The University of the State of New York

The State Education Department
State Review Officer
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No. 24-415

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:
The Law Office of Laura D. Barbieri, PLLC, attorneys for petitioners, by Laura D. Barbieri, 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 that respondent (the district) fund the costs of their son's program at the Reach for the Stars ("RFTS") for June 2024 of the 2023-24 school year. The district cross-appeals from that portion of the IHO's decision which determined that equitable considerations supported the parents' requested relief and ordered the district to fund the costs of the student's services at RFTS for July 2023 through May 2024 of the 2023-24 school year. The appeal must be sustained. 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

Given the limited issues on appeal, a full recitation of the student's educational history is unnecessary. Briefly, however, the student in this case has received a diagnosis of autism spectrum disorder (ASD) and attended RTFS since 2021 (Parent Exs. Q at p. 1; R at p. 1; S at p. 1; T at p. 1). According to the parent, on May 8, 2023, a CSE convened and developed an IEP that

recommended that the student attend a 6:1+1 special class in a district specialized school with related services (see Parent Exs. A at pp. 1, 2; B at p. 1).[1]

In a letter to the district dated June 20, 2023, the parents asserted that the district did not offer the student a free appropriate public education (FAPE) in that the May 2023 CSE failed to complete a functional behavioral assessment (FBA) or behavioral intervention plan (BIP) prior to the CSE meeting and the IEP did not include a recommendation for applied behavior analysis (ABA) despite the student requiring this method of instruction (Parent Ex. B at pp. 1-2). The parents further asserted that the May 2023 IEP was "void of 1:1 instruction and [Board Certified Behavior Analyst (BCBA)] supervision," "void of home based services" and "the related services in the IEP [we]re also insufficient" (id. at p. 2). The parents indicated that the district had not identified a school location for the student to attend for the 2023-24 school year (id.). Based on the foregoing, the parents notified the district of their intent to re-enroll the student at RFTS and seek reimbursement for "all expenses pertaining to this placement" including transportation (id.).

The parents executed an enrollment contract on August 1, 2023 with RFTS, and the student began attending the program on July 6, 2023 for the 2023-24 school year (Parent Exs. C at p. 2; F at ¶ 3; K).[2]

A. Due Process Complaint Notice

In a due process complaint notice dated April 24, 2024, the parents alleged that the district failed to offer the student a FAPE for the 2023-24 school year, and, as relief, sought tuition reimbursement and direct funding for the student's program at RFTS (see Parent Ex. A).

B. Impartial Hearing Officer Decision

A prehearing conference was held on June 4, 2024 (Tr. pp. 1-12), after which an impartial hearing convened before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on July 17, 2024 and concluded the same day (Tr. pp. 13-73). In a decision dated August 7, 2024, the IHO found that the district conceded that it denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 3; see Tr. p. 19). The IHO further held that RFTS was an appropriate unilateral placement for the student, noting that the weight of the evidence established that the student's individual special education needs were addressed by RFTS and that the instruction offered was "'reasonably calculated to enable the child to receive educational benefits'" (IHO Decision at p. 4). The IHO held that the parents provided the necessary "Ten-Days' Notice" and that there was no evidence in the record that the district responded to the notice (id.). Finally, the IHO concluded that he "[found] no issue with the reasonableness of the costs associated" with RFTS; however, he reduced the parents' requested award equivalent to the amount billed for June 2024 because the record did not contain an invoice for the June 2024 billing and there was no other "reliable evidence as to what services and how many hours were rendered in June 2024" (id. at p. 5). The IHO held further that, even though the district argued the rates charged by RFTS were

[1] The hearing record does not include a copy of the May 2023 IEP.

[2] RFTS has not 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).

"excessive," the district provided no evidence to show what the rate should be and that the equities supported the parents' claim for tuition reimbursement from July 2023 to May 2024 (id.).

IV. Appeal for State-Level Review

The parents appeal and the district cross-appeals. The gravamen of the parents' argument is that the IHO erred in not awarding full tuition reimbursement at RFTS for the 2023-24 school year including June 2024. The parents seek to admit additional evidence on appeal and provide proof of the June 2024 invoice for tuition that was absent from the record at the time of the hearing. The district cross-appeals, alleging that equitable considerations do not support the IHO's award, and specifically challenges the hourly rates charged by RFTS for discrete services on the basis that the evidence in the hearing record did not demonstrate that the rates 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-

[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).

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—Equitable Considerations and Relief

The district has not cross-appealed from the IHO's findings that the district failed to offer the student a FAPE for the 2023-24 school year and that the parents sustained their burden to establish the appropriateness of the student's unilateral placement at RFTS for the 2023-24 school year; as a result, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Accordingly, I now turn to the district's argument that the IHO's award of tuition funding is not supported by the record and that it should be reduced accordingly.

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Thus, 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 tuition or rate charged by the private school or 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 for the 2023-24 school year, signed by the parent on August 1, 2023, indicated that services were "individually programmed for the student" and set forth in the addendum and that billing would only reflect services actually delivered to the student (Parent Ex. C).[4] The addendum 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 RFTS administrator testified that the addendum reflected a "plan of service," which may differ from "the actual service rendered," emphasizing that RFTS only billed for services actually provided (Tr. pp. 52-53). Without reference to the RFTS services affidavits and invoices, the RFTS administrator testified by affidavit 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 $7,643.28 per week which comes out to $328,661.04" (Parent Ex. U ¶ 16). The administrator explained that this total reflected the weekly services planned times the number of weeks planned but was higher than the total amount billed (Tr. p. 62).

The hearing record includes service logs, services affidavits, and service invoices for the period from July 2023 through May 2024 with the total cost of services as of May 2024 equaling $248,142 (Parent Exs. F; G; I).

The RFTS administrator indicated that the rates charged for each service were "based on market rates" and "were consistent with rates charged by programs offering similar services" (Parent Ex. V ¶¶ 15-16). During the impartial hearing, the administrator elaborated that the rates charged correlated with the costs for "comparable programs providing similar services to a similar student body suffering from [autism spectrum disorder] in the low functionality of the spectrum," the costs of which were ascertained in an analysis conducted of programs available in "the entire state of New York" (Tr. pp. 53-54). The administrator noted that there were a lot of facilities available for "severely autistic children in the northern part of the state" but fewer "[i]n the city" (Tr. p. 54).

An excessive cost argument focuses on whether the rates charged for services were reasonable and requires, at a minimum, evidence of not only the rates charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. In this instance, the hearing record includes evidence of only those rates charged by RFTS, as set forth in the contract addendum, and is otherwise devoid of any evidence regarding reasonable market rates (see Parent Ex. C at p. 3; see generally Tr. pp. 13-73; Parent Exs. A-GG). In its answer and cross-appeal, the district argues that the rates charged by RFTS were "exorbitant and unreasonable" but points to no evidence by way of comparison to support this contention. During the impartial

[4] The district takes issue with the date that the parents signed the agreement, August 1, 2023, after the student began receiving services in July 2023 (see Parent Ex. C). However, as the contract reflects the essential terms and the parents' intent to be bound to pay for the services for the entire school year and given that the hearing record includes evidence that the services were delivered in July 2023 (see Parent Exs. I at pp. 1-3; K), I do not find the date the parents signed the agreement to be a factor that weighs against a full award of funding for the costs of the student's program at RFTS for the 2023-24 school year.

hearing, the district should have come forward with its own proposed dollar figures and some objective evidence to support its opinion that RFTS charges an unfair amount for the services it provides. It did not do so and has also not proffered additional evidence on appeal or sought a remand. Accordingly, there is no evidentiary basis for a determination that the rates charged by RFTS were excessive.

The district also contends that the "the services reportedly provided to student . . . fluctuated substantially from month-to-month without explanation" and this fact constitutes a factor to consider in balancing the equities when awarding relief as part of an excessive cost argument (Answer ¶¶ 14-15). For example, the district notes that the student received far fewer hours of ABA services than he was contracted to receive (student was to receive between 128 to 160 hours per month), reaching the contracted range once in May 2024 (id. ¶ 15). This argument, however cobbled together, does not relate to the cost for services provided by RFTS; instead, it could possibly be read to relate to whether the student received an excessive amount of services—i.e., segregable services—and perhaps the appropriateness of RFTS and the decisions made surrounding the delivery of services to the student; however, the district has not appealed the IHO's determination that RFTS was appropriate (see generally Answer ¶¶ 1-18). Without a more coherent allegation relating to the fluctuation in the frequency of the student's services and how this reflects that the hourly rate for services was excessive, the district's argument fails. It is not this SRO's role to research and construct the appealing party's arguments or guess what they may have intended (see, e.g., Gross v. Town of Cicero, Ill., 619 F.3d 697, 704 [7th Cir. 2010] [appellate review does not include researching and constructing the parties' arguments]; Fera v. Baldwin Borough, 2009 WL 3634098, at *3 [3rd Cir. Nov. 4, 2009] [a party on appeal should at least identify the factual issues in dispute]; Garrett v. Selby Connor Maddux & Janer, 425 F.3d 836, 841 [10th Cir. 2005] [generalized assertion of error on appeal is not sufficient]; see generally, Taylor v. Am. Chemistry Council, 576 F.3d 16, 32 n.16 [1st Cir. 2009]; Lance v. Adams, 2011 WL 1813061, at *2 [E.D.Cal. May 6, 2011] [the tribunal need not guess at the parties' intended claims]; Bill Salter Advertising, Inc. v. City of Brewton, AL, 2007 WL 2409819, at *4 n.3 [S.D.Ala. Aug. 23, 2007]). Thus, while the entire hearing record has been carefully reviewed to consider those claims that the district has specifically identified in its cross-appeal (34 CFR 300.514[b][2]; 8 NYCRR 279.8[c]; 12[a]), I will not sift through the district's pleadings, the hearing record, and the IHO's decision for the purpose of trying to justify the district's conclusions that are based upon its speculative opinion that RFTS costs a lot of money.

With respect to June 2024, as noted, the parents attach additional documentary evidence with the request for review for consideration on appeal (see generally Req. for Rev. Exs. A-E) Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Here, the parents seek to admit additional evidence that was not available at the time of the hearing including an affidavit from an administrator at RFTS, a June 2024 services invoice, an email to the parent regarding the June 2024 invoice, a billing statement, and attendance records for the June 2024 tuition billed to the parents (see Req. for Rev. Exs. A-E, see also Tr. p. 61).[5]

The parents' additional documentary evidence consists of the same or substantially similar evidence proffered by the parents at the impartial hearing, which was admitted without objection from the district (see Tr. pp. 24-25; Parent Exs. F-K). There was testimony at the hearing that the June 2024 billing was not available at the time of the hearing on July 17, 2024 (Tr. p. 61). Moreover, the district does not object to the consideration of the additional evidence. Based on the foregoing, I will accept the additional evidence submitted with the request for review because it was unavailable at the time of the hearing and it is necessary to consider in order to render a decision.

The additional evidence submitted by the parent on appeal includes services affidavits for the period of June 2024 with the total cost of services for that period being $14,783.75 (Req. for Rev. Exs. A-B). Although the IHO did not have the benefit of the June 2024 billing at the time of her final decision in this matter, based on the hearing record before me, I will order that, in addition to the funding required by the IHO's decision, the district fund the student's services for June 2024 in accordance with the amounts set forth in the invoice submitted as additional evidence.

In summary, I find no error in the IHO's weighing of equitable factors related to the costs of the RFTS program and the IHO's ordered is modified only to take into account the June 2024 services billed to the parents.

VII. Conclusion

In light of the above, there is no equitable basis that supports a reduction or denial of an award of tuition funding by the district for the student's program at RFTS for the 2023-24 school year and the IHO decision shall be modified to include the costs of services provided in June 2024.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that in addition to the funding set forth in the IHO's decision dated August 7, 2024, the district shall also directly pay RFTS for the student's services provided in June 2024 at the amount of 14,783.75.

Dated: **Albany, New York**
November 18, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[5] I note that the documents were emailed by RFTS to the parent on July 18, 2024, the day after the impartial hearing (see Req. for Rev. Ex. C).