



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-188

Application of a STUDENT WITH A DISABILITY, by her 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 Dominic Buchmiller, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 reimbursed for the costs of their daughter's services at Reach for the Stars (RFTS) for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered an appropriate educational program to the student for that school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student received occupational therapy (OT), physical therapy (PT), speech-language therapy, and applied behavior analysis (ABA) services as a young child through the Early Intervention Program (Parent Ex. H at p. 2). The student subsequently attended special class settings and received related services during preschool and as a school-age student (*id.*). A CSE

convened on January 18, 2022, determined that the student was eligible for special education services as a student with autism, and formulated her IEP for the 2022-23 school year (see generally Dist. Ex. 2).¹ The CSE recommended a 12-month program consisting of a 6:1+1 special class in math, English language arts (ELA), social studies, and science, together with five 30-minute sessions of individual OT per week, two 30-minute sessions of individual PT per week, five 30-minute sessions of individual speech-language therapy per week, and daily, individual paraprofessional (toileting) services for 0.2 of the day (id. at pp. 14-16).² The CSE also recommended assistive technology consisting of a "[s]tatic display, speech generating device" to be used throughout the school day (id. at p. 15).

The parents disagreed with the January 2022 CSE's recommendations and, in a letter dated June 21, 2022, notified the district of their intent to enroll the student at RFTS for the 2022-23 school year (see Parent Ex. E). In the June 21, 2022 letter, the parents requested that the district conduct a neuropsychological evaluation and indicated that, if the district failed to do so, they would obtain an independent neuropsychological evaluation and seek reimbursement for the evaluation from the district (id.). On September 10, 2022, the parent signed an enrollment agreement with Reach for the Stars Learning and Developing, LLC (RFTS-LD) for the provision of services to the student for the 2022-23 school year (Parent Ex. J).³

In an amended due process complaint notice, dated January 20, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. B).⁴ Generally, the parents asserted that the CSE's recommendations were not appropriate, as they did not provide the student with the 1:1 support that she required, would not address the student's behavioral needs, and did not specify appropriate methodologies (id. at pp. 5-10). As relief, the parents requested funding for the student's RFTS program and an independent educational evaluation (IEE) (id. at pp. 12, 13).

An impartial hearing convened on February 24, 2023 and concluded on July 19, 2023 after nine days of proceedings (see Tr. pp. 1-426).⁵ In a decision dated August 1, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year (IHO

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

² The CSE also recommended four 60-minute sessions of parent training and counseling per year (Dist. Ex. 2 at p. 15).

³ According to the hearing record, RFTS-LD worked in conjunction with Reach for the Stars Learning Center (RFTS-LC) to provide services to students (see Parent Ex. J). For purposes of this decision, when described collectively or when the distinction is not relevant, 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).

⁴ The original due process complaint notice was dated July 6, 2022 (see Parent Ex. A).

⁵ Two hearing dates devoted to addressing the student's stay put placement during the pendency of the proceedings took place on March 15, 2023 and March 31, 2023 (Tr. pp. 19-57). A pre-hearing conference was also held on April 17, 2023 (Tr. pp. 58-68).

Decision at pp. 12-13). The IHO also found that that RFTS was not an appropriate unilateral placement (*id.* at pp. 13-24). The IHO went on to determine that, if the unilateral placement had been found appropriate, an award of funding would have been limited to no more than \$172,300 based on the evidence in the hearing record regarding the reasonableness of the costs of the program (*id.* at pp. 25-27). The IHO denied the parents' request for district funding of the costs of the student's services at RFTS based on her finding that the unilateral placement was not appropriate (*id.* at pp. 25, 27).

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 with cross-appeal, and the parent's answer to the cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here in detail.

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

1. whether the IHO erred in finding that the recommendations in the January 2022 IEP did not adequately address the student's needs and, particularly her behavioral needs, and, therefore, denied the student a FAPE for the 2022-23 school year; and, if so,
2. whether the IHO erred in finding that RFTS was not an appropriate unilateral placement for the student for the 2022-23 school year, and, if so,
3. whether equitable considerations weigh in favor of an award of full or partial funding of the costs of the services delivered at RFTS; and
4. whether the parents are entitled to district funding of an IEE.

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]).⁶

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

VI. Discussion

A. January 2022 IEP

1. Student's Needs

While not directly at issue, a discussion of the student's needs is necessary to facilitate review of the issues raised on appeal. The student's January 2022 IEP present levels of performance indicated that she was "in an ungraded classroom" at a "private [s]pecial [e]ducation school" and had received a diagnosis of autism (Dist. Ex. 2 at p. 2).⁷ According to teacher reports reflected in the IEP, the student's "strengths include[d] her imitation skills with and without objects, matching visual skills with objects and pictures[,] and receptive identification skills" (id.). The IEP also indicated that the student "ha[d] difficulty transitioning between the classroom and

⁶ 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).

⁷ The January 2022 IEP reflects that the CSE used a number of assessments and reports when developing the student's IEP (Dist. Ex. 2 at p. 1). The dates and titles of the documents referred to in the January 2022 IEP do not correlate to the dates and titles of the assessments and reports reflected in the July 2022 prior written notice stemming from the January 2022 CSE meeting (compare Dist. Ex. 2 at p. 1, with Dist. Ex. 9 at p. 2). Some of the information in the IEP present levels of performance is consistent with information from RFTS documents prepared during the 2021-22 school year describing the student's goals and educational progress (compare Dist. Ex. 2 at pp. 2-5, with Dist. Exs. 5 at pp. 1, 2; 7 at pp. 4-7; 8). As the January 2022 IEP present levels of performance are not in dispute in this appeal, that information will be used to discuss the student's needs as known to the CSE at the time of the January 2022 CSE meeting.

other areas within [the] school building" (id.). The student was working on identifying teachers and clothing items, and pre-academic skills such as imitating motor actions with objects, demonstrating block designs from picture cards, and completing puzzles with multiple connecting pieces (id.). In reading, she was working on her ability to match upper- and lower-case letters and label letters and identify their sounds (id.). In math, the student was "working on improving her rote counting skills" and the ability to count objects and demonstrate one-to-one correspondence (id.).

According to the IEP, the student demonstrated deficits in communication skills, and she was working on following directions and matching pictures to an object (Dist. Ex. 2 at p. 2). Additionally, the student was "able to match identical objects to a sample and select the correct clothing items" (id.). Expressively, the student's ability to imitate sounds was emerging, including her ability to imitate consonant-vowel and vowel-consonant combinations (id.). The student was beginning to use pointing to request items, "label pictures of common objects," and label body parts (id.). The student did not yet independently return social greetings (id.). The IEP indicated that the student "ha[d] speech apraxia and was working with a communication device" (id. at p. 3).

Regarding the student's social development, the IEP indicated that the student demonstrated deficits in social and play skills, and her teacher reported that she "ma[d]e frequent loud vocalizations that interrupt[ed] her peers" (Dist. Ex. 2 at pp. 2, 3). She engaged in self-injurious behavior including "hitting her head, self[-]biting[,] and hitting herself with objects" (id. at p. 3). The student often undressed at school and sometimes on the bus; the parents' report reflected in the IEP indicated that the student "w[ould] tantrum when she need[ed] to put on certain clothing items" (id.). According to the IEP, the student's play skills consisted of "walking back and forth" while humming and holding a sensory toy, jumping on a trampoline, and "manding" for bubbles (id.). Additionally, the student lacked "parallel play skills and [did] not take turns or share with others" (id.). The IEP indicated that the student was working on "tolerating sitting in a group for 30 seconds and transitioning to and from the group table," playing with toys, and learning to engage in simple one-and two-step games/play (id.). Further, the IEP reflected that the student "lo[st] interest[] very quickly" and enjoyed bubbles, edibles, squishy toys, and jumping on a trampoline (id.). Parent report reflected in the IEP indicated that the student required "constant prompting to engage" and that she preferred to play on her own (id.).

Within the area of physical development, the IEP indicated that the student required support with daily living skills including toileting and dressing (Dist. Ex. 2 at p. 4). She had frequent toileting accidents in school and was taken to the bathroom every 45 minutes (id.). She was working on requesting "the restroom when needed" (id.). She required assistance with dressing tasks such as buttoning her shirt and putting on her pants (id.). The student was "working on attending to tabletop activities" and "improving her visual motor skills and fine motor skills" (id.). In the gross motor domain, the IEP indicated that the student had good imitation skills and was "able to ascend and descend the stairs while holding onto the railing" and "ride a scooter and a tricycle" with assistance (id.).

The student's management needs in the January 2022 IEP indicated that she "present[ed] with delays in her cognitive skills, deficits in communication and language[,] as well as fine motor skills and adaptive living skills" (Dist. Ex. 2 at p. 5). The IEP included seven annual goals to

address the student's needs in reading, math, expressive language, receptive language, play, daily living, and visual motor skills (*id.* at pp. 7-13). Specifically, the annual goals addressed the student's ability to match, label, and identify letters and letter sounds; count objects with one-to-one correspondence; imitate sounds and label objects; follow directions and match pictures; play with toys, engage in simple games, and "partake[e] in two[-]step play;" dress herself, wash her hands, and brush her teeth; and copy shapes to form letters and "color within a shape" (*id.*).

2. 6:1+1 Special Class

The IHO found that "[g]iven the [s]tudent's intense needs in all areas, the testimony of the [district] witness and the program offered d[id] not evidence a sufficient level of thought as to how the [s]tudent would make progress in an environment in which she would not be receiving 1:1 services most of the time" (IHO Decision at p. 12). The IHO noted that there was "little evidence" that the student "could function in group instruction or attend without intense support" (*id.*). The IHO found the district's explanation that the student would benefit from being educated with other students unconvincing, noting that the student "could be provided 1:1 support" even in a setting with other children (*id.*). Therefore, the IHO found that the district failed to offer the student a FAPE (*id.* at p. 13). On appeal, the district asserts that the IHO erred in finding that the 6:1+1 special class was not appropriate and that the student required 1:1 support. The district contends that it should not be faulted for considering the student's LRE when making recommendations. Moreover, the district argues that the January 2022 IEP appropriately addressed the student's behavioral needs and that methodology is not required to be on the IEP.⁸

State regulation provides that a 6:1+1 special class placement is designed for students "whose management needs are determined to be highly intensive, and requiring a high degree of individualized attention and intervention" (8 NYCRR 200.6[h][4][ii][a]).

In addition to identifying the appropriate special education program and services, under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP (*see* 20 U.S.C. § 1414[d][3]; 34 CFR 300.324[a][2]; *see also* 8 NYCRR 200.4[d][2]-[3]). 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

⁸ The IHO did not rely on the student's need for a particular methodology in making her determination that the January 2022 IEP was inappropriate (*see* IHO Decision at pp. 12-13). Generally, the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology is necessary (*Rowley*, 458 U.S. at 204; *R.B. v. New York City Dep't of Educ.*, 589 Fed. App'x 572, 575-76 [2d Cir. Oct. 29, 2014]; *A.S. v. New York City Dep't of Educ.*, 573 Fed. App'x 63, 66 [2d Cir. July 29, 2014]; *K.L. v. New York City Dep't of Educ.*, 530 Fed. App'x 81, 86 [2d Cir. July 24, 2013]; *R.E.*, 694 F.3d at 192-94; *M.H.*, 685 F.3d at 257). Here, I find it unnecessary to reach the methodology question given that review of the hearing record supports the IHO's determination that the program recommended in the January 2022 IEP was insufficiently supportive to meet the student's needs.

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]).⁹

Here, the CSE determined that the student "benefit[ted] from a smaller sized classroom within a specialized school" (Dist. Ex. 2 at p. 5). Therefore, the January 2022 CSE recommended a 12-month school year program in a specialized school, consisting of the following: a 6:1+1 special class placement for instruction in math, ELA, social studies, and sciences, five 30-minute sessions per week of OT, two 30-minute sessions per week of individual PT, five 30-minute sessions per week of individual speech-language therapy, and four 60-minute sessions per year of parent counseling and training (*id.* at pp. 14-16, 20). The CSE also recommended individual paraprofessional services specifically for toileting (daily for 0.2 of each day) and a static display, speech generating device to be used daily throughout the school day and at home (*id.* at p. 15).¹⁰

According to the IEP, the January 2022 CSE considered a general education placement for the student but determined it would not meet the student's needs as the student "benefit[ted] from a smaller sized classroom with supports in areas of communication, academics and fine motor skills" (Dist. Ex. 2 at p. 22). The CSE also considered a 12:1+1 special class in a community school and a 12:1+(3:1) special class in a specialized school but determined that the former was not "supportive enough" and that the latter was "too restrictive" for the student (*id.*). During the impartial hearing, the school psychologist elaborated that "a smaller classroom" or a "one-on-one" setting would be "too restrictive" and would deny the student the opportunity to "be amongst other students" (Tr. pp. 123-24).¹¹

