The University of the State of New York

The State Education Department
State Review Officer
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No. 24-104

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:
The Law Office of Laura D. Barbieri, PLLC, attorneys for petitioners, by Laura Dawn Barbieri, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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 for full payment of the costs of their daughter's tuition at Reach for the Stars for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to demonstrate that it offered the student a free appropriate public education (FAPE) for the 2022-23 school year. The appeal must be dismissed. 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 fully recited here. Briefly, the student attended Reach for the Stars Learning Center (RFTS-LC) during the 2021-22 school year and the CSE convened on March 21, 2022, determined that the student continued to be eligible for special education services as a student with autism, and formulated the student's IEP for the 2022-23 school year (see generally Dist. Ex. 1). The March 2022 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, five 30-minute sessions of individual speech-language therapy per week, and parent counseling and training, with services to commence on July 5, 2022 (id. at pp. 16-17). The parents disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public school site to which the district later assigned the student to attend for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at RFTS-LC by letter dated June 21, 2022 (see Parent Ex. C).[1]

A. Due Process Complaint Notices

In a due process complaint notice, dated July 6, 2022, the parents alleged that the district failed to offer the student a FAPE for the 2022-23 school year and sought, among other relief, tuition reimbursement and direct funding for the student's program at RFTS-LC (see Parent Ex. A).

On October 12, 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. G).[2]

The parents then filed an amended due process complaint notice dated February 8, 2023, in which they repeated their allegation that the district denied the student a FAPE for the 2022-23 school year (Parent Ex. B). More specifically, the parents asserted that the March 2022 CSE's recommendations were not appropriate because they did not provide the student with the 1:1 support that she required, did not address the student's behavioral needs, did not provide the student with a speech generating device (SGD) that she relied on to communicate, and did not specify appropriate methodologies (id. at p. 6). The parents requested pendency pursuant to a prior IHO decision dated March 12, 2021, which directed the district to fund/reimburse the student's tuition at RFTS-LC and provide door-to-door transportation (id. at pp. 1-2). Among other relief, the parents also requested tuition reimbursement and direct funding for the student's program at RFTS-LC (id. at pp. 9-10).

B. Impartial Hearing Officer Decision

A prehearing conference was held on March 14, 2023, status conferences were held on March 21, 2023, April 20, 2023, May 25, 2023, June 29, 2023, August 4, 2023, September 20, 2023, and October 19, 2023, and a pendency hearing was held on March 27, 2023 (Tr. pp. 1-69). An impartial hearing convened on November 1, 2023 and concluded on December 6, 2023, after three days of proceedings (Tr. pp. 70-213). In a decision, dated February 10, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year because of the district's failure to provide the student with "1:1 support" and because the district failed to

[1] The following exhibits are duplicative: parent exhibit C and district exhibit 2. For purposes of this decision, only the parents' exhibit will be cited when referencing the parents' 10-day notice letter dated June 21, 2022.

[2] According to the hearing record, students enrolled at RFTS-LD are being provided services at RFTS-LC (see Parent Ex. Y). 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).

provide evidence that the March 2022 IEP could be implemented at the assigned public school (IHO Decision at p. 6). The IHO further held that RFTS-LC was an appropriate unilateral placement for the student, but equitable considerations weighed in favor of reducing the parents' request for an award of tuition reimbursement to an amount not to exceed payments made to RFTS-LC when it utilized a tuition-based model of payment (id. at pp. 6-8). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at RFTS-LC for the 2022-23 school year at a reduced amount (id. at p. 8).[3]

IV. Appeal for State-Level Review

The parents appeal and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer and cross-appeal is also presumed and, therefore, the allegations and arguments will not be repeated at length.[4] The following issues presented must be resolved in order to render a decision in this case:

1. Whether the IHO erred in finding that the district denied the student a FAPE for the 2022-23 school year due to the March 2022 CSE's failure to recommend a sufficiently supportive program or the inability of the assigned public school site to implement the March 2022 IEP;

2. Whether the parents had a contractual obligation for the student's attendance at RFTS-LC because the enrollment agreement is between the parents and RFTS-LD;

3. Whether the IHO erred in reducing the tuition award due to equitable considerations; and

4. Whether the IHO displayed bias against the parents or the nonpublic school.

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

[3] The IHO decision refers to the student's nonpublic school as "Private School," which the decision defined as RFTS-LC and the decision does not mention RFTS-LD (IHO Decision at p. 2).

[4] The parents allege that the IHO erred in failing to consider whether the district violated section 504 requirements (Req. for Rev. ¶ 13). An SRO's jurisdiction is limited by State law to matters arising under the IDEA and Article 89 of the Education Law (Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Courts have also recognized that the Education Law makes no provision for State-level administrative review of IHO decisions with regard to section 504 (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 & n.17 [E.D.N.Y. 2012] [noting that "[u]nder New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"], aff'd, 513 Fed. App'x 95 [2d Cir. 2013]; see also F.C. v. New York City Dep't of Educ., 2016 WL 8716232, at *11 [S.D.N.Y. Aug. 5, 2016]). Therefore, an SRO does not have jurisdiction to review any portion of the parents' claims as they relate to section 504, and accordingly such claims will not be further addressed.

independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations

omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "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

As an initial matter, neither party has appealed from the IHO's decision which found that the parents met their burden of proving that RFTS-LC was an appropriate unilateral placement for the student for the 2022-23 school year (IHO Decision at p. 6; see Req. for Rev.; Answer). Accordingly, this finding has become final and binding on the parties and will not be further

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

discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. March 2022 IEP

1. Special Factors

Turning first to the IHO's finding that the March 2022 IEP did not offer the student a sufficiently supportive program, the district argues that the IHO erred in finding that the March 2022 IEP failed to offer the student a FAPE because the IEP did not "provide 1:1 support" (Answer ¶¶ 5-6). The parents' due process complaint notices alleged that the district denied the student a FAPE for the 2022-23 school year because the March 2022 IEP failed to recommend full-time paraprofessional services, 1:1 applied behavior analysis (ABA)-based instruction, and an SGD, and failed to develop a behavioral intervention plan (BIP) to address the student's "inappropriate behaviors" (Parent Exs. A at p. 6; B at p. 6). For the reasons set for the below, the evidence in the hearing record supports the IHO's determination that the district failed to offer the student a FAPE.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 2009 WL 3326627, at *3 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *8 [S.D.N.Y. July 3, 2008]; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavrity v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [S.D.N.Y. 2008]).

Other special factors that a CSE must consider, include the communication needs of the student, including "the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode" and "whether the student requires assistive technology devices and services" (8 NYCRR 200.4 [d][3][iv]; [v]; see 34 CFR 300.324[a][2][iv]; [v]).

State regulations define a functional behavioral assessment (FBA) as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and

> include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the

> behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it

(8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although State regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained 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). 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 (id.).

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

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

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

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

The district's failure to develop a BIP in conformity with State regulations does not, in and of itself, automatically render the IEP deficient, as the IEP must be closely examined to determine whether it otherwise addressed the student's interfering behaviors (see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 80 [2d Cir. 2014]; F.L. v. New York City Dep't of Educ., 553 Fed. App'x

2, 6-7 [2d Cir. Jan. 8, 2014]; M.W. v. New York City Dep't of Educ., 725 F.3d 131, 139-41 [2d Cir. 2013]; R.E., 694 F.3d at 190).

The March 2022 IEP states that the student was "observed as part of a [r]eevaluation" and according to her "previous" IEP, the prior CSE recommended a "[s]mall [c]lass within a specialized school with related services of [o]ccupational [t]herapy, [s]peech [t]herapy, [p]arent [c]ounseling and [t]raining, and [c]risis [p]araprofessional" services (Dist. Ex. 1 at p. 1). According to the IEP, the March 2022 CSE considered the following information: an "[a]ttempted" psychological evaluation dated November 11, 2017; "[a]ttempted" academic testing dated November 11, 2017; a Vineland Adaptive Behavior Scales assessment dated November 11, 2017; a March 2022 occupational therapy (OT) progress report; and a March 2022 speech-language therapy progress report (id.).[6] The district's school psychologist, who served as the district representative at the CSE meeting (school psychologist), testified by affidavit that the March 2022 CSE also considered a December 2021 OT progress report; a December 1, 2021 speech-language progress report; a 2017 psychoeducational evaluation; input from the student's then-current teachers; a 2020 classroom observation conducted by the school psychologist; and the parent's input during the meeting (Dist. Ex. 11 ¶¶ 2, 6, 10).

