The University of the State of New York

The State Education Department
State Review Officer
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No. 23-181

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:
Law Offices of Adam Dayan, PLLC, attorneys for petitioners, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be fully reimbursed for their son's tuition costs at Reach for the Stars Learning Center (RFTS-LC) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determinations that it failed to demonstrate that it had offered the student a free appropriate public education (FAPE) for the 2022-23 school year and ordered an independent educational evaluation (IEE) at public expense. The appeal must be dismissed. The cross-appeal must be sustained in part.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited. The CSE convened on March 1, 2022, to formulate the student's IEP for the 2022-23 school year with an implementation date of July 5, 2022 (Dist. Ex. 1 at pp. 20-21, 30). The parents disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, on June 21, 2022, notified the district of their intent to unilaterally place the student at RFTS-LC (Parent Ex. B, see Dist. Exs. 1; 2; 6). In a due process complaint notice, dated August 16, 2022, the parents alleged

that the district failed to offer the student a FAPE for the 2022-23 school year (see Parent Ex. A). Specifically, the parents alleged that the CSE's recommendation of a 6:1+1 special class in a "district 75" or specialized school without the provision of a behavioral intervention plan or 1:1 paraprofessional for this student constituted a denial of a FAPE (id. at p. 6). The parents raised a number of concerns related to the assigned public school, among them the parents contended that the student has a history of elopement and that the assigned public school did not have sufficient personnel in place to prevent the student from leaving the building (id. at pp. 7-8). The parents asserted that RFTS-LC provided the student with an appropriate special education program that was reasonably calculated to deliver educational benefit to the student (id. at p. 9).

The parents entered into a contract with Reach for the Stars Learning and Developing, LLC (RFTS-LD) on October 1, 2022 (Parent Ex. D).[1]

An impartial hearing was convened before the Office of Administrative Trials and Hearings (OATH) on March 16, 2023 and concluded on June 22, 2023 after five days of proceedings (March 16, 2023 Tr. pp. 1-33; April 26, 2023 Tr. pp. 1-71; May 2, 2023 Tr. pp. 1-36; May 16, 2023 Tr. pp. 1-50; June 22, 2023 Tr. pp. 1-54).[2, 3] In a decision dated July 20, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year because the district "offered primarily group-based instruction without adequate support for the [s]tudent's safety and behavioral needs, including elopement risk," that RFTS-LC was an appropriate unilateral placement, and that equitable considerations weighed in favor of granting the parents' partial tuition reimbursement (IHO Decision at pp. 4, 7-8). As relief, the IHO ordered the district to reimburse the parents for a portion of the cost of the student's tuition at RFTS-LC for the 2022-23 school year and directed the district to fund a neuropsychological IEE (IHO Decision at p. 11).[4]

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review, the district's answer and cross-appeal thereto, and the parents' reply to district's answer

[1] 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).

[2] The transcript of the proceedings was not consecutively paginated.

[3] A hearing was held on February 16, 2023, at which time the district requested and was granted a subpoena to RFTS-LC for the production of various records (Feb. 16, 2023 Tr. pp. 1-21). At the February hearing, counsel for the district indicated there was a previous conference in this matter and in the IHO's decision, the IHO indicated there were preliminary conferences prior to the February 16, 2023 hearing date (Feb. 16, 2023 Tr. p. 3; IHO Decision at p. 4); however, the hearing record does not include the transcripts of any proceedings prior to the February 16, 2023 hearing date or any written summaries of a prehearing conference as required by State regulation (see 8 NYCRR 200.5 [3][xi] ["[a] transcript or a written summary of the prehearing conference shall be entered into the record by the impartial hearing officer"]).

[4] The IHO also ordered the district to continue to provide transportation (IHO decision at p. 11); however, it appears that the district had already agreed to provide the student with transportation to RFTS-LC and that it was not a disputed issue at the time of the impartial hearing (March 16, 2023 Tr. at pp. 21-22; June 22, 2023 Tr. pp. 36, 48).

and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here. The crux of the parents' dispute on appeal is that they are entitled to full funding for the costs of the student's placement at RFTS-LC. The parents argue that the IHO erred in finding that the contract between the parents and RFTS-LC was not a complete contract and that the IHO erred by using the mother's testimony to reduce the tuition for RFTS-LC. The district argues in its cross-appeal that the IHO erred by holding that: the district failed to provide the student with a FAPE for the 2022-23 school year; that RFTS-LC was an appropriate unilateral placement for the student; that equitable considerations do not favor a complete denial of any award of tuition for RFTS-LC; and that because the parents first requested an IEE in their due process complaint notice the IHO should have denied their request.

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]).[5]

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).

[5] 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).

"Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. FAPE

The district argues in its cross-appeal that the IHO erred in finding a denial of FAPE for the 2022-23 school year (Answer with Cross-Appeal ¶¶ 8-15). In their reply to the district's answer and cross-appeal, the parents argue that the IHO was correct in her determination that the March 2022 IEP did not provide adequate support for the student's safety and behavioral needs, including the student's elopement risk (Answer to Cross-Appeal ¶ 3). A review of the hearing record shows that there is not enough evidence to reach a different conclusion than set forth in the IHO's decision that the district failed to provide the student a FAPE for the 2022-23 school year. As discussed below, the hearing record reflects that the March 2022 CSE was aware of the frequency and intensity of the student's behaviors but did not recommend adequate support for the student considering his behavioral needs.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ. of Shenendehowa Cent. Sch. Dist., 361 Fed. App'x 156, 160 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider developing a behavioral intervention plan (BIP) for a student that is based upon a functional behavioral assessment (FBA) (8 NYCRR 200.4[d][3][i], 200.22[a]-[b]). Additionally, a district is required to conduct an FBA in an initial evaluation for students who engage in behaviors that impede their learning or that of other students (8 NYCRR 200.4[b][1][v]). State regulation defines an FBA as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and includes, but is not limited to:

> the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulation, an FBA shall be based on multiple sources of data including, but not limited to, "information obtained from direct observation of the student, information from the student, the student's teacher(s) and/or related service provider(s), a review of

available data and information from the student' record and other sources including any relevant information provided by the student's parent" (8 NYCRR 200.22[a][2]). An FBA must also be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]).

The Second Circuit has indicated that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F.3d at 190; see L.O. v. New York City Dep't of Educ., 822 F.3d 95, 113 [2d Cir. 2016]). The Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (R.E., 694 F.3d at 190).

With regard to a BIP, the special factor procedures set forth in State regulations note that the CSE shall consider the development of a BIP for a student with a disability when:

> the student exhibits persistent behaviors that impede his or her learning or that of others, despite consistently implemented general school-wide or classroom-wide interventions; (ii) the student's behavior places the student or others at risk of harm or injury; (iii) the CSE or CPSE is considering more restrictive programs or placements as a result of the student's behavior; and/or (iv) as required pursuant to 8 NYCRR 201.3

(8 NYCRR 200.22[b][1]).

If the CSE determines that a BIP is necessary for a student "the [BIP] shall identify: (i) the baseline measure of the problem behavior, including the frequency, duration, intensity and/or latency of the targeted behaviors . . . ; (ii) the intervention strategies to be used to alter antecedent events to prevent the occurrence of the behavior, teach individual alternative and adaptive behaviors to the student, and provide consequences for the targeted inappropriate behavior(s) and alternative acceptable behavior(s); and (iii) a schedule to measure the effectiveness of the interventions, including the frequency, duration and intensity of the targeted behaviors at scheduled intervals (8 NYCRR 200.22[b][4]).

As with the failure to conduct an FBA, the district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x 2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

In this matter, the CSE convened on March 1, 2022, to develop the student's IEP for the 2022-23 school year (Dist. Ex. 1 at p. 27). According to the district school psychologist who chaired the March 2022 CSE meeting, the CSE reviewed progress updates from RFTS, that included academic and related service progress reports, along with a February 2022 psychoeducational evaluation and noted that "all of those were used to make a recommendation" (April 26, 2023 Tr.

pp. 10-12).[6] According to the hearing record, the following people attended the March 2022 CSE meeting: the district school psychologist who also served as the district chairperson; the RFTS-LC educational director; the student's classroom teacher, classroom supervisor, speech-language therapist, and occupational therapist: and the parent (Dist. Ex. 8). Additionally, the December 2021 educational progress report, the December 2021 OT progress report, the August 2021 speech-language annual evaluation report, and the December 2021 speech-language progress report for 2021-22 were all completed by the student's then-current teacher, occupational therapist, and speech-language pathologist supervisor, all of whom attended the March 2022 CSE meeting (Dist. Ex. 8; see Parent Ex. C at pp. 14, 28, 32, 44, 50).

