The University of the State of New York

The State Education Department
State Review Officer
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No. 24-322

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

Appearances:
Law Office of Courtney L Haas LLC, attorneys for petitioners, by Courtney L. Haas, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which denied their request for funding by respondent (the district) for the full costs of their son's services provided by Reach for the Stars (RFTS) during the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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

Briefly, during the 2022-23 school year, the student was in his late teens and attending an ungraded classroom in a nonpublic school (Dist. Ex. 1 at p. 1). The student has received diagnoses of autism and a seizure disorder for which he took medication (Dist. Exs. 1 at pp. 4, 5; 4 at p. 1). Review of the student's educational history shows that he has poor safety awareness skills, he has difficulty with activities of daily living (ADL) skills, and he primarily communicates using a speech generating device to make requests (Parent Ex. N at p. 1; Dist. Exs. 1 at pp. 1-4; 4 at pp. 1-

4). The student has reported delays in all areas required for independent living and the student was living in a group home as of March 2023 and was expected to transition into a day habilitation program after aging out of school (Dist. Ex. 9).

On March 31, 2023, the CSE convened and finding the student eligible for special education as a student with autism developed an IEP for the student with an implementation date of July 5, 2023 (Dist. Ex. 1 at pp. 1, 27).[1] The CSE recommended that the student receive a 12-month program with placement in a 6:1+1 special class for core subjects (25 periods per week) and related services consisting of five 40-minute sessions of individual occupational therapy (OT) per week and five 40-minute sessions of individual speech-language therapy per week, along with the support of full-time individual paraprofessional services for health, seizures (id. at pp. 19-20). The CSE also recommended that the student receive an assistive technology device, identified as a static display, speech generating device (id. at p. 20). The CSE further recommended that the parents be provided with four 60-minute sessions of group parent counseling and training per year (id.). The IEP also indicated that the student would participate in the New York State Alternate Assessment (NYSAA) (id. at p. 25).

On June 20, 2023, the district sent the parents a prior written notice of the March 2023 CSE's recommendations and a school location letter (Dist. Ex. 3 at pp. 1-5).

In a letter bearing the same date, June 20, 2023, the parents notified the district of their disagreement with the proposed program for the 2023-24 school year and their intention to re-enroll the student at RFTS for the 2023-24 school year and seek reimbursement and/or direct funding for the costs associated with the student's placement (Parent Ex. B).

The parent signed an enrollment agreement with Reach for the Stars Learning & Developing LLC (RFTS-LD) on September 5, 2023 for the student's enrollment from July 6, 2023 through June 30, 2024 (Parent Ex. E).

A. Due Process Complaint Notice

In a due process complaint notice dated December 12, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year asserting, in pertinent part, that the CSE failed to thoroughly assess the student in all areas of his suspected disabilities and should have referred the student for a neuropsychological evaluation; failed to complete a functional behavioral assessment (FBA); failed to develop a behavioral intervention plan (BIP); did not include 1:1 instruction; did not include applied behavioral analysis (ABA); failed to offer supervision by a board certified behavior analyst (BCBA); did not include appropriate annual goals or an appropriate transition plan; and failed to address the student's ADL skills, generalization, community-integration, and safety in the community (Parent Ex. A at pp. 2-3). In addition, the parents alleged that the recommended placement was inappropriate, in pertinent part, because it could not ensure implementation of the proposed IEP; lacked a speech

[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]).

therapy room for pullout services and reported that it provided push in services in lieu of pull out services; and did not provide ABA services of any kind (Parent Ex. A at pp. 2-4).

As relief, the parents sought an order directing the district to fund an independent neuropsychological evaluation and an independent vocational and transition assessment; reimbursement or direct funding for any amounts owed to RFTS for the 12-month 2023-24 school year; and an order directing the district to provide appropriate special transportation of the student to RFTS and/or reimbursement for any costs incurred for private transportation (id. at pp. 4-5).