According to the March 2022 IEP, the student was working on functional academic, prevocational, and independent living skills (Dist. Ex. 1 at pp. 2, 3). The March 2022 IEP stated that the student primarily communicated using an SGD, and "produce[d] some vocalizations paired with gestures to express her wants and needs" (id. at p. 2). The student was reported to "present with significant delays in communication and language as well as adaptive behavior" (id. at p. 4). Regarding the student's social development, the IEP indicated the student "present[ed] with negative behaviors and w[ould] elope at times," although she was able to be redirected by staff (id. at p. 3).

For the 12-month 2022-23 school year, the March 2022 CSE recommended a 6:1+1 special class placement in a specialized school, five 30-minute sessions per week of OT, five 30-minute sessions per week of speech-language therapy, and parent counseling and training (Dist. Ex. 1 at pp. 16-17). The CSE identified the student's management needs as requiring "high rates of reinforcement, prompting, repetition of skills in order to attain her acquired skills, practice her skills, sensory supports and frequent breaks and movement," breaks, use of a scribe, testing accommodations, and door to door bussing (id. at p. 4).

According to the student's mother, she and the CSE participants from the student's nonpublic school "communicated to the CSE" during the meeting that the student required "1:1 ABA" instruction and a BIP "to address [the student's] inappropriate behaviors that disrupt[ed] her learning"; further, the student's mother and the staff from the nonpublic school stated that the

[6] The June 2022 prior written notice did not list the evaluative information the March 2022 CSE relied on to develop the student's IEP (see Dist. Ex. 2).

student could not make progress in the classroom "without constant individualized support" (Parent Ex. Z ¶ 11).[7, 8]

The school psychologist testified that as indicated in the March 2022 IEP, the student's mother expressed concerns regarding the classroom size and the student's need to focus on a task (Tr. p. 94). The school psychologist further testified that the CSE did not recommend 1:1 paraprofessional services for the student and instead, recommended a 6:1+1 special class with "six students, one teacher, and [one] classroom para[professional]" (Tr. pp. 94-95). According to the school psychologist, the CSE had recommended 1:1 paraprofessional services for the student in the past; however, based on the information available at the time of the March 2022 CSE, "she had made progress" and the CSE felt that "in terms of [the] least restrictive environment, she did not require [a] [1:1]" paraprofessional for the 2022-23 school year (Tr. pp. 97-98). Further, the school psychologist opined that the student "would receive individualized support" in the recommended 6:1+1 special class since she "require[d] a very small setting to be able to learn" (Dist. Ex. 11 ¶ 14).

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 and other evidence in the hearing record shows that the student exhibited communication and behavioral needs that were not appropriately addressed in the March 2022 IEP. For example, although the December 2021 speech-language report and the student's mother advised the March 2022 CSE that the student "require[d] an iPad to communicate," and the March 2022 IEP indicated that the student "primarily communicate[d] using" an SGD, the March 2022 CSE did not recommend any assistive technology device or services (Parent Ex. Z ¶ 13; Dist. Exs. 1 at pp. 2, 5; 3 at p. 1; 11 ¶ 10). Additionally, the IEP noted that the student did not need a particular device or service to address her communication needs (Dist. Ex. 1 at p. 5).

Likewise, in written testimony the parent stated that she and the nonpublic school staff, who attended the March 2022 CSE meeting, communicated the student's needs to the CSE (Parent Ex. Z ¶¶ 10, 11). The educational director at RFTS-LC, who attended the March 2022 CSE meeting, testified via affidavit that the student exhibited "severe maladaptive behaviors" that included "bolting to have self-stimulation," and "pinch[ing], bit[ing] and squeez[ing] others with extreme force" (Parent Ex. V ¶¶ 1, 27, 42). The student was further reported to engage in self-injurious behaviors and would refuse to exit the school building during a fire drill (id. ¶ 27). The parent testified that the student exhibited self-stimulatory behaviors and that the CSE was informed she required a BIP "to address her inappropriate behaviors that disrupt[ed] her learning" (Parent Ex. Z ¶¶ 4, 11). The March 2022 IEP appears to have acknowledged some of these concerns in

[7] The parent testified that staff from the student's nonpublic school participated in the March 2022 CSE meeting, including the educational director from RFTS-LC, the speech supervisor from RFTS-LC, a board certified behavior analyst (BCBA), the student's classroom teacher, and the student's occupational therapist (Parent Ex. Z ¶¶ 9, 10; see Tr. p. 106' Parent Exs. V at ¶ 1; W at ¶ 1).

[8] The educational director of RFTS-LC testified that the student did not have a 1:1 paraprofessional at RFTS-LC, but was receiving individual instruction (Tr. p. 130). According to the educational director RFTS-LC has an enrollment of 28 students spread out through six classrooms "with a 1:1 student to teacher ratio in all classrooms" (Parent Ex. V at ¶ 15).

that it indicated the student "presente[d] with negative behaviors and w[ould] elope at times" and that the student then-currently had a BIP (Dist. Ex. 1 at pp. 3, 25). However, the March 2022 CSE determined that the student did not need strategies, positive behavioral interventions or supports to address behaviors that impeded the student's learning or that of others nor did it determine that the student needed a BIP (id. at p. 5). Although the school psychologist testified that the student's behaviors would be addressed in the 6:1+1 special class, as there was "a paraprofessional to help with behavior support," the evidence in the hearing record shows that the student exhibited behavioral needs that required supports beyond those provided for the student in the March 2022 IEP (Dist. Ex. 11 ¶ 16).[9]

As described above, the student's needs as presented to the March 2022 CSE warranted further consideration of an FBA and a BIP; additionally, the March 2022 CSE did not recommend an SGD or sufficient behavioral supports, and the IEP did not otherwise address the student's communication or behavioral needs. Therefore, there is an insufficient evidentiary basis to overturn the IHO's finding that the student was denied a FAPE for the 2022-23 school year.

B. Assigned Public School Site

In its cross-appeal, the district also alleges that the parents argued in their due process complaint notice that they were unable to tour the assigned public school in-person, and, contrary to the IHO's finding, that was not a basis to find that the district denied the student a FAPE.

Review of the hearing record shows that the student's mother affirmed that she received a school location letter dated June 12, 2022 recommending an assigned public school, but was "informed the school was not doing in-person tours" and that she "was sent a video of the school as a 'virtual tour' – but there was no information regarding the students' needs or what they have available" (Parent Ex. Z ¶ 15).[10] The IHO noted that the district failed to present a witness from the assigned public school and that the district "failed to meet their burden [of proof] because the [district] did not present any evidence that the proposed program could be implemented at the subject public school" (IHO Decision at pp. 3, 6).

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323 [a]; 8 NYCRR 200.4 [e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 3012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp.2d 605, 614 [E.D.N.Y. 2012]; Tarlowe, 2008 WL 2736027, at *6 [stating that "[a]n education department's delay does not violate the IDEA so long as the department 'still ha[s] time to find an appropriate placement . . . for the beginning

[9] The district school psychologist testified by affidavit that the student's behaviors would appropriately be addressed in the 6:1+1 special class by supports such as a token economy system and visual aids (e.g., behavior charts) although those specific supports were not noted in the student's IEP (compare Dist. Ex. 1, with Dist. Ex. 11 ¶ 16).

[10] During the impartial hearing, the student's mother testified that "[f]or the last 17 years [she had] been touring [district] schools" and [t]his [wa]s the first time that [she] was not allowed into the building due to COVID" (Tr. p. 204).

of the school year in September'"], quoting Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *8 n.26 [S.D.N.Y. Nov. 20, 2007]). Thereafter, and once a parent consents to a district's provision of special education services, such services must be provided by the district in conformity with the student's IEP (20 U.S.C. § 1401 [9][D]; 34 CFR 300.17 [d]; see 20 U.S.C. § 1414 [d]; 34 CFR 300.320). When determining how to implement a student's IEP, the assignment of a particular school is an administrative decision, provided it is made in conformance with the CSE's educational placement recommendation (see M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244-45 [2d Cir. 2015]; K.L.A. v. Windham Southeast Supervisory Union, 371 Fed. App'x 151, 154 [2d Cir. Mar. 30, 2010]; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009]; White v. Ascension Parish Sch. Bd., 343 F.3d 373, 379 [5th Cir. 2003]; see also Veazey v. Ascension Parish Sch. Bd., 121 Fed. App'x 552, 553 [5th Cir. Jan. 5, 2005]; A.W. v. Fairfax Co. Sch. Bd., 372 F.3d 674, 682 [4th Cir. 2004]; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 756 [2d Cir. 1980]; Tarlowe, 2008 WL 2736027, at *6; Placements, 71 Fed. Reg. 46588 [Aug. 14, 2006]). There is no requirement in the IDEA that an IEP name a specific school location (see, e.g., T.Y., 584 F.3d at 420).

While parents are entitled to participate in the determination of the type of placement their child will attend, the IDEA confers no rights on parents with regard to school site selection (C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. Mar. 4, 2014]; see Luo v. Baldwin Union Free Sch. Dist., 2013 WL 1182232, at *5 [E.D.N.Y. Mar. 21, 2013], aff'd, 556 Fed. App'x 1 [2d Cir Dec. 23, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *10 [S.D.N.Y. Feb. 20, 2013]; see also *R.E.,* 694 F.3d at 191–92 [finding that a district may select a specific public school site without the advice of the parents]; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *11 [S.D.N.Y. Oct. 16, 2012] [noting that parents are not procedurally entitled to participate in decisions regarding public school site selection], aff'd, 553 Fed. App'x 2 [2d Cir. Jan. 8, 2014]).

Regarding the parents' ability to tour an assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or

proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]).[11]

On the other hand, there is district court authority indicating that a parent has a right to obtain information about an assigned public school site (see H.L. v. New York City Dep't of Educ., 2019 WL 181307, at *9 [S.D.N.Y. Jan. 11, 2019] [noting that "[i]n light of M.O., courts have found that parents have the right to obtain timely and relevant information regarding school placement, in order to evaluate whether the IEP can be implemented at the proposed location"]; F.B. v New York City Dep't of Educ., 2015 WL 5564446, at *11-*18 [S.D.N.Y. Sept. 21, 2015] [finding that the parents "had at least a procedural right to inquire whether the proposed school location had the resources set forth in the IEP"]; V.S. v New York City Dep't of Educ., 25 F. Supp. 3d 295, 299-301 [E.D.N.Y. 2014] [finding that the "parent's right to meaningfully participate in the school selection process" should be considered rather than the "parent's right to determine the actual school selection"]; C.U. v. New York City Dep't of Educ., 2014 WL 2207997, at *14-*16 [S.D.N.Y. May 27, 2014] [holding that "parents have the procedural right to evaluate the school assignment" and "acquire relevant information about" it]).

Based on the above, while there is no relevant legal authority granting a general entitlement for a parent to visit an assigned public school, there is some authority that a district's failure to accommodate parents' inquiries concerning an assigned school could, under certain circumstances, constitute a procedural violation that could contribute to or even rise to the level of a FAPE denial. In this instance, as I have previously found that the district failed to offer the student a FAPE for the 2022-23 school year because the March 2022 IEP did not address the student's identified needs, it is not necessary to further determine whether the parent's ability to obtain information about the assigned public school in order to evaluate whether the IEP could be implemented at the public school was frustrated to the extent that it resulted in a denial of FAPE. However, it must be noted that the district relies solely on the parent's testimony that she received a video of a virtual tour of the school in support of its position that it sufficiently responded to the parent's request to tour the school (Answer at p. 4; see Parent Ex. Z at ¶ 15). Accordingly, addressing this issue would require an assessment of whether the video tour provided the parent with sufficient information to address her inquiry regarding the assigned public school, an assessment for which there may not be sufficient information in the hearing record to make properly and I decline to disturb the IHO's finding on this issue.

C. Equitable Considerations

On appeal, the parents argue that the IHO erred in finding that RFTS-LC hired a "private consultant" to change RFTS-LC's tuition-based mode to a fee-based service model, that the IHO

[11] Nothing in this decision is intended to discourage districts from offering parents the opportunity to view school or classroom placements, as such opportunities can only foster the collaborative process between parents and districts envisioned by Congress as the "core of the [IDEA]" (Schaffer v. Weast, 546 U.S. 49, 53 [2005], citing Rowley, 458 U.S. at 205-06; see also 20 U.S.C. § 1400[c][5]).

erred in finding that RFTS-LC or RFTS-LD committed fraud, and that the IHO displayed bias against RFTS-LC's fee-based service model (Req. for Rev. ¶¶ 3, 5, 6).[12]

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. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [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).

Having found that the unilateral placement at RFTS-LC was appropriate, the IHO addressed equitable considerations by holding that the parents complied with notice requirements and cooperated with the CSE process, but held that the "new fee model appear[ed] to be an effort by [RFTS-LC] to defraud the [district] of hundreds of thousands of dollars" (IHO Decision at pp. 6-7). According to the IHO, a "private consultant" of RFTS-LC "changed the fees for the same services that were provided in previous school years in order to increase the [district]'s payment from $150,000 to $500,000 per year, approximately"; the IHO then determined that the parents

[12] For the most part, the parents' request for review refers to the nonpublic school the student attended as RFTS, which the request for review defines as RFTS-LC; however, in multiple instances the request for review indicates that the student's education program and related services were "provided by RFTS-LD to [the student] at RFTS-LC" and in one instance refers to RFTS-LD as "the private school program" and RFTS-LC as "the private school" (Req. for Rev. at ¶¶1-5).

were "only entitled to payment equal to the tuition-based model that the school used in previous school years" (id. at pp. 7-8).

The enrollment agreement between the parents and RFTS-LD for the 2022-23 school year indicated that the parents 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. G at pp. 1-2).[13] The parent exhibit that includes the enrollment agreement also includes a rate sheet that sets forth rates per half hour for various services (id. at p. 6).

During the hearing, the student's mother testified that when she signed the contract with RFTS-LD she did not know the amount she was contracting to pay for the 2022-23 school year (Tr. pp. 200, 202; see Parent Ex. G). On August 7, 2023, the RFTS-LD administrator attested that the invoices for the student's 2022-23 school year totaled $425,518.90 and broke down the total hours and rates charged (id. ¶ 13). However, on November 6, 2023, the RFTS-LD administrator attested that "there were a few discrepancies between the monthly invoices and the student's attendance records, therefore [he] carefully reviewed the records, made the appropriate changes" and sent a corrected invoice for the costs of the student's program for the 2022-23 school year that totaled $390,832.50 (Parent Ex. EE ¶¶ 5, 6).

The student's mother testified that the difference in costs between the 2021-22 school year and the 2022-23 school year were "[r]oughly double" and that it was her understanding that the difference in cost was because RFTS-LC "changed their billing methods" and that the student's educational program did not change (Tr. p. 201). The student's mother testified that the student attended RFTS-LC "for roughly 17 years, and it has always been that the tuition was paid off of pendency. So being that [she] already had pendency . . . [i]t was [her] assumption that [the student] was going to be covered under pendency, as she always is" (Tr. pp. 202-03).

The RFTS-LD administrator overseeing operations and finance (RFTS-LD administrator) testified via affidavit that the rates charged by RFTS-LD were "based on market rates" and that the "rates were consistent with rates charged by programs offering similar services" and "also took into consideration RFTS's costs in recruiting, hiring and retaining professional educational and administrative staff" (Parent Ex. Y ¶¶ 1, 10). Although the RFTS-LD administrator testified that the rates were "based on market rates" and they included "the totality of costs to the program," there was little explanation provided in the hearing record as to how a "market rate" was computed for any of the services delivered to the student or why the change in fee structure resulted in the total costs of the same educational program doubling form one year to the next (Tr. pp. 168-69; Parent Ex. Y at ¶ 10).[14]

[13] The district asserts that there is no agreement between the parents and RFTS-LC, the entity providing services, since the parents contracted with RFTS-LD and that, therefore, no relief may direct payment to RFTS-LC (Answer ¶ 9). However, the parents agreed to pay RFTS-LD for services delivered by RFTS-LC (Parent Ex. G) and the district cites to no authority that such an agreement would be invalid.

[14] The RFTS-LD Administrator has had difficulty explaining how RFTS-LD determined rates for services in at least one prior administrative proceeding (see Application of the Dep't of Educ., Appeal No. 23-151 at pp. 21-22).

Considering all of the above, the IHO had sufficient reason to question the increase in the tuition amount from when RFTS-LC operated on a tuition-based model to the fee-for-services model utilized by RFTS-LD and to call into question the propriety of the RFTS-LD billing practices and the excessiveness of the costs of the student's programming. The most glaring indications of an excessive rate in this matter was parent's testimony of the doubling of the cost of the student's tuition due solely to a change in billing practices, the parent's testimony that she was not aware of the cost of the program when she signed the contract with RFTS-LD, the RFTS-LD administrator adjusting the cost of the student's program during the course of the hearing by more than eight percent, and the lack of valid explanation to justify the increased cost of the student's programming (see Tr. pp. 200-02; Parent Exs. G; Y; EE).

While the IHO did make some comments on the record indicating prior knowledge of the RFTS-LC's fee-based service models from having heard other cases regarding the school; there is no evidence in the hearing record that he relied on his knowledge from prior cases in rendering his decision on this one, nor is there any indication in the hearing record that the parents were prevented from addressing any of the IHO's concerns regarding the billing practices employed by the parents' chosen nonpublic school. As such, I do not find evidence in the hearing record of IHO bias.[15] Additionally, while the parents are correct in asserting that there is no evidence of a private consultant hired by RFTS-LC in the hearing record and accordingly the IHO erred in referencing one in his decision, this alone is insufficient to overturn the IHO's determination that equitable considerations favored a reduction of the parents' full request for relief. This is especially so when the IHO primarily relied on the drastic increase in costs due to a change in the fee structure instead of a change in the student's educational programming and the parents' own testimony supported this finding (see Tr. pp. 200-02).

Accordingly, it appears that the IHO appropriately balanced equitable considerations in reducing the costs of the student's programming chargeable to the district to what he determined was a reasonable rate based on the provision of the same program to the student in the past.

The parents further argue on appeal that the IHO erred in issuing his April 12, 2023 order of pendency which directed the district to fund the student's placement at RFTS-LC "based on the cost of the tuition during the 2018-2019 school year" (Amended Req. for Rev. at p. 2; Parent Ex. CC at p. 3). Considering the above, the change from RFTS-LC to RFTS-LD appears to have been more of a shift in the way the school charged for services, rather than a change in the educational program being provided to the student (Tr. pp. 201-02; Parent G). However, in reviewing the Second Circuit's decision in Ventura de Paulino, one of the reasons the Court found that the district

[15] It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

was authorized to decide how (and where) the students' pendency services were to be provided, instead of the parents, was the potential difference in the costs of educational services between schools (Ventura de Paulino, 959 F.3d at 533-35). The Court specifically noted that "[d]ramatically different costs may be presented when parents unilaterally choose to enroll their child in a new school" and that the IDEA did not to permit parents of students with disabilities to utilize the stay-put provision to frustrate State fiscal policies (id. at p. 535). Thus, when the parents contracted with RFTS-LD for a services-based program provided by RFTS-LC, at a substantially higher cost than the student's prior program delivered by RFTS-LC, the parents rejected the pendency placement at RFTS-LC and the program contracted for with RFTS-LD was not required to be funded through pendency. As the IHO already awarded pendency in this matter, I decline to disturb his award, which includes a directive that the district fund RFTS-LC based on the cost of tuition for the 2018-19 school year (see Apr. 12, 2023 Interim IHO decision at p. 3).

Under the circumstances, the IHO correctly considered equitable factors related to the costs of the RFTS-LD 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 be reduced so that it matches the cost of the student's prior tuition at RFTS-LC when RFTS-LC utilized a tuition based model. The hearing record shows that the IHO sought to ensure 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 issues, and reviewed the evidence in the hearing record. 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 to the tuition-based model that RFTS-LC utilized in prior school years will not be disturbed.

VII. Conclusion

The hearing record supports the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year and that the costs of the student's program at RFTS-LD were excessive and should be reduced to match the cost of the rate RFTS-LC charged when it used a tuition-based model.

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 6, 2024

STEVEN KROLAK
STATE REVIEW OFFICER