In her written testimony, the school psychologist stated her view that the annual goals, management needs, and smaller classroom size were appropriate for the student (Dist. Ex. 10 ¶¶ 7, 11-13, 15-17). The school psychologist testified at the impartial hearing that the small class size the CSE recommended would address the student's maladaptive behaviors given the school's "classroom wide behavior plans" (Tr. p. 114). She explained that, while an FBA was discussed at

⁹ While not set forth as a special factor in the IDEA or federal regulation, State regulation also includes as a special factor a CSE's consideration of "supplementary school personnel (or one-to-one aide) to meet the individualized needs of a student with a disability" (8 NYCRR 200.4[d][3][vii]; see 20 U.S.C. § 1414[d][3][B]; 34 CFR 300.324[a][2]).

¹⁰ The January 2022 IEP testing accommodations included extended time of time and a half, separate location/room within a group of six students, and use of a scribe with a human reader (Dist. Ex. 2 at pp. 16-17). The January 2022 CSE recommended the student participate in the New York State Alternate Assessment for ELA and math due to her "significant delays in cognitive and communication skills" (*id.* at p. 18).

¹¹ The reference in the IEP and the school psychologist's testimony to restrictiveness of the special class ratio here generally reflects the misplaced understanding of a student's need for additional adult support within a classroom compared to the student's placement in the LRE, which relates to the disabled student's opportunities to interact with nondisabled peers—and not a student's opportunity to interact with other disabled peers in a special class with more students in it (see *R.B. v. New York City Dep't of Educ.*, 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] [explaining that the requirement that students be educated in the LRE applies to the type of classroom setting, not the level of additional support a student receives within a placement with the goal of integrating children with disabilities into the same classrooms as children without disabilities]; *T.C. v. New York City Dep't of Educ.*, 2016 WL 1261137, at *7 [S.D.N.Y. Mar. 30, 2016] [noting that "restrictiveness" pertains to the extent to which disabled students are educated with non-disabled students, not to the size of the student-staff ratio in special classes]).

the January 2022 CSE meeting, "it was not recommended for [the student] at th[at] time" (Tr. p. 115). She testified that the special class would be staffed with a special education teacher trained to work with students with "negative behaviors" and that a classroom paraprofessional would be available to support a student who needed more help (Tr. pp. 115-17).

Despite the view of the school psychologist that the IEP was sufficiently supportive to meet the student's needs, a review of the present levels of performance shows that the student exhibited behaviors that were not adequately addressed in the January 2022 IEP. As discussed above, the IEP indicated that the student removed her clothing at school and engaged in self-injurious behaviors as well as maladaptive behavior that interrupted her peers (Dist. Ex. 2 at p. 3). She had difficulty maintaining her attention in a group for longer than 30 seconds and needed consistent prompting to stay engaged (id.). The CSE did not recommend an FBA or a BIP and only offered paraprofessional services for toileting (id. at pp. 5, 15).

Additionally, the evaluator who prepared the December 2021 educational progress report, part of which was reflected in the January 2022 IEP, indicated that the student demonstrated maladaptive behaviors that "severely impede[d] her ability to learn and attend during instructional periods" (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 8 at pp. 1, 2). According to the report, the student exhibited screaming and crying, self-injurious behaviors such as scratching her arms/face and forcefully hitting her head or arm, flopping to the ground, eloping, removing her clothing, and putting non-edible objects in her mouth (Dist. Ex. 8 at p. 1). The student exhibited these behaviors when she was unable to make her needs known or have them met (id. at p. 2). The report indicated that RFTS was planning to conduct a "Functional Analysis and Practical Functional Analysis" in order "to help create a behavior plan to reduce the presence of maladaptive behaviors" (id. at p. 1). Further, the student's speech-language pathologist clinical fellow at RTFS reported in December 2021 that the student benefitted from verbal cues, gestural cues, and "modeling of gestures" from familiar communication partners (Dist. Ex. 4 at p. 1). Teachers and therapists used the student's enjoyable activities, such as running and skipping, to "facilitate motivation and participation" (id. at p. 5). She also benefitted from the option to take breaks, and was provided with "fast-paced instruction, continuous positive reinforcement, predictable routines, and visual schedules and supports[] implemented throughout the day" (Dist. Exs. 4 at p. 2; 8 at p. 1).

The school psychologist testified that the techniques the student required to be successful were typically found within the management needs section of the IEP and "throughout the present levels of performance[]" (Tr. p. 127). She described that the student "lo[st] interest quickly" and then listed items in the IEP that the student worked for such as "jumping on the trampoline," bubbles, and "laying on a beanbag" (Tr. pp. 128-29). A review of the January 2022 IEP indicated that, beyond some items the student found reinforcing, it did not include specific, individualized strategies to address her behavior, attention span, or learning needs (see Dist. Ex. 2). The management needs section of the January 2022 IEP reiterated the program the CSE recommended, rather than supports the student required to demonstrate success in the classroom (id. at p. 5). The IEP did not recommend a 1:1 or shared aide to support the student's behavioral needs, did not include annual goals to address her behavior, and determined that an FBA and BIP were not necessary, despite information from her then-current providers at RFTS to the contrary (id. at pp. 5, 7-13).

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). Similarly, a district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render an 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).

Here, as described above, despite the CSE's determination that an FBA and BIP were not warranted, the January 2022 IEP does not otherwise address the student's behavioral needs. Accordingly, I find no reason to disturb the IHO's finding that the district denied the student a FAPE for the 2022-23 school year.

B. Unilateral Placement

Having found that the IHO did not err in finding that the district failed to offer the student a FAPE, the next issue to be address is whether RFTS was an appropriate unilateral placement. On appeal, the parents assert that the IHO erred in finding that the student's programming at RFTS was not appropriate because she ignored evidence that it met the student's special education needs, inserted her opinion that the student's ABA instruction was provided in a "dry and lifeless manner" and directed the parent to information regarding "other approaches," took issue with the RFTS providers' qualifications, and opined that the student failed to make progress during the 2022-23 school year.

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).

Regarding the student's needs, RFTS conducted OT and speech-language evaluations of the student in April and May 2022, the results of which continued to show that the student exhibited significant motor, sensory, daily living skill, attention, and communication needs (compare Dist. Ex. 2 at pp. 2-5, with Parent Exs. Q; U).¹² At that time, RFTS was conducting a speech generating device trial with the student with some success (see Parent Ex. Q at pp. 10-12).

Turning to the student's unilateral placement, the evidence in the hearing record shows that RFTS was designed to meet the needs of students with autism "age [two] years [nine] months and up" (Parent Ex. K at p. 1). The program "serve[d] students with autism with significant academic, behavioral, and social-emotional needs by providing specifically designed instruction to address their needs" (Parent Ex. CC ¶ 3). The program included ABA services, speech-language therapy, OT, music therapy, play therapy, and sensory integration training (Parent Exs. K at p. 1; CC ¶ 4). Each level of service was provided to the student on an "intensive one to one basis" based on his or her assessed needs (Parent Ex. K at p. 1). According to the program description, RFTS offered

¹² On December 8, 2022 the district conducted a psychoeducational evaluation of the student, which indicated she continued to exhibit significant delays in cognitive, pre-academic, and adaptive skills (see Dist. Ex. 3).

"individual education plans for each child," after school programs and activities in the summer, and a "[g]reater than a one[-]to[-]one teacher student ratio" (id.).

The educational director of RFTS testified that the school used "applied behavior analysis as [its] main methodology throughout the entire school day" for the 29 students enrolled at the school (Tr. pp. 185, 186). The school provided various related services, and the team worked together to ensure consistency of work on each student's goals and educational plans (Tr. pp. 185-86). The educational director testified that there was a Board Certified Behavior Analyst (BCBA) at the school whose focus was to ensure a student's behaviors were "appropriate for learning" (Tr. pp. 187-88). The educational director indicated that the school used shaping, prompting, "high rates of reinforcement," and "fading of prompts" and collected data on students' progress to "guide[] [RFTS staff] to know if [they] need[ed] to put any changes into place" (Tr. p. 187).

The educational director testified that each students' curriculum was individualized to their needs and that RFTS was "only implementing curriculum that would be supportive for their deficits and what they need[ed] to accomplish as individual students" (Tr. p. 188). The educational director described the various curricula the school used to teach reading, math, life skills, language, play, and social skills (Tr. pp. 188-191). She indicated that, prior to implementation of a curriculum, a student was assessed and, from those results, RFTS staff "create[d] the individualized education plan" and then the goals (Tr. p. 192). Each goal had a lesson plan, where "the goals [were] broken down into very small, discrete steps that [were] individualized for each learner" (Tr. pp. 192, 193). The lesson plans gave the teachers specific information about "how to teach each goal to the learner" including the materials used and appropriate reinforcement (Tr. p. 193). Teachers developed lesson plans and tracked student's progress for each goal using "the ACE online database system, which is the autism curriculum encyclopedia" (Tr. pp. 193-94).

1. Specially Designed Instruction

Turning to the student's specific program, the administrator of RFTS testified via affidavit that the student was provided with "daily" ABA instruction, speech-language therapy, and OT, and she provided the credentials of the professionals providing services to the student (Parent Ex. CC ¶¶ 1, 2, 13). According to the educational director, the student was in a classroom with four other children (Tr. p. 256). The student had exposure to the other students in the classroom during morning meeting, art group, music group, gym time, and a speech group, as well as during a group gymnastics class in the community (Tr. pp. 293-95).¹³

According to the "[e]ducational [c]urriculum [p]lan" for the 2022-23 school year, the student's "classroom [was] staffed with a teacher for each student in addition to a speech therapist working in the classroom throughout the day" (Parent Ex. O at p. 1). The student's instructional methods included a fast pace, positive reinforcement, routines, and the use of visual supports (id.). The student's program was "broken down into short[,] attainable steps and target[ed] the use of

¹³ The educational director indicated that, when the student went into the community, RFTS staff ensured her opportunities for reinforcement increased "because that transition outside of the school building [was] more difficult for her" (Tr. p. 275). The parent testified that the family received support as needed from the school and that the school taught them strategies to use for transfer of skills to the home (Tr. p. 363).

positive reinforcement in order to build momentum and increase desired behavior for learning" (id.).

The student's program included goals for receptive language, her ability to request items, expressive vocabulary, semantic knowledge, motor imitation, block imitation, visual performance with patterns and sequences, visual spatial skills, group skills, play skills, daily living skills, independence with general classroom routines, and behavior skills (Parent Ex. O at pp. 2-6). The student's sensory-based preferences, such as jumping, tickles, and blowing bubbles, were included in some of the goals and narrative updates of the educational curriculum plan (id. at pp. 2, 3, 4, 5).

According to the document, the student was "presented with opportunities to practice tolerating delayed and denied access to preferred activities" and "to engage in contextually appropriate behavior after being told 'no'" (Parent Ex. O at p. 2). She was taught to ask for a break "as a functional communication response" to escape demands at which point "she [was] provided with access to all preferred items/reinforcers" (id.). In addition, the student was working on engaging in contextually appropriate behavior after being told "no," and she "work[ed] on tolerating wearing weather-appropriate clothing" (id.).

To address the student's communication needs, the speech therapy director of RFTS indicated in a written affidavit that the student received four sessions per week of speech therapy rather than the recommended five due to "a city-wide provider shortage" (Parent Ex. BB ¶¶ 1, 12). Both the speech therapy director and speech therapy provider for the student were trained in "PROMPT ([p]rompts for [r]estructuring [o]ral [m]uscular [p]honetic [t]argets)" which the director described as "a tactical kinesthetic approach to sound production" (id. ¶¶ 3, 8, 15). The director indicated that "PROMPT address[ed] [the student's] language and motor delays" and that in addition to this, she had developed "an oral motor program" that was "incorporate[d] . . . into her speech sessions with [the student's] speech therapist" (id. ¶¶ 15, 16). The February 2023 oral motor schedule described the frequency, duration, materials, and specific notes that provided the student with the necessary stimulation (Parent Ex. T at p. 1).

Regarding how RFTS addressed the student's specific daily living skill and behavior needs, when the student's schedule was created for the year, supervision with the "lead [behavior analyst candidate] in the classroom" was scheduled for first thing Monday mornings to support the student with transitions off the bus, toileting, classroom routines, and eating breakfast (Tr. pp. 228-33, 257). The student frequently undressed on the bus, and "[s]ometimes it took more than one teacher to . . . get her off the bus and get her dressed and safely upstairs" (Tr. p. 229). The educational director stated that by scheduling that level of support at that time they could follow the behavior plan and dressing protocol and ensure the student arrived safely in the classroom (Tr. pp. 229-30).

The educational director went on to testify that this time of the morning was "probably one of [the student's] hardest times of the entire school day" which is why the schedule was designed as it was "when the school year began" (Tr. p. 233). Additionally, the student's OT sessions were provided in the morning to work on daily living skills, including dressing, toileting, handwashing, and hair-brushing, which were tasks the student was unable to complete at her home (Tr. p. 234). At times, the occupational therapist co-treated with the classroom lead or the BCBA because "behaviorally[] there [were] things that interfere[d], but also physically it [was] hard for her to get dressed" (Tr. pp. 234-35). The student's daily schedule, including possible co-treat sessions,

changed as a result of team meetings or conversations where the student's needs were discussed (Tr. pp. 238-43, 275).

Turning to the student's self-injurious behaviors, the educational director testified that to keep the student safe, they were "one-to-one at all times," and "[i]f severe problem behavior[s] really interfere[d], then [they] might have more than one person with her" which could include the BCBA (Tr. pp. 286-87). The educational director testified they first "tr[ie]d to block" the behavior, and they ensured a safe environment by keeping beanbags or pillows around her or preventing the student from hitting herself (Tr. p. 287). She indicated that the school conducted an FBA with input from the parents, and a behavior plan was created in January 2022 and updated in May 2022, that "was still effective" in the 2022-23 school year "because it did reduce the behaviors" (Tr. pp. 218-20; Parent Ex. P at p. 2). The educational director testified that there were multiple functions of the student's behavior and they focused on teaching communication skills as she was unable to "tell [them] what she need[ed] or want[ed]" (Tr. pp. 288-99). She went on to say that the student's AAC device was critical to improving functional communication skills (Tr. pp. 290). In addition, the school taught the student tolerance of demands while increasing her time on task (Tr. pp. 219, 291-92).

The student's BIP, last updated in May 2022, identified the target behaviors as "mild," defined as "[a]ny instance of striking any part of her body ([except head]) with her hand, floor or any object with a force of greater than [three] inches" and "severe," defined as "[a]ny instance of striking her own head with floor or any object with a force of greater than [three] inches" (Parent Ex. P at p. 1). Based on a functional analysis completed in January 2022, the BIP indicated the hypothesized functions of the behavior were to escape demands and gain "access to attention and tangibles" (*id.*). The BIP included the student's leisure and edible reinforcers, such as bubbles, spinning, and strawberries (*id.*). The BIP described the proactive plan to address the student's behaviors, which included teaching her a functional communication response to obtain reinforcers, a toleration response to waiting or being told "no," and "contextually appropriate behavior . . . after being told 'no' with the absence of problem behavior" (*id.*). Specific objectives were included, such as relinquishing reinforcement, engaging in contextually appropriate behavior, and tolerating "no," and each included a description of the reinforced response, such as requesting a break and providing a high five (*id.* at pp. 2-3).

As disrobing/dressing was another of the student's most interfering behaviors, a differential reinforcement of other behavior (DRO) was created to "systematically increase[] the amount of time [the student] must remain appropriately clothed in order to gain access to a highly preferred isolated reinforcer" (Tr. p. 222; Parent Exs. O at p. 7; Z). According to the educational director, the student obtained reinforcement when she remained clothed and did not get undressed (Tr. p. 222). She indicated that the DRO "use[d] a visual component" so the student "kn[ew] that she should stay dressed or continue to put on clothing" (*id.*). The DRO protocol indicated the current item of clothing introduced to the routine and what items of clothing were required to be considered fully dressed (Parent Ex. Z at p. 1). Specific instructions within the DRO identified what should be done when the student was getting dressed, when she was fully dressed, after a reinforcer was provided, and if she removed an item of clothing (*id.*).

In finding RFTS inappropriate, the IHO takes issue with the credentials of the providers at RFTS and the use of ABA methodology for this student.¹⁴ Contrary to the IHO's concerns about the credentials of the providers at RFTS (see IHO Decision at pp. 14-15), the private school need not employ certified special education teachers (Carter, 510 U.S. at 13-14). Moreover, the evidence in the hearing record shows that some of the student's providers held master's degrees in special education, OT, communication disorders, and ABA (Parent Ex. CC ¶ 13).

Regarding ABA, the evidence available in the hearing record includes no allegation or argument that ABA was an inappropriate methodology for the student and no expert opinion to counter the recommendation for ABA for the student. The IHO relied, in part, on strategies for parents to use to capture their child's interest, which were outlined on handouts attached to a March 2019 neuropsychological evaluation, to find that, in contrast, the ABA program at RFTS was "dry and scripted" and insufficient to "stimulate the child's interest and education" (IHO Decision at pp. 14-15). However, the primary recommendation for the student included in the evaluation report was for "a full-time, one-on-one, [ABA] educational environment, as part of a specialized, ABA school with related services, family training and education, and a 12-month program" (Parent Ex. H at p. 7), which captures the main components of the RFTS program.¹⁵ Further, components of the RFTS program included art, music, and literacy (see Tr. pp. 293, 297). Contrary to the IHO's conclusion that the RFTS program was designed without consideration of the student's learning needs, interests, or factors that contributed to her dysregulation (IHO Decision at pp. 16-17), the evidence summarized above identified several ways in which the RFTS program took into account the functions underlying the student's dysregulation, including timing and environmental factors, and incorporated her interests as reinforcers. While it may be that the student could also benefit from other methodologies or approaches to learning or that RFTS could have included as part of the program additional supports to address the student's sensory needs or incorporate her interests, 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 parents' unilateral placement has passed that test in this instance. A review of the available evidence indicated that RFTS developed specific goals and protocols to address the student's educational and behavioral needs for the 2022-23 school year, including a BIP and

¹⁴ In addition, the IHO goes so far as to opine that the student "developed self-injurious behavior[]" at RFTS during the 2021-22 school year and that her "unrelenting self-injurious behaviors [perhaps] evidence[d] a fundamental disagreement . . . by the Student with the program being provided" (IHO Decision at p. 17). However, the hearing record does not support the IHO's broad theories about causation in this regard and, further, indicates that the increase in the student's behaviors was first apparent in the home, not in school (see Tr. p. 244).

¹⁵ The IHO gave less weight to the recommendations in the evaluation, in part, because evaluator had not observed the student in the unilateral placement (see IHO Decision at p. 11, citing Tr. p. 321). However, the evaluator testified that he was familiar with RFTS as he had evaluated and observed other students who attended and that he had reviewed the student's records from RFTS and spoken with her parents since she began attending RFTS (Tr. pp. 321-22).

dressing protocol (Parent Exs. O; P; R; S; T; V; W). Based on the available information in the hearing record, RFTS provided the student with specially designed instruction targeted to meet the student's specific special education needs.

2. Progress

With respect to evidence in the record concerning the student's progress at RFTS, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The student's 2022-23 educational curriculum plan included a narrative "[m]id-[y]ear [u]pdate" for each domain targeted including language and communication skills, pre-academic skills, social and leisure skills, daily living skills, and behavior (Parent Ex. O at pp. 2-6).

Regarding the student's pre-academic skills, progress was noted with the student's copying and matching of patterns (Parent Ex. O at p. 5). The educational director testified that the student demonstrated improvement with her understanding of verbs and nouns, identifying her name and age on her device, sorting, and exhibiting pre-math skills (Tr. pp. 248-51). She described that by using the communication device the student learned the pre-reading concept of moving from left to right (Tr. pp. 251-52). In addition, the student learned to match colors, shapes, letters, and numbers (Tr. pp. 252, 296). When asked about progress in math skills, the student's father testified that she was "able to point to different numbers" (Tr. pp. 359-60).

Within the language and communication domain, teachers reported the student made "slow but steady progress" in receptive language and "steady gains" in expressive language skills (Parent Ex. O at pp. 3, 4). A December 2022 speech-language progress report indicated the student's ability to follow directions had improved, and that she demonstrated "develop[ing]" receptive identification skills, expressive vocabulary skills, and social communication skills (Parent Ex. S at pp. 2, 3, 5). The student "ha[d] mastered imitating familiar words" and demonstrated improvement in her "ability to sit and participate in a group activity for up to 15 minutes" (id. at pp. 4, 5). The student's use of her "communication device continue[d] to develop" including the ability to navigate multiple pages to request a highly preferred item (id. at p. 4). Overall objectives from the 2022-23 speech-language treatment plan included improvement in her ability to follow directions, demonstrate pretend actions, receptively identify objects and familiar people, sort by class, request preferred items and help, label objects and verbs, answer personal information questions, imitate functional sound combinations, use of her communication device, improve

social communication and group participation skills, and expand semantic knowledge for safety awareness (Parent Ex. R at pp. 1-5).

The supervisor of the speech and language department at RFTS indicated that the student had "mastered a few device goals" since the goals were originally developed in spring 2022 (Tr. p. 346; Parent Ex. BB ¶¶ 1, 19). The student also demonstrated improvement "following two-step directions" and with "receptive identifications" (Parent Ex. BB ¶ 20). The student improved her ability to request help, "use[d] one-word utterances" inconsistently, "identif[ied] body parts on herself," and "s[at] in a group for up to ten minutes at a time before she need[ed] a break" (*id.*). The supervisor testified that the student had made "some nice gains with using her speech generated device" and had "made some progress in terms of verbalizing for items that she want[ed], functionally, and she [was] also attending for longer periods of time" (Tr. p. 348). She further testified that when the behavior plan was first implemented the student was able to attend for "about 30 seconds" and now she was able to attend to "a tabletop task for three to five minutes before she need[ed] a break" (Tr. p. 356).

According to the educational director, the student began using her communication device with a variety of individuals and during circle for brief periods of time (Tr. pp. 246-47). She testified that the student learned to use the communication device with individual teachers and then generalized it to a different environment (Tr. p. 247). She offered that during circle, the student navigated to that page of her device and was able to match the day, date, and year when asked (*id.*). The student's father indicated in his affidavit that the student continued to learn how to use her AAC device and demonstrated progress in her communication skills (Parent Ex. DD ¶¶ 35, 36). The student's father offered that "she is much more engaged, willing, and able to express what she needs" (*id.* ¶ 36).

Turning to the student's social skills and behavior, the speech-language therapist noted that the student worked on identifying familiar people (Parent Exs. S at p. 2; Y at p. 19). By the end of the second quarter of the 2022-23 school year, the student "continue[d] to work on sitting appropriately in groups" and teachers worked to expand the student's leisure and play skills (Parent Ex. O at p. 5). The student reportedly enjoyed cooking activities in a group but had more difficulty with group art activities (*id.*). The educational director testified that at the beginning of the school year, the student "demonstrated a lot of interfering behaviors" including difficulty transitioning, staying dressed, and exhibiting aggressive behavior towards herself and others (Tr. pp. 213-14). In addition, the student had difficulty "with communication and language" and her "[g]roup skills were very difficult because she would either hurt her peers next to her or she had a hard time waiting her turn" (Tr. pp. 214-15).

The 2022-23 educational curriculum plan mid-year update indicated that implementation of the behavior plan resulted in a decrease of self-injurious behavior that "continue[d] on a decreasing trend across the school day" (Parent Ex. O at p. 6). The educational director offered that the student's aggression towards herself and others had decreased while at the same time the student's communication skills had increased (Tr. pp. 244-45). The student became more independent using her communication device, which "helped to reduce some of [the aggressive] behaviors" as her ability to communicate improved, including her ability to request a break (Tr. pp. 245, 294).

According to her teachers, the student had increased her prosocial behavior by demonstrating a "toleration response" (a high five and no problem behaviors) when she was "denied access to preferred items or activities" (Parent Ex. O at p. 7). The educational curriculum plan reflected progress in the behavior domain, as the student increased one rating level on three of the four specific skills (*id.* at p. 6). The student did not achieve a higher rating for maintaining appropriate dress, although it was reported that she "continue[d] to make progress tolerating wearing winter clothing across the school day" with the use of a DRO (*id.* at p. 7). According to the progress snapshot, the frequency of the student removing her clothing fluctuated between August 2022 and February 2023, with an overall decrease in this behavior by April 2023 and she had stopped removing her shoes altogether (Parent Ex. Y at pp. 9, 10). The educational director testified that "there [were] still times that [the student] [did not] stay dressed, but for the most part, she" remained "fully dressed to and from school" during the winter after the DRO was implemented (Tr. p. 243).

An OT progress report was completed in December 2022 (Parent Ex. W at p. 1). The therapist reported the student had made "moderate progress toward her sensory processing goals" and exhibited "an increase in sensory-seeking behaviors" (*id.*). According to the report, when the student was in a "regulated state," she demonstrated "an increased ability to follow directives and retrieve personal or school items within a closed environment" (*id.* at p. 2). The occupational therapist reported that the student exhibited increased tolerance for sensory input to her head and with teeth brushing (*id.*). Additionally, the student "expanded her ability to engage in gross motor and balancing activities" (*id.*). She demonstrated "significant improvement with coordinated movements and continual jumps" and "slow and steady improvement in her functional shoulder, arm, and hand control" (Parent Ex. W at pp. 2, 3). Further, the progress report indicated that the student had made "minimal progress" in her visual and fine motor skills (*id.* at p. 4).

The occupational therapist reported that the student had demonstrated "improvement in her ability to actively participate in activities of daily living" (Parent Ex. W at p. 4). The curriculum plan indicated that the student demonstrated success with a 90-minute toileting schedule (Parent Ex. O at p. 6). The student was able to "turn[] on the water, wet[] her hands[,] and put[] on soap" when washing her hands and "no longer attempt[ed] to eat the soap after p[l]acing it on her hands" (Parent Ex. W at p. 4). She worked on buttoning skills and using utensils rather than her fingers to eat (*id.*).

In reviewing evidence of the implementation of services at RFTS, the IHO noted that the amount of services delivered fluctuated from month to month and that, on average, the student did not receive the level of speech-language therapy and OT recommended (IHO Decision at p. 20; see generally Parent Ex. L). However, as a general matter, private institutions which are not State-approved to provide special education services to students with disabilities—such as RFTS—are not required to follow the same procedural process of developing their own written IEPs for students in the same way as public school districts are (Carter, 510 U.S. at 13-14). Here, RFTS developed an educational plan for the student as discussed above and, most importantly for the student in this matter, RFTS developed a BIP for the student to address her maladaptive behaviors which were not addressed by the district (see Parent Exs. O-P). 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. Accordingly, while a private placement that provided related services which fluctuated dramatically or were altogether missing for prolonged periods of time without adequate

explanation might contribute to a finding of inappropriateness, the hearing record in this case, provides detailed testimony from the educational director, and supporting documents, describing how the educational program offered by RFTS-LC operated on a day-to-day basis with respect to providing the student with ABA instruction, related services, and multiple levels of support from a variety of providers. Moreover, the student demonstrated progress while attending RFTS-LC.

As described above, review of the evidence in the hearing record demonstrated this was a student with significant needs across multiple areas. Despite the IHO's criticism of the manner in which RFTS implemented the student's programming, records from RFTS showed that the student was beginning to show some independence and make some progress, including a decrease in aggression towards others and an increase in her communication skills and ability to remain clothed (Parent Exs. O; P; Q; R; S; U; V; W; Y). Taken as a whole, the totality of the circumstances in this particular matter demonstrates that RFTS was an appropriate placement for the student for the 2022-23 school year.

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"]).

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).

Although, the IHO found that the unilateral placement at RFTS was not appropriate, the IHO did address equitable considerations. Specifically, the IHO addressed the cost of the services provided to the student at RFTS, holding that the parents had the burden to prove that a program was appropriate and that costs charged were reasonable (IHO Decision at p. 25).

The enrollment agreement between the parents and RFTS-LD for the 2022-23 school year indicated that the parent agreed to the provision of services listed in the attached services plan and that services were billed on a fee-for-service basis (Parent Ex. J at pp. 1-2).¹⁶ The parent exhibit that includes the enrollment agreement also includes a rate sheet that set forth rates per half hour for various services (*id.* at p. 6).¹⁷ The RFTS administrator indicated that thus far for the 2022-23 school year invoices for July 2022 through March 2023 totaled \$264,653 (Parent Ex. CC ¶ 15; see Parent Ex. L at pp. 1-9). The administrator testified that the rates charged were "based on market rate" and were "consistent with rates charged by programs offering similar services and include[d] overhead costs" (Parent Ex. CC ¶ 11; *see* Tr. pp. 378-80). The IHO noted that the enrollment agreement allowed for a total maximum tuition that could reach approximately \$582,475 (IHO Decision at p. 25; *see* Parent Ex. J).

During the impartial hearing, the IHO solicited evidence from the parties regarding tuition charged by "comparable full time 1:1 ABA programs" (IHO Ex. IV at p. 14; *see* Parent Exs. JJ-KK; Dist. Exs. 11-18). In reviewing the evidence submitted, the IHO found that the program at Atidaynu (offered by the district as an example of a comparable program) was "not exactly comparable" to RFTS but that the programs at both the Keswell School (Keswell) (offered by the parents) and Manhattan Behavioral Center (MBC) (offered by both parties) were comparable to RFTS (IHO Decision at p. 8).¹⁸ Based on the evidence in the hearing record, the IHO held that the district should not have to pay more than \$172,300, which was the cost of Keswell (*id.* at pp. 25-27).¹⁹

On appeal, the parents point to an IHO decision in a prior matter involving the student's 2021-22 school year, which ordered district funding of the full costs of the student's program at RFTS without reduction on equitable grounds (*see* Parent Ex. FF). The parent argues that the costs of the student's program at RFTS for the 2022-23 school year are comparable to the costs of the program for the prior school year and, therefore, not excessive (*compare* Parent Ex. GG, *with* Parent Ex. J). However, contrary to the parents' position, the IHO in the present matter was not

¹⁶ The district asserts that there is no agreement between the parent and RFTS-LC, the entity providing services, since the parent contracted with RFTS-LD and that, therefore, no relief may direct payment to RFTS-LC. However, the parent agreed to pay RFTS-LD for services delivered by RFTS-LC (Parent Ex. J) and the district cites to no authority that such an agreement would be invalid.

¹⁷ The rate sheet does not have the "DocuSign" number on the page as do the other pages of the contract, calling into question whether the rate sheet was part of the agreement signed by the parents (*see* Parent Ex. J).

¹⁸ The IHO noted that the parents did not argue that the Keswell program was not comparable to RFTS (IHO Decision at p. 25).

¹⁹ The IHO separately considered whether charges by RFTS for supervision were excessive; however, the IHO's ultimate conclusions about the excessiveness of the costs of RFTS were reached by examining its costs in comparison to comparable programs (IHO Decision at pp. 24-27).

bound to by the prior IHO decision concerning a different school year, which was based on a different hearing record that was not before the IHO in this proceeding. Although the prior IHO's decision has become final and binding on the parties relative to the student's 2021-22 school year, the prior decision is not binding on the IHO's or SRO's consideration of the merits of the parent's requested relief pertaining to the 2022-23 school year and does not in and of itself provide a basis for a finding that the costs of the unilateral placement were not excessive. In addition, the parents contend that ABA and related services providers charge a wide range of hourly rates, which have been found reasonable in other cases. Ultimately, however, the parents had the opportunity to develop a hearing record regarding such rates for comparable services and their after-the-fact attempt to rely on references to rates in prior administrative decisions in unrelated matters without context or record basis is insufficient to overcome the IHO's analysis of comparable rates which was based on the hearing record as developed in the present matter.²⁰

Under the circumstances, the IHO correctly considered equitable factors related to the costs of the RFTS program and there is no reason to disturb the IHO's finding, based on the evidence in the hearing record, that funding for the program for the 2022-23 school year should not exceed \$172,300. The IHO ensured the development of the hearing record on the question of the costs of comparable programs, gave the parties an opportunity to be heard on the issue, and reviewed the evidence in the hearing record, specifically, the evidence regarding comparable costs of other similar programs in the area. Based on that analysis, the IHO rendered a decision to limit the amount of funding. Accordingly, the IHO's determinations that equitable considerations do not support the parents' full request for relief and that relief should be limited based on the cost of the comparable program of Keswell will not be disturbed.²¹

D. Independent Educational Evaluation

On appeal, the parents assert that the IHO erred in failing to address their request for a district funding of an independent neuropsychological evaluation. The parents argue that the student had not been evaluated since March 2019 and that the district has been on notice of their request for an IEE since June 2022. In response, the district contends that the request for an IEE should be denied. The district asserts that subsequent to the parents' June 2022 letter, it conducted a psychoeducational evaluation and the parents have not asserted disagreement with that evaluation.

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

²⁰ One of the State-level administrative appeal decisions cited by the parent includes no findings of reasonableness of the service rates at issue; rather, in that matter, the excessiveness of the costs was not successfully challenged by the district due to a lack of evidence (see Application of a Student with a Disability, Appeal No. 20-145). The other decision cited by the parent includes no discussion of cost whatsoever (Application of the Dep't of Educ., Appeal No. 13-079).

²¹ The district correctly argues that the parents did not demonstrate the services delivered for the last months of the school year (see Parent Ex. L) and that in other matters where the fee-for-service model was utilized, this lack of evidence was found to preclude the parents requested relief for those time periods; however, here, where the IHO has, on equitable grounds, based her award on a tuition-based model, I decline to make further adjustments to the award.

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]).

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]). 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]).

In their June 21, 2022 letter to the district, the parents indicated that the student had not been evaluated since March 2019 and that those evaluations were outdated (Parent Ex. E at p. 2). The parents asserted that new evaluations were needed to determine the services the student required (*id.*). The parents requested that the district conduct a neuropsychological evaluation and stated that, if the district failed to do so, they would seek reimbursement for an "independent comprehensive neuropsychological evaluation" (*id.*).

The parents' reference in the June 2022 letter to their future intent to obtain an IEE conditioned on a future hypothetical failure by the district to conduct a reevaluation of the student does not amount to a present request for an IEE based on a disagreement with an existing district evaluation. The parents' June 2022 letter does not explicitly state disagreement with a district evaluation, noting only that the existing evaluation was outdated. 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, 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).

In response to the parents' request for an updated evaluation of the student, the district conducted a psychoeducational evaluation of the student on December 8, 2022 (see Dist. Ex. 3). While the parent had requested a neuropsychological evaluation, as opposed to a psychological evaluation, any district evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A], [B]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). Whether it is an initial evaluation or a reevaluation of a student, a district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

After the district completed its evaluation, the parents were free to disagree with it. That disagreement could include that the evaluation was insufficiently comprehensive because it failed to include the type of information that might be found in a neuropsychological evaluation. However, there is no evidence in the hearing record that the parents requested an IEE based on their disagreement with the district's December 2022 evaluation outside of their due process complaint notice in this matter (see Parent Ex. B). According to the parents, they received a copy of the December 2022 psychoeducational evaluation on January 3, 2022 (id. at p. 11). The parents requested an IEE in the January 20, 2023 amended due process complaint notice, asserting that the December 2022 psychoeducational evaluation was only an informal assessment, did not identify the student's needs, and failed to provide a recommendation, and further that they did not have enough time to review it before the CSE meeting that took place on (id.).

In past decisions SROs 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, SROs 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 observed that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly 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];²² 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 (Trumbull, 975 F.3d 152, 168-69 [2d Cir. 2020]).²³ Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed the 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 (see, e.g., Application of a Student with a Disability, Appeal No. 23-081). I see no reason to depart from this trend.

On appeal, the parent argues entitlement to the IEE since the student "was last evaluated in March 2019, and new evaluations are needed" and seems to ignore the district's December 2022 psychoeducational evaluation. In any event, the evidence in the hearing record does not show that the parents requested an IEE based on a disagreement with a district evaluation outside of the due process complaint notice; and, accordingly, they are not entitled to an IEE at public expense at this juncture. With that said, if the parents remain dissatisfied with the district's December 2022 evaluation of the student, the parent may submit a request to the district that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

VII. Conclusion

In summary, the hearing record supports the IHO's determination that the district failed to offer the student a FAPE for the 2022-23 school year. However, contrary to the IHO's determination, the hearing record demonstrates that the parents met their burden to prove that the unilateral placement of the student at RFTS was appropriate for the 2022-23 school year. The IHO's finding that the costs of the student's program at RFTS was excessive and should be reduced based on the cost of comparable programs is supported by the hearing record.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determination above.²⁴

²² 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.

²³ 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" (975 F.3d at 169).

²⁴ To the extent the parent requests an order requiring the district to provide transportation to and from RFTS, as the 2022-23 school year has ended, it appears that this request is now moot.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated August 1, 2023, is modified by reversing those portions which found that the unilateral placement of the student at RFTS for the 2022-23 school year was inappropriate for the student and denied the parents' request for district funding of the costs of the unilateral placement; and

IT IS FURTHER ORDERED that the district shall fund the costs of the student's unilateral placement at RFTS for the 2022-23 school year, in an amount not to exceed \$172,300.

Dated: **Albany, New York**
 November 17, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER