that RFTS-LC was not an appropriate unilateral placement, that equitable considerations did not weigh in favor of the parent's requested relief, and to order the district to directly fund the costs of the student's tuition at RFTS-LC for the 2022-23 school year.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.

In a reply to the district's answer, the parent responds to the allegations and arguments asserted therein and continues to seek the relief outlined in her request for review.⁸

⁸ Although the parent prepared, served, and filed a reply to the district's answer in this case, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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

evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent that would trigger the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

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).

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—Unilateral Placement at RFTS-LC

A. Student Needs

Overall, and as noted by the IHO, the student's needs in this matter are not in dispute (see IHO Decision at pp. 8-10). The parent testified that, at the beginning of the 2022-23 school year, the student exhibited delayed academic skills, indicating for example that his reading level was approximately "three years below grade level" (Parent Ex. CC ¶ 3). She further testified that the

student had "deficits in writing" and could not yet write complete sentences or stay within the lines when writing (*id.*). In mathematics, the parent testified that the student could perform addition and subtraction and was working on learning to count money and to perform multiplication (*id.*). Socially, the parent noted that the student got along well with teachers but had difficulty with peers and did not demonstrate an interest in playing with peers his age (*id.* ¶ 4). She further noted that the student struggled to "connect with others who d[id] not share his interests" (*id.*). At the start of the 2022-23 school year, the parent testified that the student did not "play with his classmates" and would "grab items from his peers that he wanted because he did not understand how to use his language to make that sort of request" (*id.*).

With respect to the student's behavioral needs, the parent testified that the student "tend[ed] to focus on things he c[ould not] control" and was "easily frustrated and anxious if something [wa]s not working the way he want[ed]" (Parent Ex. CC ¶ 5). She also testified that when the student did not get "what he want[ed], he w[ould] kick and make loud noises," and during these episodes, the student could not "focus on anything else and w[ould] continuously repeat what he want[ed]" (*id.*). Additionally, the parent testified that the student displayed the following maladaptive behaviors: "biting his hands when he g[ot] nervous, aggression, and mouthing inedible objects" (*id.*). The parent also testified that at the June 2022 CSE meeting, both she and RFTS-LC staff "expressed that [the student] often engage[d] in tantrums, prefer[red] eating without utensils and need[ed] help getting dressed" (*id.* ¶ 7-8). Moreover, the parent testified that, at the June 2022 CSE meeting, both she and RFTS-LC staff "emphasized [the student's] need for 1:1 ABA-based instruction and a [BIP] to remediate his behavioral challenges and make him available for learning" (*id.* ¶ 8). According to the parent, RFTS-LC was an appropriate unilateral placement for the student because he required a "curriculum entirely based on ABA" to remediate his "interfering behaviors," and he required "significant individualized attention and 1:1 instruction because of his inability to sit in a group and his difficulty with playing with peers and following instructions" (*id.* ¶ 16).

In addition to the parent's testimony about the student's needs, the hearing record includes a copy of the student's educational plan developed by RFTS-LC for the 2022-23 school year (see generally Parent Ex. T).⁹ The educational director of RFTS-LC (director) testified that the student's educational plan guided the student's overall curriculum and was developed in July 2022 (see Tr. pp. 183, 197-99; see generally Parent Ex. T). As reflected in the educational plan, the student required "individualized instruction to acquire, maintain, and generalize new skills, and to continuously follow a [BIP] that [wa]s effective in reducing problem behavior" (Parent Ex. T at p. 1). The educational plan noted that the behaviors targeted included "eloping, aggression (mild, severe), and breaks taken" (*id.* at p. 2). The educational plan also noted that the student responded

⁹ The hearing record also includes two other documents produced by RFTS-LC identified using "IEP" as an acronym; however as discussed above, they do not contain the same information as would be included as part of a district created IEP, rather each contains annual goals and short-term objectives for the student's related services of OT and speech-language therapy (see generally Parent Exs. V; Y). Many of the annual goals and short-term objectives included in the RFTS-LC OT and speech-language therapy documents were included within the student's overall RFTS-LC educational plan for the 2022-23 school year (compare Parent Ex. T, with Parent Ex. V, and Parent Ex. Y). For clarity, references in this decision to the student's RFTS-LC educational plan or the related services documents for the 2022-23 school will refer to his overall RFTS-LC educational plan developed for the 2022-23 school year at RFTS-LC, which the parent has identified as parent exhibit "T."

well to "systemic teaching with positive reinforcement to learn new skills" (id. at p. 1). As described in the RFTS-LC educational plan, during the completion of academic tasks, the student sometimes replied with the "opposite answers or something that rhyme[d] with the correct answer" (id. at p. 2). Additionally, the student relied "heavily on teacher support, schedules and verbal cues to ask questions to obtain the information he need[ed] about his day" (id. at p. 1).

With regard to the student's behaviors, the RFTS-LC educational plan reflected that, "[d]ue to the recent lateness of his bus in the morning, [the student's] aggressions ha[d] increased throughout the day" (Parent Ex. T at p. 1). In addition, the educational plan indicated that the student's "behavior and affect coincide[d] with his bus arriving late/[the parent] dropping him to school, changes in his schedule and different things that happen[ed] outside of the building while looking out the window or taking a walk in the community that [we]re out of his control (i.e.: cars moving out of the garage, teachers going to lunch, etc.)" (id. at p. 2). It was also noted that the student recently began working with "teachers to talk about things that [we]re in his control (involve[d] only him) and things that [we]re out of his control (involve[d] others) with a visual of different scenarios" for him to identify as either within his control or out of his control (id.). The RFTS-LC educational plan indicated that with the support of his behavior plan, the student continued to "require full support throughout the day to assist with aggression towards himself and others," and that when he became aggressive, the student often dropped to the floor and it could "become difficult to get him back regulated" (id.). The RFTS-LC educational plan described the student's behaviors as elopement; aggression toward others in the form of hitting, slapping, biting, throwing objects at, punching, grabbing their clothing; and self-injurious behaviors, such as hitting his body with an open or closed hand forcefully (id.). As noted in the educational plan, the student's "morning arrival time was improving with some teachers," he required reinforcers to walk in the building and upstairs, to store his belongings in his cubby, and while sitting at his desk (id.).

The director testified that, during the 2022-23 school year, the student's behavior was his "biggest need[] or challenge"—explaining that the student "demonstrated a really big deficit with his ability to have appropriate behaviors to then allow for teaching of skills that were required from him on his [] education plan" (Tr. pp. 190-91). The director further explained that the student was "very rigid, so a lot of his behaviors, when trying to teach him new things that he d[id] not have in acquisition, . . . he avoid[ed] the task at hand by becoming very oppositional," he would "change the topic," and he would "try to change your response" (Tr. p. 191). In addition, the director testified that the student did not like "being incorrect," and would often attempt to take the "lesson and try to run it his way versus allowing things like that" (id.). According to the director, many of the student's behaviors interfered with "things that he didn't even have control over," which caused "severe problem behavior when it related to other people" and "really interfered with his learning" (id.). The student's rigid behavior also made it "very difficult for him to be a part" of a group, because he wanted to control how the lesson was taught, the teacher's directions, and the teacher's and students' responses (Tr. p. 192). Additionally, the director testified that the student had "issues with elopement at the beginning of the school year," barging out of the classroom to avoid a "demand-based" task (Tr. p. 193). The director also testified that the student would enter the classroom "such a mess" because his bus may have taken a right turn instead of a left turn or another student was absent and did not ride the bus that day, which resulted in the student perseverating on that particular issue (Tr. pp. 194-95). Relatedly, the student would, at times, scream or tantrum in the classroom after he observed a car pulling into the school driveway, rather than pulling out of the school driveway as he wanted it to do (see Tr. p. 195).

In addition, the director testified that the student had a "very difficult time with his daily living skills, such as eating with utensils" (Tr. p. 193). She further testified that the student demonstrated difficulty with "time and space," or "personal space," and he exhibited "severely deficient" skills in reading and mathematics at the start of the school year (Tr. p. 194).

The hearing record also includes evidence describing the student's needs in the areas of speech-language and OT skills, which were addressed through related services of speech-language therapy and OT services (see generally Parent Exs. T; U-Z). Notably, the student's respective therapists indicated that the student's behaviors interfered with his learning. For example, a December 2022 OT progress report indicated that the student continued to present with "deficits in the areas of sensory processing, gross motor, fine motor, and problem-solving skills which impact[ed] his ability to participate in academic related tasks, self-care tasks, and complete his daily routines," and the occupational therapist recommended the student continue to receive OT at his then-current frequency and duration to increase his ability to participate across all environments (Parent Ex. W at p. 4). A speech-language progress report indicated that the student's rigidity "interfere[d] with his readiness to learn and acquire new skills," and he at times "answer[ed] incorrectly or [said] the opposite answer in order to elicit a silly response" (Parent Ex. Z at p.1). The progress report also noted that the student demonstrated "moderate maladaptive behaviors which include[d] but [were] not limited to hand biting, putting non-edibles in his mouth, hitting, flopping, and property destruction" (id.).

B. Specially Designed Instruction and Progress

As noted above, while a parent need not show that a unilateral placement furnishes every special service necessary to maximize a student's potential, in order to qualify for reimbursement under the IDEA, a parent has the burden to establish that the unilateral placement provides specially designed instruction to meet the student's unique needs, as well as support services as necessary to allow the student to benefit from instruction.¹⁰ Here, the IHO found that the parent failed to sustain her burden because the hearing record lacked evidence "demonstrat[ing] that the student made significant progress during the 2022/2023 school year" and was devoid of evidence about the student's program post-dating March 2023 to the conclusion of the school year (IHO Decision at pp. 17-18).

On appeal, the parent contends that the IHO erred by misapplying legal standards and improperly determined that the student was not making sufficient progress to find RFTS-LC was an appropriate unilateral placement. Generally, 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,

¹⁰ Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

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 because, under the totality of the circumstances, it can lend support to other evidence presented by parents who are attempting to satisfy the second Burlington/Carter criterion (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]; see T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016]).

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"]).

Although a student's progress is a relevant inquiry, it does not follow that the district, or the IHO could hold the parent to an outcome-based standard, because the IDEA was not designed to ensure guaranteed outcomes for students with disabilities, even with the provision of specially designed instruction for their unique needs (see Walczak, 142 F.3d at 133 [stating that "IDEA requires states to provide a disabled child with meaningful access to an education, but it cannot guarantee totally successful results"]; M.H., 685 F.3d at 245 [noting that the "[t]he purpose of the Act was instead 'more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside' [citations omitted]]).

In this instance however, and as explained herein, even if the IHO relied, in part, on student's progress, or the lack thereof, to find that RFTS-LC was not appropriate, an independent review of the entire hearing record supports the IHO's ultimate conclusion that RFTS-LC was not an appropriate unilateral placement because the evidence does not support finding that RFTS-LC adequately addressed the student's behavioral needs, which significantly interfered with the student's ability to access his education and make progress.

Initially, and as noted above, the director of RFTS-LC testified that the student's behaviors constituted his biggest challenge during the 2022-23 school year and, as a result, the student was unavailable to learn the skills in his educational plan (see Tr. pp. 190-91, 194-95). In addition, the student's RFTS-LC educational plan for the 2022-23 school year documented the student's interfering behaviors, which, according to the educational plan that was reportedly developed in July 2022, had recently increased due to issues with bussing and arriving to school (see Parent Ex. T at pp. 1-2). The evidence in the hearing record reflects that RFTS-LC staff reached out to the district regarding the student's bussing issues in an email dated December 21, 2022 (see Parent Ex. J at p. 3). According to the email, the student was having an "extremely difficult time behaviorally ever since his bus route changed and he ha[d] been getting to school late each day" (id.). The RFTS-LC staff who sent the email included a "behavior graph," which reflected his late arrivals

to school beginning on or about October 22, 2022 (id. at pp. 3-4).¹¹ The email further indicated that, when the student arrived to school late, he was upset and it sometimes took up to "an hour to calm himself down again, which t[ook] nearly [two] hours of productivity out of his school day" (id. at p. 3). For example, RFTS-LC staff indicated in a follow-up email to the district that the student had been arriving to "school every morning at 9:30 [to] 9:45," and the school's sessions began at 8:30 a.m., and as a result of the student being "unable to settle down for a few hours . . . there [wa]s minimal progress that could be made with him" (id. at p. 1).¹² Staff further indicated that they had "data proving regression in his behavior and in his progress or lack of since the bus issue started" (id.).¹³

At the impartial hearing, the student's behavioral supervisor at RFTS-LC, a BCBA who testified in May 2023 (BCBA supervisor), admitted that the student's "challenging behaviors . . . interfere[d] with his progress at school when it c[ame] to academic and social goals," and his behaviors included aggression, elopement, and self-injurious behaviors, as well as "occasionally flop[ping] to the ground" (Tr. pp. 54, 60-61).¹⁴ The BCBA supervisor had developed a BIP for the student (see Tr. p. 60; see generally Parent Ex. Q).¹⁵ With respect to aggression, the BCBA supervisor testified that it had "definitely changed in form over time," and while the student had made progress, "currently, his aggression [wa]s in the form of typical like hitting, grabbing, kicking, pushing, bullying, whether it be hair [or] clothing" (Tr. p. 61). With regard to elopement, the BCBA supervisor described this behavior as "moving away from his one-to-one teacher unless directed to do so" (Tr. p. 61). According to her testimony, the student engaged in these behaviors to "escape demands" and, at times, acted purposefully to avoid an unpreferred activity (Tr. p. 61). The BCBA supervisor also testified that the student lacked safety awareness, which also "really interfere[d] with his ability to learn because he w[ould] put himself in unsafe situations," such as eloping or flopping to the ground during community walks or in the middle of an intersection (Tr. pp. 61-62). The BCBA supervisor admitted that the same behaviors occurred in school as well, and that it was "hard to really make progress when he [wa]s engaging in those behaviors," which

¹¹ A review of the student's behavior graph reveals that his elopement behavior appeared to spike between October 8, 2022 and October 15, 2022, almost a week prior to the date that RFTS-LC documented increased behavioral issues related to bussing beginning on October 22, 2022 (see Parent Ex. J at p. 4).

¹² While not specifically addressed in this decision, the student's arrival times as noted in the RFTS-LC emails is a cause for concern when reviewing the RFTS-LC billing records, which appear to reflect billing for services during the times when the student was purportedly not arriving to school until 9:30 or 9:45 a.m. (see Parent Ex. DD at pp. 9-15).

¹³ It is unclear from the evidence in the hearing record if, or how, the transportation issue was resolved (see generally Tr. pp. 1-301; Parent Exs. A-Z; AA-DD).

¹⁴ The supervisor's testimony occurred in May 2023, near the conclusion of the 2022-23 school year (see Tr. p. 34).

¹⁵ It is unclear from the evidence in the hearing record when the BCBA supervisor developed the student's BIP; however, the document, itself, reflects that the "[m]ost recent preference assessment" took place on November 20, 2022 and that the BIP had been "last updated" on March 10, 2023 (see Parent Ex. Q at p. 1; see generally Tr. pp. 1-301; Parent Exs. A-P; R-Z; AA-DD). The hearing record does not include a corresponding functional behavioral assessment (FBA) completed by RFTS-LC (see generally Tr. pp. 1-301; Parent Exs. A-Z; AA-DD).

was compounded by the student's "lack of attending skills"—which was another behavior RFTS-LC was "working on" (Tr. p. 62). She also testified, however, that when the student was "not engaging in those behaviors, he w[ould] still struggle with gaining attention, maintaining eye contact, sitting in his chair for extended durations, [and] keeping his hands on the table" (Tr. p. 62).

Upon review, the student's BIP targeted his aggression (toward others)—defined as "[a]ny instance of hitting, slapping, biting, throwing an object at, punching or grabbing a teacher [or] peer (or their clothing)"—and his elopement—defined as "[a]ny instance of running away from his teacher more than [two] f[ee]t without being instructed to do so" (Parent Ex. Q at p. 1). The BIP identified the student's "[h]ighly preferred" and "[l]ess preferred" reinforcers, as well as describing specific scenarios within which to use the reinforcers (id.). In addition, the BIP included a "Proactive Plan," which detailed a "Schedule of Reinforcement" for beginning work, "Transitions" for navigating the school, and "Arriving to school" from the bus (id. at pp. 1-2). Next, the BIP identified "Environmental Modifications," such as keeping the student's water bottle off his desk and positioning his reinforcers in a bin next to his desk (id. at p. 2). As "Reactive Strategies," the BIP listed specific language or reminders to use in response to when the student transitioned to work, when the student hit a teacher or peer, when the student put his hands in his mouth, and when the student eloped (id.).

In addition to developing a BIP for the student, the BCBA supervisor testified that she created a "control program" for the student, which RFTS-LC began implementing in December 2022 (Tr. pp. 62-63, 79; see Parent Ex. P at p. 2; see generally Parent Ex. R). At the impartial hearing, the BCBA supervisor testified that she developed the control program because "sometimes [the student's behaviors] also occur[red] very unpredictably" and the "unpredictability stem[med] from in some situations [when] he [wa]s trying to control things that he observe[d]" (Tr. pp. 63-64).

With respect to progress, the BCBA supervisor testified that the student could now "walk with his teacher in the community" without holding his hand, but that he continued to require reinforcers and a one-to-one teacher walking beside him (Tr. pp. 64-66). She also testified that the student continued to require a BIP because when the student engaged in his behaviors, he was "clearly unavailable for learning in those situations" (Tr. pp. 66-67).

Despite the BCBA supervisor testifying that the student made progress in his behaviors in light of the BIP implemented during the 2022-23 school year, she did not explain or describe that progress (see Tr. pp. 54-68). When referred to the "Progress Snapshot" for the 2022-23 school year, the BCBA supervisor testified that pages two through four represented data on the student's behaviors of "In/Out Control," "Aggression," and "Number of Breaks Taken" (Tr. pp. 78-79; Parent Ex. P at pp. 2-4). However, the document does not include any information past March 2023, with some reporting confined to summer 2022 or through October 2022 (see generally Parent Ex. P).

Progress reports for the student's annual goals and short-term objectives for the first three quarters were embedded within the RFTS-LC educational plan (see Parent Ex. T at pp. 3-12). The annual goals targeted the student's needs in the following domains: language and communication,

preacademic and academic skills, group instruction, leisure skills, activities of daily living (ADL) skills, community and safety skills, and behavior skills (*id.*).¹⁶ The progress report reflected that many of the student's annual goals and short-term objectives up through the third marking quarter had been rated "NYT," which, according to the rating scale, indicated that the skill had not yet been targeted (*id.*). Some annual goals and short-term objectives had been mastered (denoted with "M") and others reflected various rates of progress (denoted with numbers one through four) (*id.*). According to the report, the student's "maladaptive behaviors of hitting, swiping, and crying" made it difficult for the student to "remain in his seat and stay on task to complete work given" and similarly, his behaviors of "stating the opposite or rhyming words and begin[ning] to laugh" interfered with his ability to remain on a "topic of conversation" (*id.* at p. 7). The progress report reflected that "[o]nce behaviors minimize[d]," the student could then "begin to work on remaining on topic for up to [four] exchanges" (*id.*). The progress report noted that the student was working on reading sight words, and could answer "who, what and where questions" after a short story was read to him but that he required reminders to remain on topic and at times he would make up his own story (*id.* at p. 9). In mathematics, the progress report reflected that the student was working on counting skills and time concepts, and he could skip count by "2, 5 and 10," identify time digitally, and was beginning to count money and make a shopping list (*id.* at p. 10). The student's RFTS-LC educational plan included one annual goal and approximately six short-term objectives related to the student's behavior skills (*id.* at p. 12). The annual goal targeted the student's ability to "gain attention appropriately, wait, and tolerate denied access" (*id.*). Overall, the progress report for the short-term objectives reflected progress regarding aggression and elopement, with only one short-term objective not yet targeted during the marking periods reported (*id.*).

In reviewing the approximately 79 short-term objectives in the student's RFTS-LC educational plan, during the first quarter, it appears that the student worked on approximately 12 of the short-term objectives, as the remaining 67 short-term objectives were reported as "NYT," or not yet targeted (Parent Ex. T at pp. 3-12). For the second marking quarter, it appears that the student worked on approximately 27 additional short-term objectives, or a total of approximately 39 short-term objectives received a rating scale descriptor denoting the progress made (*id.*). For the third marking quarter, the progress report reflects rating scale descriptors of progress for a total of 37 short-term objectives, or 2 less than the previous quarter (*id.*). Some of the student's short-term objectives in the progress report did not include any rating scales, for example, for the second and third marking quarters, the student's short-term objectives related to improving his story comprehension (*id.* at p. 9). Some of the student's short-term objectives remained rated as "NYT" for three consecutive marking quarters, such as his articulation objectives (*id.* at pp. 7-8).

In addition, the hearing record included a copy of an "ACE Skills Assessment Across Years," which offered a comprehensive review of the student's skills at RFTS-LC during the 2021-22 school year; however, as noted by the IHO, the hearing record does not include results from the same assessment for the 2022-23 school years that would allow for a comparison of the student's skills from one school year to the next (Parent Ex. S at pp. 1-90; see generally Tr. pp. 1-301; Parent Exs. A-R; T-Z; AA-DD).

¹⁶ The hearing record also included separate progress reports for his related services of speech-language therapy and OT (see generally Parent Exs. V-W; Y-Z).

Based on the foregoing evidence, although the hearing record reflects that RFTS-LC began addressing the student's interfering behaviors at some point during the 2022-23 school year through the BIP and the control program discussed, the student's behaviors continued to significantly interfere with his ability to access his education and make progress on a substantial number of his annual goals and short-term objectives. In particular, due to the lack of evidence in the hearing record concerning the academic goals and short-term objectives identified in the RFTS-LC educational plan, such as testimony by a teacher of the student or other staff knowledgeable about his academic functioning in the classroom or some other evidence pertaining to the academic instruction he received, the hearing record contains insufficient evidence to show how RFTS addressed the student's academic needs during the 2022-23 school year, other than the generic descriptions in the hearing record about how the RFTS program is implemented for all students, which falls short of the specialized instruction which is the parent's burden to demonstrate was offered to the student by the unilateral placement. While the student's complex behavioral challenges understandably perhaps took precedence in terms of the evidence presented by the parent, the student also has a variety of academic needs which must be addressed through specialized instruction that is reflected evidentiarily in the hearing record.

Here, however, there was very little evidence concerning how this student received his instruction with respect to what academic skills were being worked on with the student or what strategies were being used to address the student's academic needs during the times he was regulated enough to attend to instruction (see Hardison, 773 F.3d 372, 387 [finding a unilateral placement inappropriate where the hearing record lacked "more specific information as to the types of services provided to [the student] and how those services tied into [the student's] educational progress," and additionally stressing the importance of "objective evidence" in determining whether a parent's placement is appropriate]; see also L.Q. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 490 [S.D.N.Y. 2013] [rejecting parents' argument that counseling services met student's social/emotional needs absent the counselor's testimony or evidence about the counselor's "qualifications, the focus of her therapy, or the type of services provided" or how the services related to the student's unique needs]; R.S. v. Lakeland Cent. Sch. Dist., 2011 WL 1198458, at *5 [S.D.N.Y. Mar. 30, 2011] [rejecting the parents' argument that speech-language therapy services met student's needs where parents "did not offer any evidence as to the qualifications of the provider of the therapy, the focus of the therapy, or when and how much therapy was provided"], aff'd sub nom., 471 Fed. App'x 77 [2d Cir. Jun. 18, 2012]). Accordingly, there are gaps in the record as to the type of specialized instruction RFTS provided to the student with respect to academics within the context of his persistent rigidity, perseveration and complex interfering behaviors with daily periods of dysregulation and further attentional needs, taking into account the evolving identification of antecedents to his behavior and strategies to address his behavioral needs. Without more specific evidence as to how the student's academic needs were addressed in tandem with his behavioral needs, the parent has failed to meet her burden to demonstrate that the student's primary areas of need were sufficiently addressed by specialized instruction at RFTS. As a result, consistent with the IHO's determination, the parent has failed to meet her burden of establishing that RFTS-LC was an appropriate unilateral placement for the student.

VII. Conclusion

In summary, having found that the IHO properly concluded that the parent failed to sustain her burden to establish the appropriateness of the student's unilateral placement at RFTS-LC for

the 2022-23 school year, the necessary inquiry is at an end, and I need not reach the issue of whether equitable considerations weighed in favor of the parent's requested relief.

THE APPEAL IS DISMISSED.

**Dated: Albany, New York
November 30, 2023**

**CAROL H. HAUGE
STATE REVIEW OFFICER**