The March 2022 CSE recommended the student attend a 12-month program in a 6:1+1 special class in a specialized school for math, English Language arts (ELA), social studies, and sciences, with the following related services: individual OT five times per week for 30 minutes; individual speech-language therapy five times per week for 30 minutes; and parent counseling and training in a group four times per year for 60 minutes (Dist. Ex. 1 at pp. 20-21). Additionally, the CSE recommended the student utilize a static display speech generating device (SGD) (id. at p. 21). The March 2022 CSE further recommended the student receive testing accommodations in the form of: extended time (1.5), separate location/room, test read, breaks, and use of a scribe (id. at p. 23).[7] Finally, the March 2022 IEP, in addition to the above, recommended resources and strategies to address the student's management needs including fast paced, structured learning, and high rates of reinforcement; a highly specialized educational program that facilitates the acquiring, applying and transfer of skill across all environments; a smaller sized classroom with a small student to teacher ratio and supervision;; reminders to stay focused to task; explicit verbal directions; and special transportation accommodations of door to door (id. at p. 6).

Further review of the hearing record indicates that the March 2022 IEP reflected a limited description of the student's behaviors (see generally Dist. Ex. 1). Specifically, the March 2022 IEP reflected information from the February 2022 psychoeducational evaluation report that indicated the student "present[ed] with low frustration tolerance, and may get easily overwhelmed when asked to engage in non-preferred tasks" (compare Dist. Ex. 1 at p. 4 with Dist. Ex. 5 at pp. 3-4). The IEP further stated that the student occasionally exhibited "maladaptive behavioral reactions when frustrated or stressed by various triggers" (compare Dist. Ex. 1 at p. 4 with Dist. Ex. 5 at p. 4).[8]

[6] It is unclear from the hearing record which educational and related services progress reports were reviewed at the March 2022 CSE meeting; however Parent Exhibit C was admitted into the hearing record as "Email to CSE re Documents for 3/1/22 IEP Meeting with Attachments" and it showed the information that was available to the March 2022 CSE from RFTS as it contained an email from the educational director of RFTS-LC to the district school psychologist with attachments consisting of the following reports and evaluations: a RFTS-LC education plan from the first quarter of the 2021- 22 school year; a December 2021 educational progress report; a May 2021 OT evaluation; a December 2021 OT progress report; an August 2021 speech and language annual evaluation report; and a December 2021 speech and language progress report (Parent Ex. C).

[7] The student was recommended for the State alternate assessment due to the severity of his deficits (Dist. Ex. 1 at p. 25).

[8] The IEP included an annual goal that stated student would improve waiting skills, "reduce maladaptive behavior," and decrease rigidity at mealtime (Dist. Ex. 1 at p. 14). Short-term objectives for the annual goal targeted the student's ability to wait without problem behaviors or repetitive requests and reduce problem behavior related to escaping from a non-preferred activity (id.). However, the IEP did not describe the nature of the targeted

Finally, the March 2022 IEP reported parental concerns that the student would "cry and tantrum because he [wa]s unable to express his feeling in words" and that the "parent reported that [the student] w[ould] elope" (Dist. Ex. 1 at pp. 3, 29).[9] According to the March 2022 IEP, the student did not require strategies, interventions, or supports to address behaviors that impeded the student's learning or that of others and the student did not require a BIP (Dist. Ex. 1 at p. 7).

However, a review of the February 2022 psychoeducational evaluation report shows that not all of the student's behaviors described in the report were included in the March 2022 IEP. Specifically, in the psychoeducational evaluation report, the evaluator indicated that the student had "difficulty utilizing words to express his feelings when upset, and w[ould] instead 'run and scream'" and noted that "[i]t c[ould] be difficult to calm him down when he [wa]s upset" (Dist. Ex. 5 at p. 1). Additionally, the evaluator reported that "at times" during the evaluation, the student "exhibited frustration" and "slight aggression," and described how the student would touch or pinch her hand or arm (id. at p. 2). Notably, she reported that "at one point [the student] stood up and mildly pushed the evaluator, which caused the evaluator to fall sideways off of her chair" (id.). The evaluator reported that the student "appear[ed] to have low frustration tolerance, and c[ould] become emotionally and behaviorally reactive when frustrated or stressed" (id. at p. 5).

According to the December 2021 educational progress report from RFTS-LC, the student followed a BIP that was effective in reducing maladaptive behaviors (Parent Ex. C at p. 14).[10] The report explained that the student's maladaptive behaviors that occurred during the school day interfered with his learning, and that these behaviors included vocal protests, described as "verbal refusal, yelling, and crying," which could occur in response to demands, "relinquishment of reinforcement," or when overly excited (id.). Additionally, the December 2021 educational progress report indicated that the student engaged in aggressive behaviors described as hitting, grabbing or squeezing, and biting (id.). The evaluator opined that the student engaged in aggressive behaviors in order to gain access to attention, in response to relinquishment or denied access to reinforcement, or in the presence of a demand (id.). The evaluator further noted that there were "situations where the actual cause of [the student's] irritation [wa]s sometimes unknown as it may be due to an internal/unobservable variable" (id. at pp. 14-15). The evaluator opined that while the student's inappropriate vocalizations continued to decrease steadily, they still occurred at a rate that interfered with learning (id. at p. 15). The evaluator explained that the student's BIP was in place to reduce

maladaptive behaviors.