B. Impartial Hearing Officer Decision

Following a prehearing conference held on January 16, 2024 and two status conferences, an impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on May 13, 2024 (Tr. pp. 1-272). In a decision dated June 24, 2024, the IHO found that the district did not offer the student a FAPE for the 2023-24 school year and that the parents demonstrated that RFTS was an appropriate unilateral placement (IHO Decision at pp. 20-22). However, the IHO concluded that equitable considerations did not favor the parents (id. at p. 22). With respect to equitable considerations, the IHO found that the parents were unreasonable, in that the tuition for the nonpublic school was "exorbitant" (id.). The IHO determined that the costs of the services provided by the school were unreasonable, weighing the student's lack of progress over the course of 15 years attending the nonpublic school and the fact the school was teaching pre-vocational skills to the student given that "the student was unable to learn academics" and "the students in the program are not capable of functioning" (id. at pp. 22-23). As a result, the IHO ordered the district to make direct payment to RFTS in the amount of $121,116.67 (1/3 of the maximum amount set forth in the parent's contract with RFTS (id. at p. 25). In addition, the IHO ordered the district to continue to provide the student with appropriate transportation, as per the student's IEP, for the remainder of the 2023-24 school year (id.).[2]

IV. Appeal for State-Level Review

The parents appeal, alleging, as relevant here, that the IHO erred in finding that equitable considerations were not in their favor and in reducing the amount of tuition awarded at RFTS by two thirds. The parents seek an award of the full contractual costs of the student's tuition with RFTS for the 2023-24 school year based on invoices and billing in the amount of $287,100.70, which includes additional evidence submitted with the request for review as proposed exhibits covering the period from April through June 2024.

The district submits an answer, in which the district asserts that the IHO's decision not to award the full costs of the student's tuition at RFTS should be upheld. The district argues that the amount charged by RFTS was "plainly excessive and unreasonable," that the hearing record included evidence that RFTS changed its billing methods, that substantial fluctuation in the services provided from month to month were not sufficiently explained, and that the RFTS

[2] With respect to the parents' other requested relief, the IHO noted that the parents withdrew their request for an independent neuropsychological evaluation and did not make any arguments, or submit any evidence, in support of an independent vocational and transition assessment, limited travel time or a 1:1 transportation aide, or reimbursement for any payments made to RFTS (IHO Decision at p. 23).

administrator lacked credibility and did not provide an explanation as to how RFTS determined rates for services. The district objects to the parents' additional evidence asserting that it is irrelevant as it does not address whether the services were reasonable.

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]).[3]

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).

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

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

VI. Discussion

A. Preliminary Matters

Initially, the district did not appeal the IHO's finding that it failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 20), nor that the parents sustained their burden that the unilateral placement of the student at RFTS was appropriate for the 2023-24 school year (id. at p. 21). As such, these findings have become final and binding on the parties and will not be reviewed on appeal (34 CRF 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6 -*7, *10 [S.D.N.Y., March 21, 2023]).

B. Equitable Considerations

The focus of the parties' arguments on appeal is whether the IHO erred in reducing the amount awarded for the student's placement at RFTS for the 2023-24 school year based on equitable considerations. The final criterion for a tuition 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.

Reimbursement may also be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C.

§ 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68). under the IDEA"]).

Additional factors that may warrant a reduction in tuition under equitable considerations include 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).

In this instance, the enrollment agreement between the parents and RFTS-LD for the 2023-24 school year indicated that the parent agreed to the provision of services listed in the attached addendum and that billing would only reflect services actually delivered to the student (Parent Ex. E). The parent exhibit that includes the enrollment agreement also includes an addendum that set forth a frequency for services per week with hourly rates for each service and a weekly cost for each service (id. at p. 3). The hearing record also includes services affidavits for the period from July 2023 through March 2024 with the total cost of services as of March 2024 equaling $221,950.20 (Parent Exs. F; G). The additional evidence submitted by the parent on appeal includes services affidavits for the period from April 2024 through June 2024 with the total cost of services for that period being $65,150.50 (Proposed Exs. V; W). However, without reference to the RFTS services affidavits, which he signed, the RFTS administrator testified by affidavit dated May 6, 2024 that for the 2023-24 school year "[t]he overall cost of [the student's] program, not including absences or holiday breaks, is 43 weeks in the amount of $8,450.00 per week which comes out to $363,350.00" (Parent Ex. U ¶ 16).

In balancing equities, the IHO initially noted that there was no evidence that the parents failed to attend the student's CSE meetings, had not provided the district with a ten-day notice, were not cooperative with evaluations, or that there was any wrongdoing on the part of the parents (IHO Decision at p. 22). However, the IHO found that the parents were unreasonable in their expectation that the district should pay "such an exorbitant amount for what the student [wa]s being taught." (id. at pp. 22-23). The IHO reviewed the parent's contract with RFTS and the addendum to the contract and noted that the maximum amount for the proposed services totaled $363,350.00 (id. at p. 23; see Parent Ex. E). The IHO noted that the RTFS administrator testified that the actual cost for the 2023-24 school year would be lower than that set forth in the contract and would total around $300,000 for the full school year (IHO Decision at p. 22; see Tr. p. 233-34, 252). However, the IHO concluded that even a lower amount in the three hundred-thousand-

dollar range was exorbitant for what the student's needs were and what the student was being taught (IHO Decision at p. 22).

As support, the IHO referred to the parent's testimony that the student had been attending RFTS for the past 15 years and that the cost of school was not always what it is now (IHO Decision at p. 22). Review of the parent's testimony shows that he testified that the cost of the school changed but he did not recall when everything changed (Tr. 191). The IHO then discussed the student's progress, or lack thereof, over the course of his attendance at RFTS (IHO Decision at p. 22). Without citation to the evidence in the hearing record, the IHO referenced the testimony of the RFTS education director and indicated that she testified that the student could not learn academically (reading, writing, math) and that RTFS was teaching functional academics (recognizing his name, cleaning, hot vs. cold, etc.); according to the IHO, the student had been at RFTS for 15 years, yet he was still only at a kindergarten functional level (id.).[4] The IHO concluded that "[w]hile the case law has established that parents need not show that the student made progress to establish appropriateness, when taken as a whole, "the student here has made such little progress in a 15-year time span" (id.). Further, the IHO stated that she was not persuaded that the student will make much more progress, even with all the services that RFTS was providing (id.). Finally, the IHO noted that RFTS was teaching the student pre-vocational skills in his late teens (id.). According to the IHO, "[t]his could have and should have been taught to the student when he was younger, especially given that it has been evident to the private school for some time now that the student was unable to learn academics" (id. at pp. 22-23).

As relevant here, the district argues that the IHO correctly found that equitable considerations do not warrant an award of full tuition reimbursement because of the unreasonable costs of the services provided to the student as recited by the IHO. The district further argues that the IHO correctly placed little weight on the testimony of the RFTS "administrator overseeing the financing and operations" who could not provide any breakdown of the rates charged by RFTS or how RFTS had determined that these were "market rates" for the services provided. In addition, in seeking to discredit RTFS billing records admitted into evidence, the district maintained that it was "troubling" that the services reportedly provided to the student during the school year fluctuated substantially from month-to-month, particularly those relating to ABA services.

In reviewing the balancing of equitable factors, the IHO correctly concluded that there was no evidence that the parents did not attend the IEP meetings, had not complied with a ten-day notice, were not cooperative with evaluations or that there was any wrongdoing on the part of the parents (IHO Decision at p. 22). The district asserted no argument to the contrary.

However, the IHO inappropriately considered what she determined to be the student's failure to adequately progress during his 15 years of attendance at RFTS when conducting her

[4] Review of the educational director's testimony shows that the student was working on prevocational skills, ADL skills, and functional academics; the educational director testified that that learning for the student would look different than for other learners (Tr. pp. 81-83, 90-91). In particular, related to functional academics, the student was learning vocabulary to build towards independent task completion, identifying his name so that he would know what belongs to him, and safety awareness noting the importance of distinguishing hot and cold to be aware of what he can and cannot touch (Tr. pp. 83-84, 115-16).

balancing of equitable factors and in her resultant reduction of direct funding. The Second Circuit Court of Appeals has held, it is error for an IHO to apply the Burlington/Carter test by conducting reimbursement calculations that are based on the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hour day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P. , 2024 WL 763386 at *2 quoting Forest Grove Sch. Dist. v. T.A. , 557 U.S. 230, 246-47 [2009]). The student's progress at RFTS, while not dispositive, was a relevant factor to consider in the calculous of whether RFTS was an appropriate unilateral placement for the student (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]). But the IHO should not have mixed the student's progress at RFTS into her analysis of equitable considerations, especially considering that the IHO had already concluded the services delivered by RFTS to be appropriate to meet the student's needs. In fact, in finding that the unilateral placement was appropriate, the IHO concluded that the student had made progress while attending RFTS (IHO Decision at p. 21).

It would have been permissible, as an equitable consideration, for the IHO to have reviewed the educational services delivered by RFTS to determine if there were segregable services provided in excess of a FAPE as the Second Circuit has noted that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (L.K., 674 Fed. App'x at 101). However, the IHO did not make such a finding and instead appeared to discount the effectiveness, and thus the appropriateness, of the services being delivered. Additionally, the IHO's conclusion that the student was not likely to further progress rested on pure speculation.

As to the district's argument of unreasonable and exorbitant rates, generally speaking, an excessive cost argument focuses on whether the rate charged for services was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. In this instance, the RFTS administrator testified that the rates charged to the parents were "market rates" and that they were consistent with rates charged by programs offering similar services (Tr. at 226-227; Parent Ex. U at ¶15). During cross examination, the administrator testified that "the market rate is the usual price that is charged for our services" and provided the names of two programs indicating they were comparable (id. at 227). When questioned further the administrator testified that the two named programs serviced students "in similar condition" to the students receiving services at RFTS and that those two programs "charge[d] a little bit more that [RFTS]" (Tr. pp. 241-42). To be certain, the RFTS administrator was not the most forthcoming of witnesses. For example, when asked whether RFTS had a different fee structure from the then current services based model, the RFTS administrator testified that it had been the same format since he started working there in May of 2022; however, when asked if he was aware of a prior model he initially conceded that he was aware but refused to answer indicating "the fact that [he] ha[d] some knowledge about historical data, [he] d[id not] this qualifie[s] [him] as a … as an expert in that" (Tr. pp. 217-18). Nevertheless, the attorney for the district's cross-examination was underwhelming as it did not

follow up on his responses to this line of questioning and, while obtainable and relevant, there is ultimately no evidence in the hearing record as to how much RFTS had previously charged the parents or the district for this student's educational programming. Mere arguments by an attorney on issues of disputed fact do not constitute evidence, a point of which the district is well aware.

In response to the RFTS administrator's testimony, the district could also have responded with its own evidence of rates for comparable services from other private schools or some cost- or salary-based evidence to support its assertion that the rates were unreasonable and exorbitant. Instead, the district chose to present no witnesses at the hearing and supplied no exhibits supporting its contention that the rates charged for services by RFTS were unreasonable. Absent the admission of any such evidence at the hearing, it is apparent that the IHO's conclusion that the costs of the RFTS services were "unreasonable" and "exorbitant" rested on her conclusory opinion without a factual basis in the evidence admitted into the hearing record. The fact that the costs are significant does not, by itself, render them unreasonable.

Finally, turning to the district's argument that the costs of the program were suspect because the services provided by RFTS, particularly those related to ABA, substantially fluctuated from month-to-month, a detailed examination of the RFTS monthly billing, together with the monthly amounts charged specifically for ABA services, and the student's attendance record undermines the district's assertion (compare Parent Exs. F-G, with Parent Ex. K). Initially, review of the student's attendance record shows that he did not have any absences between July 2023 and February 2024; however, the number of days the student was in attendance per month varied due to the school not being open on certain days (see Parent Ex. K). For example, in December 2023 the student was present for school for 15 days and received a total of 92.5 hours of ABA services, while the student was present for 19 days in November 2023 (receiving 120 hours of ABA services) and 22 days in January 2024 (receiving 129.5 hours of ABA services) (Parent Exs. F at pp. 5-7; K). Accordingly, the fluctuation was not as substantial as it may appear from the billing alone. The number of hours of ABA services the student received per school day fluctuated around 6 hours and even this fluctuation may have been due to the student's schedule being shorter on Fridays (see Parent Ex. J).

Based on the foregoing, I find that the balancing of equitable considerations favors the parents. In addition, the IHO's reduction of the amount to be directly funded to RFTS for the costs of the services provided to the student for the 2023-24 was based in part on a misapplication of the Burlington/Carter test, was not supported by the evidence in hearing record and must be reversed.

VII. Conclusion

In summary, I have considered the parties' dispute over the amount of funding owed for RFTS for the 2023-24 school year and find that the equitable factors presented in the evidence favor the parents. Furthermore, I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated June 24,2024, is modified by reversing those portions which reduced amount of funding to be paid to RFTS by the district due to the student's lack of progress and equitable factors; and

IT IS FURTHER ORDERED that upon the presentation by the parents to the district of all RFTS invoices relating to the 2023-24 school year, the district shall directly fund RFTS in an amount not to exceed $287,100.70.

Dated: **Albany, New York**
September 25, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER