The University of the State of New York

The State Education Department
State Review Officer
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No. 23-064

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Thivierge & Rothberg, P.C., attorneys for petitioners, by Raquel Gordon, Esq

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which partially denied their request for payment for their son's privately obtained program provided Reach for the Stars Learning and Developing LLC (RFTS-LD) at Reach for the Stars Learning Center (RFTS-LC) during the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that the student's pendency placement is a services-based program provided by RFTS-LD. The appeal must be sustained. The cross-appeal must be sustained.

II. Overview—Administrative Procedures

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8

NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received diagnoses of autism, pervasive developmental disorder-not otherwise specified (PDD-NOS), and a seizure disorder (Parent Exs. C at p. 1; H at p. 1; K at p. 1; Dist. Ex. 4). The student has been attending RFTS-LC since 2009 and indicated that the student was placed in a classroom with four other student with a 1:1 teacher to student ratio and utilized the principles of ABA for the 2021-22 school year (Parent Ex. I at p. 1).

For the 2020-21 school year, the student attended an ungraded, remote distance learning home program provided by RFTS-LC (Parent Ex. C at p. 1; Dist. Ex. 4 at p. 1).[1] During the 2021-22 school year, the student received 1:1 applied behavior analysis (ABA) throughout the day in addition to individual and group services in speech-language therapy, music, occupational therapy (OT) and group instruction "with a focus on community safety skills and functional leisure skills such as socializing appropriately, food prep, game play, outings, shopping and exercise" (Dist. Ex. 4 at p. 1).

[1] During the 2020-21 school year the student chronologically would have been in 12th grade (Parent Ex. C at p. 1).

RFTS-LC developed an OT progress report dated December 2020 which indicated that the student received his daily program utilizing remote learning including remote OT services and remote speech-language therapy services (Dist. Ex. 5 at p. 1). The OT progress report recommended that the student continue to receive five 45-minute sessions per week of individual OT in a school environment (id. at p. 4). A speech-language progress report dated December 1, 2020 noted that the student made progress towards his annual speech-language goals but continued to demonstrate deficits in the areas of expressive and receptive language, as well as pragmatic skills (Dist. Ex. 7 at p. 5). The progress report included a recommendation that the student continue to receive five 45-minute sessions per week of individual speech-language therapy (id.).

On March 16, 2021, the CSE convened to create an IEP for the student for the 2021-22 school year (Parent Ex. C).[2] Finding the student eligible for special education as a student with autism, the CSE recommended that the student receive 12-month services consisting of a 6:1+1 special class placement for English language arts, math, social studies, and sciences, along with related services consisting of five 30-minute sessions per week of individual OT, five 30-minute sessions per week of individual speech-language therapy, and daily school nurse services (id. at pp. 1, 12). The CSE also recommended that the parents receive five 60-minute sessions of parent counseling and training per year (id. at p. 12). The CSE further recommended that the student receive full-time individual paraprofessional services for health and seizures and the use of an assistive technology device, identified as a static display, speech generating device (SGD) for use at school and at home (id. at p. 13). For special transportation, the CSE recommended that the student be transported from the closest safe curb location to school (id. at p. 18).

According to a district form identified as an occupational safety and health physician review: medical requests for transportation accommodations form, dated May 19, 2021, the district approved the transportation accommodations for the student consisting of: air conditioning; a paraprofessional on the bus; and limited travel time of less than 30-minutes (Dist. Ex. 2).[3]

In a prior written notice dated June 9, 2021, the district described the March 2021 CSE recommendations to the parents and identified the evaluative information considered by the March 2021 CSE (Dist. Ex. 3). In a separate school location letter to the parents, bearing the same date, the district identified the specific school site (assigned school) that the district assigned the student to attend for the 2021-22 school year and where the district indicated the March 2021 IEP would be implemented (id. at p. 5).

On June 16, 2021, the parents sent a letter to the CSE chairperson in which they indicated they had concerns about the appropriateness of the March 2021 IEP, but they were interested in considering the district's program and placement (Parent Ex. D at p. 1). They also indicated that they were in contact with the parent coordinator at the assigned school, they were reaching out to the assistant principal at the assigned school, and they did not yet have enough information to determine if the assigned school will be appropriate for the student (id.). Further, the parents stated

[2] The hearing record contains two copies of the March 2021 IEP (compare Parent Ex. C, with Dist. Ex. 1). For purposes of this decision, only the parent exhibit is cited.

[3] The form is dated May 19, 2021; however, it also indicates that it was signed by a district representative on May 10, 2021 (Dist. Ex. 2).

that "in an abundance of caution" they intended to continue the student's enrollment at RFTS-LC for the 2021-22 school year beginning in July and that they reserved the right to seek relief from the district for the tuition, costs, and expenses of the student's program (id.). In addition, the parents indicated that they would "accept on a 'without prejudice' basis" school nurse services and the assistive technology device listed on the student's March 2021 IEP, along with the special transportation services (id.).

On June 28, 2021, the parents sent a second letter to the CSE chairperson indicating that they met with the assistant principal of the assigned school who answered all their questions and provided additional information regarding the program at the assigned school (Parent Ex. E at p. 1). The parents raised a number of concerns regarding the assigned school and indicated that it would not meet the student's needs and declined to enroll the student there (id. at pp. 1-2). The parents repeated that they intended to continue the student's enrollment at RFTS-LC and would look to the district for the costs of the student's program (id. at p. 2).

On July 1, 2021 the student's father contracted with Reach for the Stars Learning and Development LLC RFTS-LD) to provide educational and support services to the student during the 12-month 2021-22 school year (Parent Ex. Q). According to the contract, RFTS-LD would work "hand in hand" with RFTS-LC to provide educational and support services to the student during the 2021-22 school year (id.).[4]

A June 9, 2022 educational progress report created by RFTS-LC indicated the student required individualized instruction to acquire, maintain, and generalize his skills, and that the student should continuously follow a behavior intervention plan (BIP) because it was effective in reducing his problem behaviors (Parent Ex. M at p. 1). Further, because the student presented with global delays across all areas of development, the student required ABA instruction during all his services for him to continue to make progress (id. at p. 3).

A. Due Process Complaint Notice

In a due process complaint notice dated March 1, 2022, the parents alleged that the district failed to offer the student a FAPE for the 2021-22 12-month school year (Parent Ex. A at pp. 1, 3). The parents alleged that they disagreed with the "overall appropriateness and sufficiency of the program" the district offered the student (id. at p. 1). The parents claimed that the program offered by the district failed to offer the student "critical supports" such as a behavior intervention plan (BIP) and an intensive 1:1 ABA program to meet his needs (Parent Ex. A at p. 1).[5] Additionally, the parents claimed that the district's assigned school placement could not have implemented the student's "complete IEP" (id.).

[4] RFTS-LC and RFTS-LD have not been approved by the Commissioner of Education as schools with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[5] The parents in their due process complaint notice indicated that the student had a history of engaging in several inappropriate and interfering behaviors and that despite these behavioral issues, the district failed to undertake or recommend a functional behavioral assessment (FBA) for the student (Parent Ex. A at p. 4).

Further, the parents claimed that the March 2021 IEP was procedurally and substantively defective and insufficient to offer the student a FAPE (Parent Ex. A at p. 2). The parents alleged that the district failed to evaluate the student in all areas of suspected disability in advance of the 2021-22 school year and, more specifically, failed to conduct any age appropriate transition assessment (id.).

Regarding the district's recommended program in the March 2021 IEP, the parents claimed that the district relied on information and reports prepared by RFTS-LC but failed to "meaningfully consider" the recommendations for the student's program from RFTS-LC staff (Parent Ex. A at p. 3). Further, the parents alleged that the 6:1+1 special class recommendation was not appropriate or sufficient for the student as it would not be able to provide the student with the 1:1 instruction and behavior interventions that he required (id.). The parents claimed that the district failed to consider a placement that was like the 1:1 ABA program the student received at RFTS-LC despite the student's progress (id.).

Also, the parents claimed that the March 2021 IEP lacked sufficient supports, services, and strategies to address the student's interfering behaviors; that the recommended management needs were not sufficient nor appropriate; and that the recommended service of a health paraprofessional was not an adequate or appropriate substitute for the 1:1 instruction and behavior intervention from appropriately trained and supervised professionals (Parent Ex. A at p. 4). Further, the parents claimed that the March 2021 IEP failed to recommend any supports for school personnel; failed to establish sufficient monitoring of the student's performance; contained vague, generic, and insufficient postsecondary goals, goals and objectives, transitional needs, and transition activities; lacked a mandate for adapted physical education including goals and objectives; failed to "correctly note" the student's medical alerts; lacked information about "Promotion Criteria"; failed to develop a sensory diet for the student; failed to consider the full continuum of programming and services for the student; failed to offer the parents individualized parent counseling and training; and failed to offer the student sufficient supports and services, including related services (id. at pp. 4-5) Overall, the parents claimed that the district's recommendations for the student for the 2021-22 school year were insufficient and not tailored to the student's individual needs (id. at p. 6).[6]

Regarding the student's unilateral placement at RFTS-LC, the parents claimed that the program, placement, and services at RFTS-LC was appropriate for the student and that were no equitable considerations that would preclude or reduce any award to the parents (Parent Ex. A at p. 7).

As relief, the parents requested an order directing the district to reimburse or fund the tuition, costs, and expenses of the student's program and services for the 12-month 2021-22 school year at RFTS-LC (Parent Ex. A at p. 7). The parents also requested that the student's placement be provided under pendency based on a September 16, 2014 unappealed IHO decision which established RFTS-LC as the student's placement for the purposes of pendency (id. at p. 2).

[6] The due process complaint also included a claim that the district's proposed March 2021 IEP was reflective of "impermissible policy and predetermination, elevated over [the student]'s individual needs" (Parent Ex. A at p. 5).

B. Impartial Hearing Officer Decision and Events Post-dating the Due Process Complaint Notice

The parties attended multiple status conferences between June 7, 2022 and November 1, 2022 while the matter was under investigation by the district for settlement purposes (Tr. pp. 1-32). The evidentiary phase of the impartial hearing began on December 14, 2022 and concluded on December 22, 2022 after three days of proceedings (Tr. pp. 33-119).[7]

After the conclusion of the impartial hearing, the parties and the IHO engaged in multiple conversations over email regarding the services provided to the student and the cost of the student's program at RFTS (see IHO Exs I-XI). The conversations took place from December 26, 2022 to February 9, 2023, during which time the parents provided additional information regarding the services provided to the student, identifying which provider provided each service to the student and their salaries, in addition to other evidence requested by the IHO for the purpose of pendency (IHO Exs. I at pp. 4-5; III at pp. 8-9; V; VII-X).[8]

Regarding pendency, in an email to the parties dated January 17, 2023, the IHO noted differences between the 2013-14 school year program identified in the September 2014 IHO decision, which was provided by RFTS-LC, had a set rate for tuition, and included a schedule involving "many periods and activities" and the student's program provided by RFTS-LC during the 2021-22 school year, which was based on a services contract with hourly rates and included only ABA and related services (IHO Ex. III at pp. 7-8). In response, counsel for the parents noted that the contracts changed during the 2021-22 school year and the schedules might represent a revised format given the passing of time (id. at p. 7). The district indicated that it agreed that pendency was based on the September 2014 IHO decision, but asserted that there was a material change from the pendency placement for the reasons set forth in the IHO's email and also based on the unprecedented expense of the school program being $342,587.50 for the 2021-22 school year (id. at p. 3).

On January 23, 2023, the district requested that the IHO sign two subpoenas duces tecum to RFTS-LC and RFTS-LD, in addition to twelve subpoenas testificandum for various service providers and staff associated with RFTS-LC and RFTS-LD (IHO Ex. XI at p. 15). The IHO responded on the same day indicating that she would not sign subpoenas for twelve individuals and that she was inclined to limit the subpoenas (id. at p. 13-15).[9]

On January 26, 2023, the IHO emailed both parties stating that she assumed the following facts unless the parents provided additional evidence to the contrary: (1) that the only agreement between the parents and RFTS-LC or RFTS-LD was the one admitted into evidence; (2) that there

[7] The IHO also issued an order on consolidation dated July 20, 2022 denying consolidation of this matter with another due process complaint notice filed by the parents (see July 20, 2022 Interim IHO Decision).

[8] The IHO's initial December 26, 2022 email was not included in the hearing record, but is referenced in the parent's January 4, 2023 letter to the IHO (IHO Ex. IV at p. 1).

[9] The subpoenas identified in the district's January 23, 2023 email to the parties were not included as evidence in the hearing record (see Parent Exs. A-V; Dist. Exs. 1-9; IHO Exs. I-XI).

were no invoices, bills and/or demands for payment sent to the parents; and (3) there were no courses or subjects provided to the student for the 2021-2022 school year (id. at p. 11).

In a February 7, 2023 email to the parties, with respect to pendency, the IHO noted that the parents had not submitted any evidence showing that the program identified in the September 2014 IHO decision was the same as the program provided to the student for the 2021-2022 school year or that the parents contracted with the same entity to provide the student's program, and further requested that if the parents or district disagreed with the IHO's statement, they could present an argument to the contrary (IHO Ex. XI at p. 7).[10]

In a decision dated February 16, 2023, the IHO found that because the district did not present a case during the impartial hearing and rested on its submitted documents alone, it did not offer a FAPE to the student for the 2021-22 school year (IHO Decision at p. 5).

Regarding the nonpublic program the student received during the 2021-22 school year, the IHO determined that the program was appropriate (IHO Decision at pp. 5-6). Specifically, the IHO found that during the 2021-22 school year the student received five 45-minute sessions per week of individual speech-language therapy, five 45-minute sessions per week of individual OT, one 30-minute session per week of group OT, and 1:1 ABA services in addition to music therapy (id. at p. 5). The IHO noted that for the 2021-22 school year, the student received 1:1 ABA instruction and was originally placed in a classroom with four other students but that during the school year, his classroom was changed to a dyad (id.). The IHO then outlined the student's schedule and determined that according to the schedule the student received 23.5 hours of 1:1 ABA services per week (id.). The IHO also found that the student made "some progress" in the areas of behaviors, communication, OT, functional skills, and independence (id. at p. 6). Weighing the above, the IHO found the student's nonpublic school program appropriate (id.).

The IHO then engaged in a lengthy discussion regarding equitable considerations (IHO Decision at pp. 6-11). The IHO noted that the parents entered into a "services enrollment contract" rather than a tuition agreement with RFTS-LD, a for-profit entity, which collaborated with RFTS-LC, a not-for-profit entity, to provide educational and support services during the 2021-22 school year (id. at p. 6). The IHO stated that this appeared to be "a mechanism to charge exorbitant rates for a school program" (id.). The IHO found that the total cost of $342,587.50 for the student's program charged by RFTS-LD for the 2021-22 school year was "extraordinary" (id.).[11] The IHO noted that the salaries of the ABA providers who provided services to the student during the 2021-22 school year were approximately $50,000 each and that the student's ABA services were being billed at $250 per hour, approximately nine times the hourly rate the ABA providers were being paid based on their annual salaries (id.). With respect to the occupational therapist, speech-language therapists, and BCBAs, the IHO found that those providers were being paid at a "somewhat higher" rate, but there was no justification for the hourly rates other than that the rates were market rates and were based on overhead (id.). The IHO specifically noted that the school

[10] The parents did not submit any additional evidence to the contrary of the statements made in the IHO's emails to the parties (IHO Ex. XI at pp. 1-2, 6).

[11] The IHO misstated the total cost of the program as $312,587.50; however, the IHO correctly identified that the parent had already paid $80,000.00 and was seeking an additional $262,587.50 (IHO Decision at p. 7).

failed to respond to the IHO's indication that "without further evidence of the pro rata share of overhead expenses, [she] might have to conclude that the cost of services was exorbitant" (id.).

Next, the IHO noted that the services enrollment agreement established that the student's services would be billed monthly or on a schedule established by RFTS-LD but did not include any specific frequencies or durations of the services to be provided to the student (IHO Decision at p. 6). The IHO found the services enrollment agreement was an inappropriate basis to establish tuition and held that the agreement: did not charge tuition but an hourly rate for school service; did not establish what the parents were obligated to pay; and provided no evidence that the parents knew that they were agreeing to that level of hourly services at the time they signed the contract or during the school year (id. at p. 7). The IHO noted that the parents did not submit additional evidence regarding their obligation to pay for services or to show that they agreed to a set number of hours of services to be provided during the 2021-22 school year despite being given an opportunity during the impartial hearing to do so (id.; see IHO Ex. XI at pp. 6-9).

In reviewing the rates for the services provided to the student, the IHO used the providers' annual salaries to compute what hourly rate the providers were receiving; the IHO then multiplied each of the hourly rates by three to come up with what the IHO believed to be a reasonable rate—$100.00 per hour for ABA services, $150.00 per hour for BCBA services, $120 per hour for OT, and $120 per hour for speech-language therapy (IHO Decision at p. 8). The IHO then went over the total number of hours of each service the student received and multiplied the number of hours by the rate the IHO determined to be reasonable came up with a total of $126,370.00 as the maximum that should be allowed (id. at pp. 8-9).

Regarding the parents' ten-day notice letter dated June 28, 2021, the IHO found that it did not provide adequate notice to the district with respect to the unilateral placement (IHO Decision at p. 9). The IHO noted the notice indicated that the student would continue to receive services from RFTS-LC for the 2021-22 school year but did not mention that the parents would also be contracting with RFTS-LD (id.). The IHO further stated "[t]hus, the [district] may not have had any knowledge of the level of expense that would be incurred on their behalf" (id.). Additionally, the IHO found that the district was not properly notified that RFTS-LD would be the entity billing for services and thus had inadequate notice of the financial impact of its failure to remedy the deficits in its program (id. at p. 9-10).

Turning to the amount of relief awarded, the IHO found that the parents were entitled to reimbursement of the $80,000.00 already paid to RFTS-LD, which the IHO found was reasonable compensation for the services provided to the student for the entire 2021-22 school year (IHO Decision at p. 10). The IHO declined to award any additional amounts due to equitable considerations and because the contract failed to show that the parents were financially obligated to pay for the totality of the student's program provided by RFTS-LD (id.).

Regarding pendency, the IHO found that pendency was based on the September 2014 IHO Decision (IHO Decision at p. 10; see Parent Ex. B). The IHO further determined that the September 2014 IHO decision detailed the program provided by RFTS-LC during the 2013-14 school year which consisted of "a small classroom with no more than five children, specific work areas for each child, an area for group instruction, an OT sensory gym, a music therapy room, 1:1 instruction, errorless teaching, a behavior plan, a sensory diet, fast paced 1:1 instruction," five 60-

minutes sessions per week of speech-language therapy, and five 60-minute sessions per week of OT (IHO Decision at p. 10). The IHO found no significant difference between the RFTS-LC program for the 2013-14 school year and the RFTS-LC program for the 2021-22 school year (id.). However, the IHO determined that the portion of the school year for which the student was entitled to pendency was from March 2022 through June 2022 and that the cost of the services the student received as pendency should not exceed the reasonable cost as determined by the IHO (id. at p. 11). The IHO then determined that she already awarded the parents $80,000.00 in reimbursement, which she calculated as being more than the amount the student was entitled to as pendency and, accordingly, the IHO decided not to award any additional amounts (id.).

For relief, the IHO ordered that the district reimburse the parents for the funds already paid to RFTS-LD for services provided to the student during the 2021-22 school year in the amount of $80,000.00 (IHO Decision at p. 12).

IV. Appeal for State-Level Review

The parents appeal and allege that the IHO erred in finding that there was insufficient evidence of the parents' obligation to pay for the services provided to the student for the 2021-22 school year; that the cost of the student's services for the 2021-22 school year were unreasonable; that the parents' 10-day notice should have informed the district that the parents were contracting with RFTS-LD for the 2021-22 school year; that equitable considerations warranted a reduction in the awarded relief; and that the IHO further erred in awarding less than full payment for the cost of the student's services for pendency.

Regarding the service enrollment agreement, the parents argue that the agreement with RFTS-LD is a binding contract. The parents claim that they consented to the provision of services provided to the student during the 2021-22 school year and acknowledged and agreed that in contracting for these services with RFTS-LD, they remained financially responsible for payment for all services provided to the student by RFTS-LD. Further, the parents claim that it is "undisputed that the [p]arent[s] had an understanding of the amount and frequency of services to be provided" to the student during the 2021-22 school year; that they were "well aware" that the student would be receiving services during every hour of the day while attending RFTS-LC; and that there is "no dispute" that the parents knew the number of hours to be provided to the student and the parents understood that they were financially responsible for each hour of service provided. The parents allege that when they signed the agreement, they agreed to pay for services provided to the student, so long as services were provided.

Further, the parents allege, in the alternative, that even if assuming that the terms of the contract were ambiguous, because the number of service hours were not specified, the contract should not be deemed invalid or unenforceable, as the number of hours agreed to can be determined based on the surrounding circumstances and the parties' intent. The parents argue that the IHO's finding that the lack of invoices for the contracted services undermined the validity of the contract and/or the parents' right to seek payment for the full cost of the services, "is simply misplaced and without merit." The parents claim that the agreement between them and RFTS-LD included language that RFTS-LD may delay billing to the parents if they sought reimbursement or direct payment for services provided through an impartial hearing process and thus RFTS-LD was not

required to bill the parents for the balance or seek enforcement of the parents' remaining financial obligation under the agreement.

Regarding the IHO's findings that the cost of services provided to the student during the 2021-22 school year was unreasonable, the parents allege that the IHO raised this issue sua sponte as the district did not present any argument or evidence that questioned the reasonableness of the cost of the student's services.[12] Additionally, the parents argue that RFTS-LD is entitled to full payment for services that were contracted for and provided to the student during the 2021-22 school year. The parents argue that the district never disagreed with the rates charged by RFTS-LD nor did it present evidence that such rates were unreasonable. Further, the parents argue that the IHO effectively appointed herself as an expert witness who would be able to calculate the appropriate hourly rate based on the annual salaries of the providers without evidence of the rates charged for comparable services in the same geographic area and such calculations "fall[] outside the purview of the IHO."

With respect to the IHO's findings regarding the parents' 10-day notice, the parents allege that under IDEA regulations, there is no requirement to specifically name the private school or contracted agency or specify the cost of the private placement within the 10-day notice and, further, that this issue was raised sua sponte by the IHO in her decision. Additionally, the parents argue that the IHO mistakenly implied that the purpose of the notice was to inform the district of the impact of its failure to provide an appropriate program rather than to provide the district with an opportunity to devise an appropriate educational program before the student is placed at the private school.

Regarding the cost of the student's services during pendency, the parents allege that the IHO used the same inappropriate cost "reduction mechanism" that she used in her decision to price out the cost of pendency, which was in error.

For relief, the parents seek an award of direct funding and reimbursement in the amount of $342,587.50 for the services provided to the student by RFTS-LD for the 2021-22 school year.

The district answers the parents' request for review and cross-appeals from the IHO's pendency determination, asserting that the student's pendency program was a tuition-based program at RFTS-LC, not a services-based program provided by RFTS-LD. The district argues that the IHO properly determined that equitable considerations weighed against the parents. The district also argues that the parents' request for review should be dismissed for failure to comply with State practice regulations. Accordingly, the district requests that its cross-appeal be sustained and the IHO's determination regarding the specific rates to be charged for pendency services be reversed.

In an answer to the district's cross-appeal, the parents generally respond to the district's allegations with admissions and denials and specifically respond to the procedural issues raised by the district regarding the request for review. Further the parents allege that the student's program

[12] The parents further allege that the district did not introduce any evidence showing that the rates charged by RFTS-LD were outside the reasonable range of rates charged in the New York City metropolitan area (Req. for Rev. at pp. 5-6).

changing from a tuition-based program to a services-based program does not constitute a unilateral change in the student's pendency program.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

(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]).[13]

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).

[13] 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).

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

VI. Discussion

A. Preliminary Matters – Compliance with Practice Regulations

As a threshold matter, it must be determined whether the parents' appeal should be dismissed for failure to timely file their appeal with the Office of State Review.

The district contends that the parents' request for review should be dismissed for failure to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]). In this instance, the district argues that the parents' request for review fails to comply with practice requirements of Part 279 because the parents failed to file their request for review with Office of State Review two days after they personally served the district. Additionally, the district argues that the parents failed to verify all their pleadings; that the request for review was not signed; and that the request for review failed to conform with the page format limitations set forth in State regulation.

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b]; 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Moreover, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[a][4]). Additionally, all pleadings shall be verified by a party (8 NYCRR 279.7[b]). Further, State regulation states that all pleadings and memoranda of law shall be typewritten in black ink, single sided, double-spaced, and with a minimum 12-point type text size in the Times New Roman font on pages containing margins of at least one inch (8 NYCRR 279.8[a][2]).State regulation further provides that the "petitioner shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). Additionally, a "State Review Officer may dismiss sua sponte a late request for review or, in his or her sole discretion, may excuse a failure to timely serve or file a request for review within the time specified for good cause shown" (8 NYCRR 279.13).

In this instance, the Office of State Review received a letter from the district, dated March 31, 2023, requesting an extension of time to file its answer and cross-appeal. On April 3, 2023,

the Office of State Review granted the extension request and notified both parties that no proceeding was currently pending before it because the Office of State Review had not yet received a request for review in this matter. The Office of State Review requested the district to send a courtesy copy of the parents' request for review which was received the next day.

On April 19, 2023, the parents filed the following documents with the Office of State Review: a notice of intention to seek review (dated March 13, 2023), a case information statement (dated March 13, 2023), an affidavit of verification (notarized on April 19, 2023), a notice of request for review (dated March 28, 2023), a request for review (dated March 28, 2023), and an affidavit of verification (notarized on March 23, 2023).[14]

As indicated by the district in its answer and cross-appeal, the parents' verification was notarized on March 23, 2023, five days before they served the notice of request for review, the request for review, and the affidavit of verification on the district on March 28, 2023 (see March 23, 2023 Parent Aff. of Service; Answer and Cross-appeal at ¶ 8). As correctly asserted by the parents in their answer to the cross-appeal, there is nothing in the practice regulations, and the district has not pointed to any authority, to support a finding that an affidavit of verification by the parents must be verified on the same day that the pleadings are served upon the opposing party (see 8 NYCRR 279.7[b]).

Further, the district alleges that the parents' notice of request for review does not contain the representing attorney's signature as required by State regulation (see 8 NYCRR 279.7[a]). Upon further review of the parents' pleadings, the parents' attorney signed the request for review, the notice of intention to seek review and the case information statement with a conformed signature "/s/" (see Parent Notice of Intention to Seek Review; Parent Req. for Rev.; Parent Case Information Statement). It should be noted that there is nothing in the practice regulations, and the attorney for the parents has not pointed to any authority, to support a finding that the submission of a document bearing a conformed signature meets the requirement that all pleadings must be signed (8 NYCRR 279.8[a][4]).

Additionally, the district alleges that the parents' request for review does not conform with the State regulation regarding the form of pleadings (see 8 NYCRR 279.8[a][2]). Initially, the parents' request for review did not conform with State regulations since the request for review was not in the Times New Roman font and was not presented on pages containing margins of at least one inch.

In correspondence, dated May 8, 2023, and copied to the district's attorney, the parents' attorney requested leave to amend the March 28, 2023 request for review stating that her good cause basis was "that during the conversion to PDF of the documents prepared in word format for th[e] Request for Review on March 28, 2023, a computer glitch made changes in the original documents." The parents' attorney submitted an amended request for review with accompanying

[14] The parents allege that the request for review was mailed to the Office of State Review on March 28, 2023 (Answer to Cross-Appeal at ¶ 5). Further, they allege that after it was discovered that the request for review was not delivered to the Office of State Review, on or around April 3, they took proper steps to file the request for review electronically (id. at ¶ 6).

documents. In correspondence dated May 9, 2023 and copied to the parents' attorney, the district objected to the parents' request for leave to amend their March 28, 2023 request for review.[15]

Considering the above, despite the procedural deficiencies regarding the parents' pleadings, the district concedes that it received the notice of intention to seek review and the request for review within the regulatory timeframe for filing an appeal. Additionally, as indicated above, the district requested an extension to file its answer in this proceeding on March 31, 2023, which was granted by the Office of State Review on April 3, 2023. It is undisputed that the district was able to respond to the parents' request for review and there is no indication that it suffered undue prejudice as a result of the form of the parents' pleading or the late filing of the request for review.

As noted by the parents' attorney in her answer to the district's answer with cross-appeal, the parents have not engaged in an ongoing or extensive history of non-compliance, in this or any other related matter regarding this student. The attorneys for the parents are cautioned that repeated failures to conform to the practice regulations with regard to the form requirements and the filing of pleadings can result in dismissal of an appeal by a State Review Officer. However, in this instance, I decline to exercise my discretion to reject the request for review.

B. 2021-22 School Year

Initially, as the district has not appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2021-22 school year and that RFTS was an appropriate placement for the student for the 2021-22 school year, the IHO's findings are final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

1. Equitable Considerations

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

[15] In a letter dated May 10, 2023, the undersigned notified counsel for the parents that their requested leave to amend their request for review will be addressed in this final decision. Upon review, it is not necessary to accept the amended filing as the substance is the same as the initial filing and the irregularities in form do not detract from its legibility.

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"]).

In this case, the IHO awarded the parents a portion of their requested relief, finding there was sufficient evidence to show that the parents paid $80,000.00 toward the services provided to the student during the 2021-22 school year and that the amount paid was reasonable for the program provided to the student during that school year (IHO Decision at p. 8). However, the IHO did not award the parents the total requested amount of $342,587.50, based on a number of equitable considerations (id. at pp. 6-11). The IHO found that the services agreement entered into by the parents and RFTS-LD did not establish that the parents had an obligation to pay for any services provided by RFTS-LD in addition to those for which they had already expended $80,000.00 in funds; that the hearing record supported finding that the total cost of the services requested by the parents was excessive; and that the parents' ten-day notice letter dated June 28, 2021 did not provide adequate notice to the district of the potential total cost of the unilateral placement (IHO Decision at pp. 7, 9).

The parents argue that the IHO erred in her finding that equitable considerations warranted a reduction of the awarded payment for the services provided to the student during the 2021-22 school year. More specifically, the parents argue that there was sufficient evidence of the parents' obligation to pay for the services provided to the student during the 2021-22 school year; that the cost of such services provided was reasonable; and that their 10-day notice complied with State regulations (see generally Req. for Rev. at pp. 3-10).

The district alleges that the IHO was correct to bar any direct funding award but concedes that the parents were entitled to the $80,000.00 reimbursement awarded by the IHO (Answer and Cross-appeal at p. 5 fn. 3; ¶ 9).

Thus, since the district concedes that the parents are entitled to the $80,000 reimbursement, the IHO's award will not be disturbed. However, the parents request for payment of the remaining balance of $262,587.50 to RFTS-LD must be addressed and, therefore, the remaining discussion will be regarding an appropriate award of relief based on the equitable considerations raised by the IHO and addressed by the parties.

a. Parents' Financial Obligation

The IHO found that that the parents did not provide evidence of their financial obligation to pay for the unilateral services and further that the services enrollment agreement did not charge tuition but an hourly rate for school service; did not establish what the parents were obligated to pay; and provided no evidence that the parents knew that they were agreeing to that level of hourly services at the time they signed the contract or during the school year (IHO Decision at pp. 6-10; see Parent Ex. Q).

The parents argue that the services enrollment agreement was a binding contract in which the parents consented to the provision of services to be provided to the student by RFTS-LD and agreed they would remain financially responsible for payment for all services provided to the student by RFTS-LD during the 2021-22 school year (Req. for Rev. at p. 3). More specifically, the parents argue that the contract, itself, establishes the parents' obligation to pay, and that, in addition, the there is no dispute that the parents knew the number of hours of services that would be provided to the student and understood that they were responsible for payment at the hourly rates specified in the services enrollment agreement (id.).

According to the services enrollment agreement executed by the student's father on July 1, 2021, the agreement was valid for services starting July 1, 2021 through June 30, 2022 (Parent Ex. Q at p. 1). Pursuant to the agreement, the parents contracted with RFTS-LD and agreed to "collaborate and coordinate" with RFTS-LD and RFTS-LC staff in "formulating the [student]'s special education services and service plans" and consented to the provision of services (id. at p. 1). The services enrollment agreement indicated that RFTS-LD "provides special education support services and related therapies and services at enhanced market rates" and that a list of the rates was attached to the agreement as "Appendix A" (id. at p. 1). The special education and related services rate sheet provided rates for listed services based on half-hour increments (id. at pp. 2-3). As correctly determined by the IHO, the services enrollment agreement indicates that services would be billed monthly or on a schedule as established by RFTS-LD, but it did not indicate which services would be provided to the student during the 2021-22 school year (Parent Ex. Q at pp. 1-2; IHO Decision at p. 7).

The student's father testified that the services enrollment agreement did not contain "one big price" but that the cost was broken down into hourly rates (Tr. 107). According to the student's father's affidavit testimony the parents paid $80,000.00 towards the cost of the student's services for the 2021-22 school year and "under[stood] that the balanced owed to [RFTS-LD] [wa]s 262,587.50" (Parent Ex. U at ¶ 20). Despite the lack of information regarding the frequency of services to be provided during the 2021-22 school year, the student's father's affidavit stated that "regardless of the outcome of this matter, we are responsible to Reach for the Stars Learning and Developing LLC for the balance owed for [the student]'s 2021-2022 programming" (Parent Ex. U at ¶ 22). Based on the foregoing, the evidence shows that the parents had an understanding that they were responsible to pay the cost of the student's 2021-22 program with RFTS-LD at the time they signed the services enrollment contract.

Finally, although the contract is not specific as to the amount of services the student received during the 2021-22 school year, the hearing record includes affidavits executed by an administrator of RFTS-LD identifying the amount of services delivered to the student and, prior to closing the hearing record, the IHO obtained a more detailed list identifying the amount of services and who provided each of the student's services (Parent Ex. R; IHO Ex. V).[16]

[16] After the last hearing date, the district indicated that it intended to seek information "to ensure that services were actually provided to the student" (IHO Ex. III at p. 4). According to the district, it intended to seek information regarding the administrator of RFTS-LD, whose affidavits were submitted to show what services were delivered to the student, because of allegations in an indictment against the administrator regarding theft of government funds and wire fraud conspiracy (id.). In later response to an email from the IHO, the district noted

While the contract is not specific with respect to the exact services the student would receive, in consideration of the parent's testimony, there is insufficient basis to controvert the executed enrollment contract, which obligated the parents to pay RFTS-LD for the costs of services delivered to the student and identified essential terms of the agreement, such as the types and costs of services that could be provided to the student (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]).

Further, regarding the parents' lack of financial resources to directly pay for the student's services provided by RFTS-LD, the student's father testified that he made requests for financial aid but was told "the tuition is the price that it is, and it's not negotiable" and that the price did not include any other fees (Tr. p. 103). The parents provided a copy of a portion of their 2021 tax return to show their inability to pay (Parent Ex. T). Additionally, within the student's father's affidavit testimony, he referenced the family's income and expenses and indicated that they "[we]re unable to afford the entire cost of the 2021-22 school year" (Parent Ex. U at ¶ 21). Accordingly, the parents have proven their inability to directly pay for the student's services and thus would be entitled to direct payment.

b. Excessiveness of Services

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; 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., 674 Fed. App'x at 101; 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 [2d Cir. Jan. 19, 2017]).

Initially, there is no argument presented on appeal and the IHO did not find that the amount of services provided to the student exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Accordingly, the issue of excessiveness is specific to the cost of the program and services provided. Additionally, the district did not argue that the cost of student's program provided by RFTS-LD was unreasonable during the impartial hearings or in its answer with cross-appeal. The district only argued that the services enrollment agreement between RFTS-LD and the parents did not impose a financial obligation on the parents (Answer with Cross-Appeal at ¶¶

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that one of the issues was "whether services were actually provided to the student"; however, the district attributed this issue to the parents' burden of proving the appropriateness of the parents' unilateral placement of the student at RFTS (IHO Ex. XI at p. 5). As the district has not appealed from the IHO's finding that the unilateral placement of the student was appropriate, the issue of whether the services identified in the affidavit were actually delivered to the student will not be further addressed.

9-11). Relatedly, the district did not present any evidence that the cost of the services provided by RFTS-LD was excessive, i.e., by reference to evidence of lower-cost programs and/or services that were comparable to and available in the same geographic areas or correlated to the amount of 1:1 ABA services the student required to receive a FAPE.

As noted above, the IHO emailed the parties after the final hearing date to inquire about, among other things, the rates paid by RFTS-LD to the student's providers (see IHO Ex. IV at p. 3). After learning that the providers were employees of RFTS-LD, and the salaries paid by RFTS-LD, the IHO expressed concern that the providers' services were being billed at rates "many multiples of their salaries" and that she was "struggling to justify that" (IHO Ex. I at pp. 1-2; see IHO Exs. IV at p. 3; V at p. 5). The IHO indicated that she would like to hear "justification for that, or if there is no justification, what a reasonable payment should be for ABA, supervision, [speech-language therapy] and OT by these employees" (IHO Ex. I at p. 2). However, when the IHO was wrapping up the submission of evidence and indicated that she would make certain assumptions if she did not receive further evidence, only one of the IHO's statements related to the rate charged by RFTS-LD for services (IHO Ex. XI at pp. 6-7, 11-12). The IHO stated that the parties may make their arguments regarding the cost of services and that she was accepting the parents' submission of the providers' salaries as fact (id. at p. 7). However, in her final decision, the IHO noted that "the program did not respond to [her] assertion that [] without further evidence of the pro rata share of overhead expenses, [she] might have to conclude that the cost of services was exorbitant" (IHO Decision at p. 6).

The IHO found that there was no justification for the hourly rates charged by RFTS-LD other than that they were the market rates and based on overhead (IHO Decision at p. 6). The IHO then calculated rates for each service provided by RFTS-LD during the 2021-22 school year based on the salaries paid to the providers (id. at p. 8). The IHO found that ABA providers were paid approximately $50,000 per year which would amount to approximately $30 per hour; BCBAs were paid between $52,000 and $93,000 per year and, based on the higher salary, the approximate rate paid to the BCBAs was approximately $50 per hour; occupational therapists were paid a salary of approximately $70,000 per year and the approximate rate would be $40 per hour; and the speech-language therapists were paid a salary of around $72,000 and the approximate rate would be $40 per hour (id.). Based on these findings, the IHO held that if she were to award the parents any direct funding, it would be at the following rates: $100 per hour for ABA services; $150 per hour for ABA supervision; and $120 per hour for both speech-language therapy and OT (IHO Decision at p. 8).

Ultimately, the hearing record does not contain sufficient evidence to support the IHO's conclusion. While the IHO initially sought justification of the cost of the services provided by RFTS-LD from counsel for the parent, instead of following through with that request it was left out of the IHO's emails that indicated she would make certain assumptions if additional evidence was not provided (IHO Exs. I at pp. 1-2; XI at pp. 6-7, 11-12). Accordingly, the IHO's reliance on the lack of evidence regarding RFTS-LD's overhead costs in her final decision appears to have been misplaced. Additionally, while the salaries paid by RFTS-LD to its employees was a first step in obtaining evidence to establish a reasonable cost for the services delivered to the student, the IHO's reduction of the providers' annual salaries to an hourly rate and multiplication of that rate by a factor of three was not based on anything contained within the hearing record (see e.g., Application of a Student with a Disability, Appeal No. 22-145 [IHO erred in using her own

knowledge to set a maximum rate for compensatory education services]). The IHO could have sought evidence as to how to properly calculate a reasonable rate based on the providers' salaries, or evidence of rates charged for comparable services by providers within the same geographic area. Nevertheless, the responsibility for the lack of evidence in the hearing record to determine a reasonable rate lies with the district for not presenting any evidence on the issue, by not raising the issue during the impartial hearing, and in particular by not subpoenaing a witness from RFTS-LD to testify as to how the school established its rates or seeking any information from RFTS-LD until after the last hearing date.

While the evidence in the hearing record does not support finding that the fees charged by RFTS-LD were excessive, the IHO's concerns are within reason as there is also insufficient evidence in the hearing record to determine that the costs being charged by RFTS-LD were reasonable. Considering that the IHO and the district were at least on the right track in some of the evidence that they were seeking after the hearing concluded, a remand in this matter to allow for further development of the hearing record on this issue would be a reasonable step (see 8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]). However, as noted above, the district has not presented an argument as to the rate for services on appeal and neither party has requested a remand or attempted to introduce additional evidence to show an appropriate rate for the services rendered. Accordingly, based on the limited hearing record before me, I will order that the district fund the student's services as provided by RFTS-LD.

c. Notice of Unilateral Placement

Turning to the parent's appeal from the IHO's determinations regarding the sufficiency of the parent's notice of their intent to place the student at RFTS-LC, the IHO found the parent's notice was insufficient because it did not mention that the parents would be contracting with RFTS-LD.

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

As correctly argued by the parents in their request for review, under the IDEA, there is no requirement for the parents to specify the name of the private school, or in this case the private provider (see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]). As indicated above,

pursuant to federal regulations, a parents' 10-day notice must give notice to the CSE that the parents' are rejecting the placement proposed by the CSE and include a statement of their concerns and their intent to enroll the student in a private school at public expense (id.). There is no requirement under the IDEA or State law that a parent's 10-day notice must include the name of the private school or provider, only that the parent disagrees with the district's proposed placement and that the parent intends to unilaterally enroll the student elsewhere.

The hearing record shows that the parents' sent two letters to the district, dated June 16, 2021 and June 28, 2021 respectively, which indicated the reasons why the parents did not agree with the district's proposed program for the student for the 2021-22 school year and that they intended to "continue to enroll" the student at RFTS-LC for the 2021-22 school year (see Parent Exs. D-E). There is no evidence in the hearing record that the district responded to the parents' June 2021 letters prior to them filing their March 1, 2022 due process complaint notice (see Tr. pp. 1-119; Parent Exs. A-V; Dist. Exs. 1-9; IHO Exs. I-XI). The district was given an opportunity to cure the March 2021 IEP's deficiencies as indicated by the parents in their two June 2021 letters, but failed to do so.

As a final point, contrary to the IHO's statement that "the [district] may not have had any knowledge of the level of expense that would be incurred on their behalf," neither State law nor the IDEA specifies that the purpose of the 10-day notice requirement is to notify the district of the potential impact of its failure to remedy the deficiencies in its program. As noted above, the purpose of the notice is to give the district an opportunity to devise an appropriate educational program for the student prior to the student being removed from the public school system (Greenland Sch. Dist., 358 F.3d at 160).

As argued by the parents, their notice met the requirements set forth in the IDEA and State law. Accordingly, the sufficiency of the parent's notice to the district was not a basis to reduce or deny the parents' requested relief.

C. Pendency

Turning to the district's cross-appeal from the IHO's determination that the student's placement at RFTS, including services provided by RFTS-LD constituted the student's pendency placement for the 2021-22 school year, the district asserts that the switch from RFTS-LC, which was a tuition-based program, to the services-based program provided by RFTS-LD was a change in the student's placement and should not be covered under pendency.

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]).[17] 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 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.

[17] 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).

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 [OSEP 2007]).

In this instance, there is no argument as to the student's pendency program. The IHO determined that the student's pendency placement was based on a prior IHO decision dated September 6, 2014 regarding the student's 2013-14 school year (IHO Decision at p. 10; Parent Ex. B). In that decision, an IHO awarded the parent's tuition at RFTS-LC for the 2013-14 school year (Parent Ex. B at pp. 11-12). A review of the student's program at RFTS-LC, as described in that decision for the 2013-14 school year, consisted of a small classroom of no more than five students with 1:1 ABA instruction, five 60-minute sessions per week of speech-language therapy, five 45-minute sessions per week of OT, and a behavior plan (Parent Ex. B at p. 6). The IHO noted that the September 6, 2014 prior IHO decision awarded full tuition at RFTS-LC totaling $93,000.00 (IHO Decision at p. 10; see IHO Ex. VII).[18] The district agrees that the IHO properly determined that the student's pendency was based on the unappealed September 2014 IHO decision relating to the 2013-14 school year but disagrees with the determination that a change from a tuition-based program to a services-based program did not constitute a unilateral change in the student's pendency program.

The district argues that that the student's pendency program was a tuition-based program at RFTS-LC, not the services-based program the student received during the 2021-22 school year provided by RFTS-LD. The district argues that the September 2014 IHO decision awarded "a flat tuition rate of $93,000.00" which included ABA services, OT, and speech-language therapy in addition to other instructions and activities at RFTS-LC. According to the district, the change in the provision of services from RFTS-LC to RFTS-LD, including the change in the way payment was structured, constituted a change in placement. Additionally, the district asserts that for the school year at issue, RFTS-LD only provided ABA services, OT, and speech-language therapy omitting some of the services included in the student's prior placement at RFTS-LC.

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.).

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

[18] The IHO made an alternative finding regarding the amount to be paid for pendency purposes. Per the information provided, the IHO determined that based on her prior calculations, the maximum amount that may be awarded for services provided from March 2022 to June 2022 was $30,350, but since the IHO held that the $80,000 reimbursement was for the whole 2021-22 school year, it included the payment for pendency and thus no further amount was awarded based on pendency (IHO Decision at p. 11).

placement. The parent testified that the student has been attending RFTS-LC since the 2009-10 school year and that the program the student received at RFTS-LC has been meeting his needs (Parent Ex. U at ¶ 3). Additionally, according to the testimony of the educational director of RFTS-LC, the student attended RFTS-LC for the 2021-22 school year and made progress (Parent Ex. V at ¶¶ 22, 25, 46). However, for the 2021-22 school year, the parents contracted with RFTS-LD, "which [they] understood was to provide [the student's] programming and services at [RFTS-LC]" (id. at ¶ 19). According to the educational director, due to financial difficulties RFTS-LC's "programming began to be provided and funded through [RFTS-LD], a service agency"; RFTS-LC sent a summary of services to RFTS-LD and RFTS-LD set rates and billed for those services and, "[i]n exchange, [RFTS-LD] provided the funding needed to run [RFTS-LC]" (id. at ¶¶48-49). In the parents' response to the IHO's post-hearing questions, the parents indicated, seemingly in contradiction, both that the student's providers were employees of RFTS-LC and were salaried employees of RFTS-LD (IHO Ex. IV at p. 3).

As noted above, the IHO found there was evidence that during the 2021-22 school year the student received 23.5 hours of 1:1 ABA services per week, five 45-minute sessions per week of individual speech-language therapy, five 45-minute sessions per week of individual OT in addition to one 30-minute session per week in a group, and music therapy (IHO Decision at p. 6). Further, as compared to the September 2014 prior IHO decision, the IHO noted that the 2021-22 school year program did not include circle time, instructional lunch, exercise/breakfast circles, or activities of daily living in addition to having less time for individual speech-language therapy per week (id. at p. 10; compare Parent Ex. B at pp. 4-7, with IHO Decision at p. 6).

Considering the above, the change from RFTS-LC to RFTS-LD appears to have been more of a shift in the way the school charged for services, inflating costs from $93,000.00 per year for the 2013-14 school year to $342,587.50 per year for the 2021-22 school year, rather than a change in the educational program being provided to the student. 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.

VII. Conclusion

In sum, the IHO's findings that the district failed to provide a FAPE to the student for the 2021-22 school year and that the program offered to the student by RFTS-LC and RFTS-LD are final and binding. Regarding equitable considerations and relief, the IHO's decision is modified to award the parents the requested cost for the student's program provided by RFTS-LD for the 2021-22 school year amounting to $262,587.50. Finally, with respect to the student's pendency

program, the IHO's finding that the student's pendency program was the program provided by RFTS-LD based on a services agreement is reversed.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO decision, dated April 4, 2023, is modified by reversing that portion of the decision which denied the parents' request for direct payment of the costs of the student's remaining program for the 2021-22 school year provided by RFTS-LD based on equitable considerations.

IT IS FURTHER ORDERED that in addition to the reimbursement that has already been ordered by the IHO, the district shall pay the requested cost of the student's program for the 2021-22 school year totaling $262,587.50 to RFTS-LD directly; and

IT IS FURTHER ORDERED that that the IHO decision, dated April 4, 2023, is modified by reversing that portion of the decision which determined the services-based program provided by RFTS-LD constituted the student's placement for the pendency of this proceeding.

Dated: **Albany, New York**
June 8, 2023

STEVEN KROLAK
STATE REVIEW OFFICER