[9] Related to the student's communication needs, the IEP indicated that the student "present[ed] with language-based challenges, which c[ould] impact his ability to communicate effectively with others" (Dist. Ex. 1 at p. 4). Special factors indicated the student needed a particular device to address his communication needs and that the student required an assistive technology device or service (id. at p. 7). The March 2022 CSE recommended a SGD for the student; however, the IEP did not explain how the device would have benefitted the student (Dist. Ex. 1 at p. 21; see Dist. Ex. 1 at pp. 1-6, 21). Additionally, the CSE did not make any recommendations to provide support for the use of the device or for training for the student or support for staff. The recommendation for a SGD may assist in decreasing the student's frustration when he is misunderstood or cannot express himself, which may in turn assist in decreasing the inappropriate behavior he engages in when frustrated; however, such a recommendation should include sufficient information by which to guide implementation for its use.

[10] This BIP was created and implemented by RFTS-LC (see Parent Ex. J). While the hearing record does not contain the student's RFTS-LC BIP for the 2021-22 school year, it does contain the student's RFTS-LC BIP for the 2022-23 school year (id.).

rates of maladaptive behaviors, which included an intermittent schedule that prevented the student from predicting the intensity or duration of the work necessary to "gain access to reinforcement" (id.). Further, the plan required that the student use appropriate language to request reinforcement, tolerate denied access to reinforcement, relinquish reinforcement, follow directives associated with an area of high demand and engage in varied durations of work (id.). The evaluator explained that the student had been able to steadily increase the amount and difficulty of the work he could do while also decreasing the rate and intensity of maladaptive behavior and noted that he was engaged in work and or programming for a maximum of seven minutes (id.).

In a May 2021 OT evaluation report, the evaluating occupational therapist noted that during testing the student was occasionally observed to be upset and demonstrated behaviors such as pushing the therapist away, attempting to elope, or engaging in vocal protests (Parent Ex. C at p. 19). Additionally, the evaluator reported that the behaviors increased during novel testing and significantly decreased during familiar fine motor tasks (id.). The evaluator noted that when the student's behaviors escalated, the student required assistance to self-soothe, such as taking a break to allow the evaluator to provide him with deep pressure input in order to help him regain his composure before resuming testing (id.). The evaluator further noted that "[o]n occasion" severe behaviors such as extremely loud yelling, biting materials, and intense crying and/or flailing of arms and legs occurred, during which testing was terminated to prevent behaviors from interfering with the accuracy of the evaluation (id.).

A December 2021 speech and language progress report from RFTS-LC indicated that the student demonstrated maladaptive behaviors such as "yelling, crying, tantrums, eloping from the work setting/classroom, long periods of giggling, and sometimes aggressive behaviors such as hitting, kicking and biting," which prevented the student "from consistently engaging in tasks" (Parent Ex. C at p. 45). The speech-language pathologist further explained that these behaviors occurred most often in response to a work demand; however, she opined that the behaviors occasionally served other functions such as attention seeking, response to denial of a preferred reinforcer, or due to internal medical reasons (e.g., pain) (id.). She further opined that the behaviors interfered with the student's work and hindered his ability to target his speech and language goals during sessions every day (id.). The speech language pathologist reported that the student had an individualized work protocol and behavior plan that had improved the student's ability to engage in tasks, follow instructions, and learn novel information regarding communication skills (id.).

The RFTS-LC education director (director) testified that she attended the March 2022 CSE meeting and shared her concerns about the CSE recommendations, specifically noting that there was no recommendation for a 1:1 paraprofessional (Apr. 26, 2023 Tr. p. 60). She explained that the student "still required very intense supervision" and described that the student's behaviors encompassed aggression, property destruction, biting, and elopement, and opined that it was dangerous if he was not with someone (id.). She further opined that the student's aggression was a safety concern for other children (id.). The director testified that, during the March 2022 CSE meeting, she explained that the student required a BIP and expressed concern for the other students if the student eloped from a classroom with only one teacher and one paraprofessional who might be engaged with other students at the time (id.).

In her written testimony, the parent indicated that she disagreed with the March 2022 CSE's refusal to recommend a 1:1 paraprofessional, noting that the "CSE stated that 'he does not need it' despite reports from his instructors that he has behaviors that require constant monitoring and

supervision," and specifically indicated that she informed the CSE that a BIP and ABA services were essential for the student to participate in instruction (Parent Ex. Z at ¶ 9).

It appears that the March 2022 CSE had before it enough information to develop appropriate behavioral supports for this student for the 2022-23 school year, which may have included the support of a 1:1 paraprofessional, an FBA and a BIP, or other appropriate supports; however, based on the above, the March CSE failed to appropriately address the student's behavioral needs as described in the evaluative information available to the CSE. I strongly suggest that, if it has not already done so, the CSE reevaluate the student's behavioral needs in order to determine what supports the student requires in order to benefit from instruction.

Based on the information discussed above, the hearing record does not provide evidence that would support overturning the IHO's determination, and in fact supports her assertion that the CSE's recommended March 2022 IEP did not provide adequate support for the student's safety and behavioral needs.

B. Unilateral Placement

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the

> child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The district appeals from the IHO's finding that the parents met their burden of proving that RFTS-LC was an appropriate unilateral placement for the student, specifically because the "[p]arents presented scant evidence of any academic achievement," the evidence presented "vaguely describe[s] only limited progress," and "the services provided by RFTS-LC fluctuated wildly from month-to-month" (Answer with Cross-Appeal ¶¶ 17-19).

With regard to the parties dispute over whether RFTS-LC was appropriate to address the student's needs, the evidence reflects the student's progress at RFTS-LC during the 2022-23 school year, along with evidence that RFTS-LC created a BIP to address the student's maladaptive behaviors (see Parent Exs. I, J). The hearing record also contains a second quarter progress report for the 2022-23 school year which indicates that the student was making progress in the following areas: receptive language; learning to request items; writing a five word sentence; his math goals; answering questions about his calendar; sitting in a small group; independent leisure skills; activities of daily living (ADL) goals; and shopping with his teacher at a grocery store (Parent Ex. N at pp. 3, 5, 7, 9, 10, 11, 12, 13).

The January 26, 2022 psychoeducational evaluation report indicates that the student's cognition is in the moderately impaired range and that the student "perform[ed] significantly below grade level expectations given his age" (Dist. Ex. 5 at pp. 4-5). The hearing record contains the student's progress snapshot from July 2022 through April 2023, which charts the student's progress in the following academic, social, and ADL categories: following directions with prepositions; indicating and naming attributes; describing objects or events with attributes; naming possessive nouns; answering "wh" questions related to a text; recalling and retelling events; delivering an item or message; spelling; using a ruler to measure; identifying numbers before and after; simple addition; identifying two digit numbers; sequencing events; handwriting numbers; naming coins; identifying more or less; identifying the value of coins; playing card games socially; playing individual games; and applying deodorant (see Parent Ex. I). The psychoeducational evaluation noted the student's low frustration tolerance, and that the student can become reactive emotionally and behaviorally when he is frustrated or stressed, especially because of his difficulties expressing himself adequately because of his language-based weakness (Dist. Ex. 5 at p. 5). The evaluator opined that the student "would benefit from continued supportive services in academics, social and emotional functioning, and adaptive functioning skills" (id.). The hearing record reflects that the student's maladaptive behaviors have had a direct impact on his academic progress and as such, the student's academic performance is appropriate based on his abilities.

RFTS-LC's service affidavits reflect that the amount of related services from month to month varied, but there were no marked deviations, and it appears that for the most part the fluctuations in the level services corresponded with fluctuations in the student's attendance records (compare Parent Ex. F with Parent Ex. H). There is some evidence that RFTS-LC was not always able to provide consistent related services to the student, based on the student's attendance and because RFTS-LC "lost some therapists due to not really being able to hire right away" (May 16, 2023 Tr. pp. 11-12; see Parent Exs. F, H). However, the hearing record supports finding that the month-to-month fluctuations in the related services provided by RFTS-LC to the student did not warrant a finding that the educational services provided to the student by RFTS-LC were not appropriate under the totality of the circumstances in this particular case.

As a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS-LC—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Carter, 510 U.S. at 13-14). Here, RFTS-LC developed an educational plan for the student as discussed above and, most importantly for the student in this matter, RFTS-LC developed a BIP for the student to address his maladaptive behaviors which were not identified by the district (see Parent Exs. I-N). Furthermore, a unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP. Rather, it is well settled that parents need not show that their unilateral placement provides every service necessary to maximize the student's potential, but rather, must demonstrate that the placement provides education instruction specially designed to meet the unique needs of the student (M.H., 685 F.3d at 252; Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, at *9 [S.D.N.Y. Mar. 18, 2010]). "The test for the private placement 'is that it is appropriate, and not that it is perfect'" (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 877–78 [2d Cir. 2016] [citations omitted]).

The parent's unilateral placement has passed that test in this instance. There is sufficient evidence in the hearing record to uphold the IHO's determination that RFTS-LC "provide[d] education in an individualized context with specialized support," that it matched its program to the student's needs, and that "the [s]tudent made reasonable progress" (IHO Decision at pp. 7, 8). As such, the IHO's finding that the parents met their burden in proving that RFTS-LC is an appropriate unilateral placement for the student will not be disturbed.

C. Equitable Considerations

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

442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

The IHO found "that the weight of the evidence establishe[d] that the [p]arent cooperated with the [d]istrict in its efforts to develop an IEP and recommend a program and placement for the 2022-2023 school year" and that the parents "gave the proper ten-day notice to the [d]istrict of their intention to unilaterally place the [s]tudent at [RFTS-LC]" (IHO Decision at p. 8). As this portion of the IHO's decision has not been appealed, it is final and binding on the parties and will not further be discussed.

Turning to the parties' expressed disagreements over equitable considerations in this matter, the primary dispute concerns the IHO's reduction of tuition during the 2022-23 school year from the total requested cost of the program in the amount of $314,919.50 to $154,000.00 based on the IHO's determination that "there was not a complete meeting of the minds" between the parents and RFTS-LC regarding the true cost of the program and that "a tuition award is only justified up to the amount contemplated by the [p]arent" (see IHO Decision at pp. 8, 11).[11, 12] The IHO found that RFTS-LC

[11] The total cost of the student's program was calculated based on invoices from July 2022 through March 2023 (see Parent Ex. Y at p. 3). Accordingly, the hearing record only includes information regarding the delivery of services to the student from July 2022 through March 2023 and, therefore, although the hearing record supports finding that the services that were delivered to the student were appropriate as discussed above, given the structure of the unilateral placement, this lack of evidence means that the hearing record cannot support a finding that the unilateral placement provided an appropriate educational program to the student for the remainder of the 2022-23 school year.

[12] The district contends, as part of its cross-appeal, that the IHO correctly found that "the tuition charged by RFTS-LC for the 22-23 S[chool] Y[ear] is patently unreasonable… the parties did not comply with all terms of the enrollment contract… and that the [p]arents d[id] not seem to have understood anything close to the extent of the

"unreasonably increased tuition and that the purported contract for the school year was flawed by reasons of late execution, an unmet provision, and lack of thorough disclosure to the [p]arent of the extent of the tuition increase" (IHO Decision at 8; see June 22, 2023 Tr. pp. 16-17). The parent contends that the IHO erred in reducing the tuition award to $154,000.00 "on the basis of one unsubstantiated statement" and that the "IHO is not entitled to ignore evidence in the record in favor of an unsubstantiated guess" (Req. for Rev. at p. 6).

In reviewing the IHO's determination that RFTS-LC unreasonably increased its tuition, the hearing record, as a whole, includes a sufficient basis for calling the rates charged by RFTS-LD into question. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 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).

One of the more perplexing aspects of this matter involves the parents understanding of the arrangements that came about with the private schooling which came about in an atypical fashion; the evidence shows that the parents did not enter into a contract with RFTS-LD until October 2021, three months after the start of the 12-month school year for this student and one month after the parents filed their due process complaint notice in this proceeding (see Parent Exs. A; D). The parent's testimony established that she signed an enrollment contract with RFTS-LD on October 1, 2022 and that, at the time she signed the contract, she understood that she was contractually financially responsible for all the services that RFTS provided to the student for the 2022-23 school year, and that she discussed RFTS's hourly rates and billing practices at the time that she entered into the enrollment contract (June 22, 2023 Tr. pp. 43-44; see Parent Ex. D). The parent testified that it was explained to her that the prices for RFTS "depended on how many hours each child got, so it's not, it's not like they could tell me how much it's going to cost or, you know, depending on the hours" (June 22, 2023 Tr. pp. 45-46). However, she also testified that the first time she became aware of the rates was when she signed the contract, which was October 1, 2023 (June 22, 2023 Tr. p. 47). Somewhat inconsistently, the parent also testified that it was her understanding that the rates were tuition-based and she estimated that her anticipated contractual costs for the 2022-23 school year were between $126,000 and $154,000 (June 22, 2023 Tr. p. 47).

The hearing record establishes that the RFTS-LD administrator testified that during the 2021-22 school year, RFTS-LC switched from a tuition-based model to a fee-for-service model, which he stated increased the cost of services (June 22, 2023 Tr. pp. 14, 21). According to the RFTS-LD administrator, he was not aware of students receiving services prior to the signing of an enrollment agreement, indicating that services were delivered following the signing of an enrollment agreement and that the RFTS contract includes the rates for services (June 22, 2023 Tr. pp. 16-17). The administrator noted that the parents signed the contract with RFTS-LD on October 1, 2023, but the contract covered services delivered to the student beginning July 6, 2022 through June 30, 2023

financial obligation they purportedly assumed" (Answer and Cross-Appeal ¶ 22). As such, the district requested that the SRO "vacate the tuition award in its entirely and dismiss the present appeal" (id.).

(June 22, 2023 Tr. p. 18). Finally, in explaining the increased cost of the services delivered by RFTS, the RFTS-LD administrator testified that prior to the 2021-22 school year RFTS-LC charged a tuition of approximately $130,000 per year and relied on fundraising in order to meet the school's budgeting and that during the 2021-22 school year the school changed the billing model and the financial structure of the program but did not change the educational structure (June 22, 2023 Tr. p. 21).[13]

Based on the testimony of the parent and the RFTS-LD administrator, the IHO was correct to question whether the parent fully understood the costs for services (IHO Decision at p. 8). As noted above, the parents entered into the contract with RFTS-LD three months after the start of the school year, and after the commencement of this proceeding; however, as discussed above, the testimony of both the parent and the RFTS-LD administrator indicated that the parents were not aware of the rates for services until they signed the contract. Their testimony is not a reliable indicator that the costs charged by RFTS-LC reflected reasonable costs especially when there was two differing understandings of the arrangements in the evidence between the parent and the private school. Accordingly, there was sufficient basis to question the validity of the rates charged on the basis that they were unreasonably excessive and to reduce the awarded costs of the program based on equitable considerations.

My review of the evidence in the hearing record leads me to the conclusion that the IHO did not err in finding sufficient cause to question the terms of the contract and the costs related with RFTS. I note that the parents' witness from RFTS-LC was given multiple opportunities during the hearing to clarify the tuition costs, but failed to do so (June 22, 2023 Tr. pp. 10-26). I will not disturb the IHO's discretionary tuition reduction of direct payment of the student's education at RFTS to $154,000 for the 2022-23 school year.

As one final point on equitable considerations, although the evidence that RFTS-LC was not always able to provide consistent related services to the student did not rise to the level of a denial of a FAPE, it is another factor that may be considered in balancing the equities (May 16, 2023 Tr. pp. 11-12; Parent Ex. F). While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too

[13] The RFTS-LD administrator testified that RFTS-LD charged a market rate for services and he identified other schools that he believed charged for services using a fee for services model, but he was "not sure of the exact amounts charged" (June 22, 2023 Tr. p. 14).

much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]). The fee-for-service model leaves itself particularly vulnerable to the argument that segregable services exceed the level that the student required to receive a FAPE (see L.K., 2016 WL 899321, at *7). Accordingly, although I do not address it in this matter, the frequency and duration for which RFTS-LC chose to deliver services, and particularly ABA services, to the student, could also warrant a reduction based on equitable considerations.

D. Independent Educational Evaluation

The IHO granted the parents' request for a neuropsychological IEE at public expense, but the district cross-appeals, contending that the hearing record does not contain evidence of a request from the parents for an IEE other than the parents' due process complaint notice. The parents request that the IHO's order for the district to fund a neuropsychological IEE be upheld.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

Here, the parents allege in their August 2022 due process complaint notice that the district "must fund an independent, comprehensive neuropsychological evaluation to assess [the student] in

all areas of disability, or reimburse the [p]arent for the costs of a private evaluation" (Parent Ex. A at p. 10). The parents did not specify a particular evaluation or reevaluation conducted by the district with which they disagreed (see generally Parent Ex. A).

During the hearing, the CSE chairperson testified that the July 2022 CSE reviewed a psychological assessment, an educational evaluation, a speech-language therapy assessment, an OT assessment, and a PT assessment and that it was her professional belief that the CSE had sufficient information (April 26, 2023 Tr. pp. 10-11). However, the IHO reasoned that "[t]he [d]istrict did not present any evidence opposing the [p]arent's right to the requested IEE" and granted the parents' request for a neuropsychological IEE (IHO Decision at pp. 10-11). It is within an IHO's authority to order an IEE at public expense as part of an impartial hearing (34 CFR 300.502[d]; 8 NYCRR 200.5[g][2]; [j][3][viii]; Luo v. Roberts, 2016 WL 6831122, at *7 [E.D. Pa. Oct. 27, 2016] [noting that an IHO "is permitted, and in some cases required, to order an [IEE] at public expense"], on reconsideration in part, Luo v. Owen J. Roberts Sch. Dist., 2016 WL 6962547 [E.D. Pa. Nov. 28, 2016], aff'd, 2018 WL 2944340 [3d Cir. June 11, 2018]; Lyons v. Lower Merrion Sch. Dist., 2010 WL 8913276, at *3 [E.D. Pa. Dec. 14, 2010] [noting that the regulation "allows a hearing officer to order an IEE 'as part of' a larger process"]; see also S. Kingstown Sch. Comm. v. Joanna S., 2014 WL 197859, at *9 n.9 [D.R.I. Jan. 14, 2014] [acknowledging opinion that the regulation empowers hearing officers to solicit independent expert opinions but disagreeing that the regulation gives an IHO "the inherent power to make up remedies out of whole cloth"], aff'd, 773 F.3d 344 [1st Cir. 2014]).

On appeal, the parents argue that the IHO's order directing the district to fund a neuropsychological IEE should be upheld (Req. for Review at p. 8). The district cross-appeals, asserting that the parent requested an IEE for the first time in her due process complaint notice and that there is no evidence of any dispute regarding evaluations or a request by the parents before they filed their due process complaint notice (Answer and Cross-Appeal ¶¶ 23-24).[14] The district argues that "a request made in a [due process complaint notice] is not a proper means of obtaining an IEE at public expense and, thus, the IHO should not have ordered such an award in this matter" (id. ¶ 24). In the parents' reply to the district's answer and cross-appeal, the parent "acknowledges that the SRO has recently taken the position that parents should not rely solely upon a due process complaint to request an IEE" but argued that "in the present matter, the [p]arent did not have an opportunity to disagree with the [district's] evaluation before the hearing" (Parent Reply ¶ 15).

I have concerns with the parents' inclusion of the request for an IEE in the due process complaint notice in the first instance (see Parent Ex. A at p. 10). In past decisions SROs, including the undersigned, have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, I have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and my observation is that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly

[14] The parent's affidavit asserts that the parent emailed the district a request for a new evaluation on October 26, 2022, but that email is not part of the hearing record (Parent Ex. Z ¶ 5). Regardless, the parent's October 26, 2022, email was dated well after the parents filed their due process complaint notice on August 16, 2022 (see Parent Ex. A).

indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[15] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[16] My continued study of the judicial and administrative guidance on the topic has led me to change my previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first). Moreover, I am convinced in this case that the parents may have included the request for an IEE as an afterthought. This is an improper use of the due process procedures.

Accordingly, I find that the IHO's decision to grant the parents' request for the district to fund a neuropsychological IEE was in error as the request was raised for the first time in the due process complaint notice and the parents' due process complaint notice did not include any disagreements with an evaluation conducted by the district. The Second Circuit has made it clear that a parent must disagree with a district evaluation as of the time it was conducted, and that subsequent changes in circumstances do not support a disagreement with an evaluation (Trumbull, 975 F.3d at 171 [2d Cir. 2020] citing N.D.S. by and Through de Campos Salles v. Acad. for Sci. and Agric. Charter Sch., 2018 WL 6201725, at *2 [D. Minn. Nov. 28, 2018] ["'Informing a school that, subsequent to an evaluation, a child's condition has changed is not the same thing as disagreeing with the evaluation'"]). Under those circumstances, the appropriate course of action "would be more frequent evaluations—and the parents are entitled to request one per year—not an IEE at public expense. If the parent[s] disagree[] with those evaluations, then they would be free to request an IEE at public expense with which to counter" (Trumbull, 975 F.3d at 171).

[15] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[16] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

With that said, the parents have a right to request that the district perform a neuropsychological evaluation and any other evaluations that they deem to be appropriate. Upon receipt of such request, the district must consider whether it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parent with prior written notice describing, if applicable, its reasons for concluding that additional evaluations of the student are unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parent is dissatisfied with the district's response or evaluations, the parent may then submit a request to the CSE that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

VII. Conclusion

The evidence in the hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year and that the services delivered to the student between July 2022 and March 2023 at RFTS-LC were an appropriate unilateral placement for the student. A thorough review of the hearing record supports the IHO's reduction based on equitable considerations, therefore the portion of the IHO's decision reducing the amount of the tuition reimbursement will not be disturbed. For the reasons cited above, the IHO's award of an IEE at public expense is hereby reversed.

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

THE APPEAL IS DENIED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 20, 2023, is modified by reversing that portion which directed the district to fund the costs of a neuropsychological IEE.

Dated: **Albany, New York**
September 28, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER