The University of the State of New York

The State Education Department
State Review Officer
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No. 24-416

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 Firm of Laura D. Barbieri, PLLC, attorneys for petitioners, by Laura Dawn 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) fully fund the costs of their son's services at the Reach for the Stars Learning and Developing LLC (RFTS) program for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which found that the district did not offer the student appropriate special education programming for the 2023-24 school year and that the services unilaterally obtained by the parents were appropriate to meet the student's needs. 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 student has received diagnoses of autism spectrum disorder (ASD), intellectual disability, and attention deficit hyperactivity disorder (ADHD) (Parent Ex. CC at pp. 3, 9; see Dist.

Ex. 10).[1] The student began receiving special education services as a young child, and attended the district's specialized school programming and a nonpublic school prior to the parent's unilateral placement of the student at RFTS in July 2022 (Parent Ex. EE ¶¶ 7-9).

A CSE convened on March 20, 2023, determined that the student was eligible for special education as a student with autism, and developed an IEP for the student for the 2023-24 school year (sixth grade), to be implemented beginning July 5, 2023 (see generally Dist. Ex. 2).[2] The March 2023 CSE recommended 12-month programming consisting of a 6:1+1 special class placement in a specialized school, one 30-minute session per week of individual counseling, one 30-minute session per week of group counseling, five 30-minute sessions per week of individual occupational therapy (OT), and five 30-minute sessions per week of individual speech-language therapy (id. at pp. 24-26). The March 2023 CSE also recommended full-time group paraprofessional services for health and safety (id. at p. 25).

Via prior written notice and a school location letter, both dated June 20, 2023, the district summarized the March 2023 CSE's recommendations and notified the parents of the public-school site the district assigned the student to attend for the 2023-24 school year (see Dist. Exs. 3; 4).

In a letter to the district dated June 20, 2023, the parents expressed their disagreement with the recommendations contained in the student's March 2023 IEP, as well as with the particular assigned public school for the 2023-24 school year, and, as a result, notified the district of their intent to re-enroll the student at RFTS and seek reimbursement/prospective payment of all expenses pertaining thereto, including transportation, if the district failed to address their concerns (Parent Ex. B at p. 2).

On August 9, 2023, the parents entered into a contract with RFTS for the student to receive special education services for the period of July 6, 2023 through June 30, 2024 (Parent Ex. D at pp. 1-2).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated September 13, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p. 3). As relevant to this appeal, the parents alleged that the student's March 2023 IEP failed to "include" a behavioral intervention plan (BIP) or 1:1 instruction, and that the IEP did not mandate the use of applied behavior analysis (ABA) methodology (Parent Ex. A at pp. 3-4). The parents sought determinations that the district denied the student a FAPE for the 2023-24

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent exhibit and district exhibit were identified. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] 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]).

[3] RFTS has not been approved by the Commissioner of Education as an agency or school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

school year, that the parents' unilateral placement of the student at RFTS was appropriate, and that equitable considerations would not bar an award of funding for the 2023-24 school year (id. at pp. 4, 5). As relief, the parents requested an order directing the district to reimburse the parents or directly/prospectively fund any amounts owed to RFTS for ABA, related services, and any other related costs or services for the 2023-24 school year and an order directing the district to continue to provide appropriate transportation for the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened on October 31, 2023 and concluded on June 17, 2024 after five days of proceedings (Tr. pp. 1-208).

In a decision dated August 12, 2024, the IHO found that the district did not offer the student a FAPE for the 2023-24 school year, that the parents demonstrated that RFTS was an appropriate unilateral placement and that equitable considerations did not weigh in favor of either party (IHO Decision at pp. 9, 11). Regarding the district's failure to offer a FAPE, the IHO found that the March 2023 IEP did not reflect the agreed upon duration of 40 minutes for related services, did not recommend ABA as a methodology despite evidence of its effectiveness with the student, and did not recommend development of a BIP despite the student's behavioral issues (id. at pp. 8-9). As for the unilateral placement, the IHO determined that, even though RFTS did not provide "the amount of related services . . . recommended on the IEP," it evaluated the student and provided him with individualized services including related services and ABA (id. at pp. 9-10). As for equitable considerations, the IHO found that the parents participated in the process and gave the district notice of their intent to unilaterally place the student (id. at pp. 10-11). The IHO ordered the district to reimburse the parent for invoices submitted from July 2023 through March 2024, but denied reimbursement or prospective payment for funding after March 2024 due to the parents' failure to submit invoices past that date (id. at pp. 10-11).[4]

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 funding for the costs of RFTS for the 2023-24 school year, including April, May, and June 2024. The parents state their intent to offer additional evidence on appeal in the form of invoices that were not available at the time of the hearing; however, the parents did not submit the referenced documents with their request for review. The parents also argue that they were contractually obligated to RFTS for the full 12-month school year and that refusing to order funding for April through June 2024 was not appropriate in light of the purpose of the IDEA. Finally, the parents also allege that the IHO erred in weighing the number of sessions of speech-language therapy provided to the student as an equitable consideration.

The district cross-appeals, alleging that the IHO erred in finding that it did not offer the student a FAPE, that the unilateral placement of the student at RFTS was appropriate for the student, and that equitable considerations supported an award of funding for July 2023 through

[4] The IHO also noted that the student did not receive speech-language therapy the number of times it was recommended on the IEP; however, it is unclear to what extent this finding weighed on the IHO's determination as to equitable considerations (IHO Decision at p. 11).

April 2024. The district contends that the CSE's recommendation for related services of 30-minute sessions instead of 40-minute sessions did not constitute a denial of a FAPE and that, contrary to the parents' recollection, the district did not agree to 40-minute sessions at the CSE meeting. The district also argues that the lack of ABA methodology or development of an updated BIP for the 2023-24 school year did not constitute a denial of a FAPE as the evidence did not demonstrate that the student required ABA to receive an educational benefit and the CSE recommended a health and safety paraprofessional, which would have addressed the student's interfering behaviors. In regard to the unilateral placement, the district argues that the testimony of the RFTS educational director lacked specific detail as to how the instructors were "actually" addressing the student's maladaptive behaviors and that the parent did not submit any documentary evidence in the form of progress reports or otherwise to offer insight into the actual instruction delivered to the student at RFTS. The district also asserts that the student did not receive all of the services called for in the contract between the parents and RFTS. In regard to equitable considerations, the district argues that the costs charged by RFTS were exorbitant and unreasonable and the IHO correctly reduced them, that the RFTS administrator's testimony did not adequately explain what proportion of the rate charged was paid to individual providers, that the student received lower levels of services than the contract required, that the contract was not reduced to writing in advance of or contemporaneously with the initiation of services, and that the absence of the last few months of invoices, as well as the fluctuation in services from month to month, justified denial of payment for April through June 2024.

In a reply and answer to the cross-appeal, the parents request that the IHO's findings that the district denied the student a FAPE and that the unilateral placement was appropriate should be upheld and further argue that equitable considerations weigh in favor of the parent's requested relief.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress.

After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and... affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

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

VI. Discussion

A. Additional Evidence

The parents state in their request for review that they are submitting additional evidence that they contend was not available at the time of the due process complaint notice filing or the impartial hearing, consisting of April, May, and June 2024 invoices. 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, as noted above, while referencing additional evidence in the request for review, the parents do not actually submit such evidence with their appeal. In any event, even if the parents had submitted the documents, I would not have considered them based on the information presented. The parents assert that "[a]t the time of disclosure, the April 2024, May 2024, and June 2024 services had not been prepared" and that there was "an operational time period during which

[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).

the invoices were produced" after the delivery of services. Evidence in the hearing record shows that invoices were provided to the parents on average approximately one month after the end of the month invoiced (i.e., October 10, 2023 email providing invoices for July and August 2023; November 1, 2023 email providing invoice for September 2023; November 27, 2023 email providing invoice for October 2023; December 25, 2023 email providing invoice for November 2023; January 29, 2024 email providing invoice for December 2023; March 5, 2024 email providing invoice for January 2024; April 3, 2024 email providing invoice for February 2024; May 7, 2024 email providing invoice for March 2024) (see Parent Exs. P; Q; AA; KK). Following this pattern, one would expect the April 2024 invoice to be complete by early June, the May 2024 invoice by early July, and the June 2024 invoice by early August.

The last date of the impartial hearing took place on June 17, 2024, and, thereafter, the record was not deemed closed until August 12, 2024 (see Tr. p. 143; IHO Decision at p. 1). While the invoices may not have been available in time to include in the initial disclosures completed by the parties before the beginning of the evidentiary phase of the impartial hearing on January 12, 2024, at no point thereafter did the parents seek to supplement their disclosure with the invoices for April through June 2024 or request that the IHO allow the submission after the final hearing date. This is notwithstanding that the parents did, in fact, make an "additional disclosure" in the matter, the district did not oppose documents related to "the billing being updated," and billing for November 2023 through March 2024 were in fact entered into evidence (see Tr. pp. 119-20, 127-31; Parent Ex. II).[6] Therefore, the parents could have submitted the invoices for April, May, and June 2024 prior to the close of the hearing record on August 12, 2024.

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). However, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application

[6] Although the transcript does not reflect that parent exhibits GG through SS were entered into evidence (see Tr. pp. 124-29), the district's certification of the hearing record reflects that the exhibits were part of the hearing record, and they were included with the hearing record on appeal. Accordingly, I have considered the exhibits. However, parent exhibit TT, while entered into evidence (see Tr. pp. 144-46), was not included with the hearing record on appeal filed with the Office of State Review. The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). Here, given that the omitted exhibit was an affidavit presented to support the appropriateness of the unilateral placement and given that I find the parent met her burden to prove the appropriateness of RFTS, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]).

of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this instance, the documents could have been offered at the time of the impartial hearing and the parents did not attempt to submit them during the hearing, accordingly, had the parents submitted them on appeal, I would not consider them.

B. The Student's Needs

Although the sufficiency of the student's present levels of performance and individual needs as described in the March 2023 IEP are not in dispute, a discussion thereof provides context for the issues to be resolved, namely whether the district offered the student a FAPE, and whether the parents' unilateral placement of the student at RFTS was appropriate to meet the student's needs.

The March 2023 IEP identified that, according to a November 3, 2022 neuropsychological evaluation report, the student presented with "profound" delays in cognitive functioning, and his verbal reasoning, nonverbal reasoning, working memory, and processing speed were "areas of significant weakness" (Dist. Ex. 2 at p. 1). The student was making slow and steady academic progress, and, with the support of 1:1 ABA instruction, was showing the ability to acquire "early academic skills" such as spelling and math (id.). The student's cognitive, academic, and adaptive skills were all noted as areas of "extreme" weakness (id.). The March 2023 IEP reported that the student's full-scale IQ was 41, which was described as extremely low (id. at p. 2).

The March 2023 IEP noted that, according to a March 2023 teacher progress report, due to aggressive behaviors, the student had not been able to participate in social play and activities of living (ADLs) until his behaviors were "managed" (Dist. Ex. 2 at p. 4). During group activities, the student called out, looked behind himself, and became distracted by noises or other people in the classroom (id.). The student struggled to follow directions, especially multi-step directions, which was impacted by his negative behaviors (id. at pp. 5-6). In reading, the student was working on a "modified" Orton-Gillingham curriculum and using pictures to answer literal questions (id. at p. 5). In math, he was working on number concepts, telling time to the hour, following and completing a pattern, and counting to five objects using one-to-one correspondence (id.). The student could add using manipulatives and follow an "abc" pattern (id.).

Regarding the student's speech-language skills, the March 2023 IEP reported that, according to the results of a July 2022 speech-language assessment, the student had delays in expressive, receptive, and pragmatic language (Dist. Ex. 2 at p. 5). The student's utterance length was "robust"; however, his speech often lacked "personal meaning" and could be "very scattered" (id.). The student engaged in conversation with familiar and unfamiliar conversation partners, but communication broke down when the conversation exceeded one or two exchanges (id.). The student continued to demonstrate deficits in language processing, responding to "wh" questions, social perspective taking, problem solving, inferencing, social awareness skills, and topic maintenance (id. at p. 6). According to the March 2023 IEP, the student struggled to use expressive language to get his needs met and could become aggressive and perseverate, which made it difficult for him to learn new concepts (id.). He was working on requesting missing items, expressive

identification of words based on class, function, and feature, and using pragmatic language skills in a group (id.).

Speaking to the student's social development, the March 2023 IEP reported that "current data from school" indicated that the student displayed hitting, crying/vocal protesting, perseverating, and off-task behavior, and negative behaviors such as jumping up and down on his knees, hitting the teacher, throwing objects, spitting, and vocal protesting daily (Dist. Ex. 2 at p. 8). He also exhibited self-injurious behavior (id.). The student required constant redirection to remain on task and was improving at following a routine; focus was placed on controlling precursors, using coping skills with visual support, and reminders of rules during group activities (id.). Consistent teacher support was necessary throughout the day, both during independent and group activities (id.). Each activity had to be systematically taught for the student to slowly build tolerance to targeted situations, and then teacher support had to be systematically faded as the student showed success using coping skills to "tolerate the targeted situation in real time" (id. at pp. 8-9).

Regarding the student's physical needs, the March 2023 IEP stated that the student was working on following a multi-step activity, improving bilateral coordination and motor planning, increasing strength and endurance, and improving reciprocal play skills, upper extremity strength and coordination, fine motor control, and independent living skills (Dist. Ex. 2 at p. 9).

The March 2023 CSE identified strategies to address the management needs of the student, including positive reinforcement, praise, encouragement, breaking a task into smaller components and teaching each component separately, prompting strategies, chunking information, repetition and review, explicit directions, use of multisensory materials and a sensory diet, use of calming techniques, flexible seating, breaks, modeling language and social skills, and the use of visuals and visual aids (Dist. Ex. 2 at p. 10). The management needs section of the March 2023 IEP also included a list of "[s]pecial [c]onsideration for [w]orking with [c]hildren on the [a]utism [s]pectrum" that and included limiting visual and auditory stimuli, using a visual schedule, providing visual structure, establishing effective communication, and providing opportunities for direct instruction of social skills, consistency with routines, sensory opportunities, and using students' strengths and weaknesses to guide instruction (id.).

C. March 2023 IEP

The IHO determined that the March 2023 CSE failed to recommend the related services with the session length "the parties agreed to at the IEP meeting," failed to recommend ABA methodology, and did "not recommend a BIP despite" the student's behavioral needs, which resulted in the denial of a FAPE (IHO Decision at pp. 8-9).[7] Review of the evidence in the hearing

[7] Although the IHO found that the March 2023 "IEP d[id] not recommend a BIP despite the needs of the student and his behavioral issues," review of the IEP shows that the CSE did recommend development of a BIP for the student (compare IHO Decision at p. 9, with Dist. Ex. 2 at p. 11). It may be that the IHO meant that the district had not developed a new BIP for the student at the time of the March 2023 CSE meeting. However, the Second Circuit has indicated that it does not follow that in every circumstance an FBA must be conducted and a BIP developed at the same time as the IEP (see Cabouli v. Chappaqua Cent. Sch. Dist., 202 Fed. App'x 519, 522 [2d Cir. Oct. 27, 2006] [noting that it may be appropriate in some circumstances to address a student's behaviors in an IEP by noting that an FBA and BIP will be developed after a student is enrolled at the proposed district

record supports the IHO's overall conclusion that the district failed to offer the student a FAPE for the 2023-24 school year.

As to whether the March 2023 CSE's recommended 6:1+1 special class with group paraprofessional services was appropriate to address the student's needs, the district representative at the March 2023 CSE meeting testified that the parent, private neuropsychologist, and staff from RFTS including the educational director, speech supervisor, occupational therapist, the student's lead teacher, and the student's Board Certified Behavior Analyst (BCBA) provider participated in the March 2023 CSE meeting (Tr. pp. 40-42).[8] At the time of the meeting, the student was attending RFTS in a class of five students, each of whom had a 1:1 ABA instructor (Parent Ex. CC at p. 4). According to the district representative, the CSE had the student's neuropsychological evaluation report, as well as RFTS progress reports from the student's occupational therapist, speech-language therapist, classroom teacher, and BCBA provider (Tr. pp. 43-44). Review of the March 2023 IEP reflects information from the neuropsychological evaluation and the neuropsychologist's report during the meeting, the March 2023 teacher progress report and the teacher's report during the meeting, the July 2022 speech-language assessment, the November 2022 speech-language progress report, and the speech therapist's report during the meeting, then-current RFTS data regarding the student's behaviors, and reports during the meeting made by the occupational therapist and the parent (Dist. Ex. 2 at pp. 1-9).

The district representative testified that the 6:1+1 special class had a ratio of "one adult to every three students" to "provide more individualized support" for students (Tr. pp. 48-49). According to the district representative, the nature of the small class setting allowed the teacher to provide more 1:1 support, and, although instruction was provided in a group, the teacher could "come back and model it and also further explain whatever the concept was . . . in a more one-to-one setting" (Tr. p. 51). The parent noted that, before enrolling at RFTS, the student had attended district specialized schools from second through fourth grade, until a CSE determined such placements could not meet his needs and recommended a 6:1+3 special class in a State-approved nonpublic school for the 2021-22 school year, which the student attended (Tr. pp. 88-90; Parent Ex. EE ¶¶ 7-9). The parent reported that, even with the higher adult to student ratio of the 6:1+3 special class, the staff "had difficulty managing [the student] there, and he didn't make any gain" (Tr. p. 91). While the district representative testified regarding the support available in a 6:1+1 special class, the testimony did not rebut the parent's account of the student's past experiences in similar or more supportive settings or offer an explanation regarding how the recommendations of the March 2023 would have offered the additional supports that may have previously been lacking.

placement]; Bd. of Educ. of Wappingers Cent. Sch. Dist. v. M.N., 2017 WL 4641219, at *12 [S.D.N.Y. Oct. 13, 2017] [finding that, where it was anticipated that the student would be in a new environment for the school year in question, "the sole fact that [a district] did not conduct an FBA prior to the implementation of an IEP does not amount to a denial of FAPE"]).

[8] The district representative testified that the group paraprofessional designation on the student's March 2023 IEP was a "clerical error," and that "full-time para[professionals] are always individual" (Tr. pp. 58-59). However, absent evidence that the error was known to all committee members, the district representative's testimony, which "materially alters the IEP," may not be relied upon to rehabilitate the deficiency (R.E., 694 F.3d at 195).

Further, the evaluative information available to the March 2023 CSE and the present levels of performance in the student's March 2023 IEP pointed to the student's need for instruction and supports on a consistent 1:1 basis (Parent Ex. CC at pp. 2, 4-5, 9-10; Dist. Ex. 2 at pp. 1, 4-9; see Dist. Exs. 8; 11). For example, the March 2023 IEP stated that the student was making "slow and steady progress" with the "support of 1:1 ABA instruction," and, although his participation in group activities had improved, he was observed "calling out" and becoming distracted by noises and people in the room (Dist. Ex. 2 at pp. 1, 4, 6). The November 2022 neuropsychological evaluation report noted that "over the course of the observation, [the student] demonstrated significant difficulty remaining on task . . . required frequent redirection and his behavioral plan was referenced often" (Parent Ex. CC at p. 5). According to the report, the student "perseverated on topics of interest, needed prompting to engage in conversational back and forth, and was highly distractable"; the report further noted that "[b]ased on the observation alone, it [was] clear that [the student] require[d] 1:1 support to remain focused on a variety of tasks" (id.). In addition, the testimony of the parent, the neuropsychologist, and the RFTS educational director, who participated in the March 2023 CSE meeting, all indicate that the student needed 1:1 instruction and support to make progress (Tr. pp. 70-73; 91-97; Parent Exs. DD ¶ 32; EE ¶¶ 6-7, 11, 14; FF ¶¶ 23-27).

Further, at the time of the March 2023 CSE meeting, the student exhibited significant behaviors that interfered with his learning, even in the 1:1 setting at RFTS, and his behavioral needs were well reflected in the evaluative information available to the March 2023 CSE (Parent Ex. CC at pp. 3-5, 9; Dist. Exs. 2 at pp. 1, 4-9; 8 at pp. 2, 4; 11 at pp. 1). The March 2023 CSE was aware of these behavioral needs, as it recommended positive behavioral interventions, supports and strategies and a BIP (Tr. pp. 50-51; Dist. Ex. 2 at pp. 4-9, 11). While the district argues that the paraprofessional services recommended by the March 2023 CSE would have addressed the student's behavioral needs, given the documented difficulties the student exhibited in his 1:1 setting at RFTS, it is unclear how group paraprofessional services would have sufficiently supported the student.

As for the student's need for instruction using ABA methodology, the November 2022 neuropsychological evaluation report indicated that the ABA instruction the student was then receiving from RFTS was "well suited to his needs" and opined that the student required a placement with 1:1 ABA throughout the day (Parent Ex. CC at pp. 4, 9-10). The district representative testified that the parent wanted the student to be taught using ABA methods and that, while the district "may not call it ABA," "most" of the district's 6:1+1 programs used the "small structure, they [were] using the repetition, they [were] using the review [and] they [were] using the one-to-one instruction," which she opined are part of ABA (Tr. p. 53). I note that the March 2023 IEP provided supports for the student's management needs that included breaking down tasks into smaller teachable components, teaching each component separately, prompting, and providing positive reinforcement, explicit directions, multisensory materials, and visual aids (Dist. Ex. 2 at pp. 9-10). While it appears that some of the strategies included in the IEP may have mirrored those utilized in ABA methodology, the district did not sufficiently explain the correlation through the evidence in the hearing record or demonstrate that the strategies recommended sufficiently addressed the student's needs in light of the clear consensus among those who described the student's needs to the CSE that the student required ABA to receive educational benefits (see A.M. v. New York City Dep't of Educ., 845 F.3d 523, 543–46 [2d Cir. 2017] [referencing and following the proposition that, when the reports and evaluative materials

present at the CSE meeting yield a clear consensus, an IEP formulated for the child that fails to provide services consistent with that consensus is not reasonably calculated to enable the child to receive educational benefits]).

Regarding the duration of the recommended related services sessions, the parent testified that the March 2023 CSE "discussed that [the student] require[d] a minimum of 40-minute sessions" for related services (Parent Ex. EE ¶ 12). The RFTS educational director also testified that the March 2023 CSE "recommended that [the student's] related services be provided in 40-minute sessions in the meeting," but when she reviewed his IEP, she "noticed that [the IEP] stated 30-minutes even though 40 minutes was agreed to by the CSE" (Parent Ex. DD ¶¶ 1, 54). The educational director further testified that, at RFTS, the student received 45-minute sessions of speech-language therapy and OT, and required related services in 45-minute sessions to "receive enough repetition, manage behaviors during sessions, and practice and master goals" (id. ¶ 41). Review of the student's March 2023 IEP shows that the related services—accounting for 12 sessions per week—were recommended to be delivered in sessions lasting 30 minutes in length (Dist. Ex. 2 at p. 25). The district did not offer any evidence to refute the educational director's testimony that the CSE intended to recommend 40-minute long related services sessions, or otherwise explain how the student could benefit from the 30-minute related services sessions recommended in the March 2023 IEP.

Therefore, given the evaluative information available to the March 2023 CSE, there is insufficient basis to disturb the IHO's determination that the recommendation for a 6:1+1 special class with group paraprofessional services did not adequately address the student's significant behavioral and educational needs. Accordingly, the IHO's overall finding that the district denied the student a FAPE is upheld.

D. Unilateral Placement

Turning to a review of the appropriateness of the student's programming at RFTS, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the

appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

In this matter, the IHO found that the student's unilateral placement at RFTS was appropriate (IHO Decision at p. 9). The evidence in the hearing record supports the IHO's finding.

Regarding the general program at RFTS, the educational director testified by affidavit that RFTS was a 12-month special education program for students who had received a diagnosis of autism (Parent Ex. DD ¶ 13). RFTS incorporated ABA services throughout the entire school day, classrooms had a 1:1 student to teacher ratio, and each classroom had one "lead teacher" who had previous experience providing ABA services to students with a diagnosis of autism (id. ¶¶ 13, 17, 18). All teachers held at least a bachelor's degree and had training in ABA and student-specific protocols (id. ¶ 20). The educational director testified that staff were trained in "student specific programs," and "each teacher [wa]s trained on how to utilize the behavior plan for each student appropriately" (id. ¶ 28). Additionally, a speech-language pathologist and a behavior analyst were assigned to each classroom (id. ¶ 19).

According to the educational director's testimony, "RFTS incorporat[ed] many different curriculum types to specifically address the needs of each student, including many multisensory approaches" (Parent Ex. DD ¶ 26). RFTS used Orton-Gillingham instruction, social skills training, music therapy, OT, speech-language pathology, "Stern Math," and the "Skills Based Treatment

model" (id.). The educational director testified that data was taken every day, during every session, was entered into a database known as the Autism Curriculum Encyclopedia, where it could be "analyzed by BCBA supervisors, [e]ducational [a]dminstration and [l]ead teachers" and included "records of the severity and frequency of problematic behavior" (id. ¶ 27).

The educational director also testified that she observed the student weekly in his classroom and was "in daily communication with his teachers and therapists" (Parent Ex. DD ¶ 34). The educational director testified that the student had a BIP to "address his maladaptive behaviors" and that the BIP was overseen by a BCBA and was "essential to [his] educational progress and plan" (id. ¶¶ 38-39). The student's family was involved in the development and implementation of the student's BIP and development of the student's BIP included participation of the student's treating child psychiatrist, family, BCBA, and educational team (id. ¶ 39).

RFTS developed an education curriculum plan for the 2023-24 school year (Parent Ex. SS). The plan described the student's then-current program, his present levels of performance in language/communication, and behavior, including descriptions of his interfering behaviors, his BIP, and resources needed to address those needs (id. at pp. 1-3). According to the educational director, RFTS developed goals for the student for the 2023-24 school year that included improving receptive and expressive language skills and conversational skills; academic skills including phonemic awareness, spelling, comprehension, syntax/grammar, time, money and beginning math skills; and community and social skills including understanding and identifying emotions, working in a group, reducing maladaptive behaviors, sharing with peers, and playing a simple turn-taking game (Parent Exs. DD ¶ 45; SS at pp. 3-14). The student's progress during the first three quarters of the 2023-24 school year is further reflected in the student's 2023-24 education curriculum plan (see Parent Ex. SS at pp. 3-14).

The educational director further testified that at RFTS, the student received five 45-minute sessions of speech-language therapy and five 45-minute sessions of OT per week from licensed providers (Parent Ex. DD ¶¶ 41-43). RFTS communicated the student's progress to his parents weekly through an online group, phone calls, text messages, in-person meetings, and emails; RFTS also issued formal progress reports twice per year and provided discussions of student progress during parent-teacher conferences (id. ¶ 44).

With respect to the implementation of services as RFTS, the district argues that the student often did not receive all of the services called for in the contract between the parent and RFTS. A unilateral placement is not mandated by the IDEA or State law to provide services in compliance with a plan such as an IEP (Carter, 510 U.S. at 13-14). Accordingly, while a private placement that provided related services which fluctuated dramatically or were altogether missing for prolonged periods of time without adequate explanation might contribute to a finding of inappropriateness, the hearing record in this case, provides detailed testimony from the educational director and supporting documents describing how the educational program offered by RFTS operated on a day-to-day basis with respect to providing the student with ABA instruction, related services, and multiple levels of support from a variety of providers for the period of time the hearing record shows the student was receiving services. Moreover, the student demonstrated progress while attending RFTS-LC. Accordingly, in this instance, the fluctuations in the delivery of services from month to month does not support a finding that RFTS was inappropriate for the student for the 2023-24 school year.

Therefore, based on the totality of the circumstances, the evidence in the hearing record supports the IHO's finding that RFTS was an appropriate unilateral placement for the student (IHO Decision at p. 9).

E. Equitable Considerations and Relief

Having determined that the district failed to offer 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, I now turn to the district's argument that equitable considerations do not support the amount of relief sought by the parents.

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).

The district contends that the amounts the district should pay for the private services provided to the student should be reduced by at least as much as identified by the IHO or more because the costs were exorbitant and unreasonable as compared to the student's needs and what the student was being taught.

In this instance, the enrollment agreement between the parents and RFTS for the 2023-24 school year, signed by the parent on August 9, 2023, indicated that services were "individually

programmed for the student" and stated that billing would only reflect services actually delivered to the student (Parent Ex. D at pp. 1-2).[9] 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 RFTS developed an educational program set forth in the contract as "a specific combination of services" and that RFTS only billed for the days the student was present and for the services it actually provided as it was "a fee-for-service program" (Tr. pp. 195, 198-99; see Parent Ex. BB ¶ 5). 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 $8,330.78 per week which comes out to $358,223.54 for the 2023-2024 school year" (Parent Ex. BB ¶ 16).

The hearing record includes service logs, services affidavits, and service invoices for the period from July 2023 through March 2024 with the total cost of services as of March 2024 equaling $186,684.70 (Parent Exs. F-N; X-Z; HH-JJ).

In its answer and cross-appeal, the district complained that the RFTS administrator never described exactly how RFTS-LD determined the hourly rates charged for the services, "except to vaguely proclaim in conclusory fashion" 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. BB ¶¶15). The district also complained that the RFTS administrator failed to explain what proportion of the rate charged for any particular service was paid to individual providers.

However, 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. D at p. 3). In its answer and cross-appeal, the district argues that the rates charged by RFTS were "exorbitant and unreasonable" based on the student's needs and what the student was being taught, but points to no evidence by way of comparison to support this contention. During the impartial 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.[10]

[9] The district takes issue with the date that the parents signed the agreement, August 9, 2023, after the student began receiving services in July 2023 (see Parent Ex. D). 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. F; G; H), 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. The RFTS administrator also testified that the contract and addendum obligated the parents retroactively and that services were provided prior to the parents signing the contract (see also Tr. pp. 205-06).

[10] The district also contends that, although the parent contracted with Reach for the Stars Learning & Development

The district next contends that the student "apparently" received lower levels of service than what was called for in the contract and this constitutes a factor to consider in balancing the equities when awarding relief as part of an excessive cost argument. However, the district cited no particular example or explained why the discrepancy would warrant an equitable cost reduction, and 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]). The IHO noted that the student did not receive all sessions of speech-language therapy, indicating that the student received 13 sessions in July 2023 out of 21 days and 11 sessions in August 2023 out of 23 days (IHO Decision at p. 11). The evidence in the hearing record reflects that the contract called for 3.75 hours per week of speech-language therapy (i.e. five 45-minute sessions per week) and that the student received 13 45-minute sessions of speech-language therapy in July 2023and 11 45-minute sessions in August 2023 (Parent Exs. F; H; I; K). However, the student's attendance record reflects that school was in session and the student was in attendance during July 2023 for a total of 15 days and during August 2023 for a total of 13 days (Parent Ex. O). As such the examples identified by the IHO reflect, at most, a total of four sessions missed over two months. In addition, the educational director testified that "the schedule will change based upon the need of the student" (Tr. p. 174) and that there were times that the student did not receive his speech-language therapy or OT because someone was absent (Tr. pp. 178-79). As noted above, the RFTS administrator testified that there was no billing for the days that the student was absent (Tr. pp. 195, 199). Even if the lapse in services identified by the IHO was more pronounced, it is unclear on what basis this would relate to the costs of services provided by RFTS. Accordingly, the evidence in the hearing record does not support a reduction of relief on the ground that the cost or amount of services was excessive.

As a final matter, with respect to April through June 2024, although the hearing record does not support the district's argument that the costs of the program were excessive, the IHO found that, given the structure of the unilateral placement and the fluctuations in billing, he would not award funding absent evidence of the sessions notes and invoices for each month (IHO Decision at pp. 10-11). The impartial hearing took place toward the end of the 2023-24 school year; however, billing records demonstrating the amounts of each service that the student received each month are only included in the hearing record for June 2023 through March 2024 (Parent Exs. F-N; X-Z; HH-JJ). Further, as discussed above, the parent did not submit the additional evidence referenced in the request for review and even if the parent had included it on appeal, it would not be considered as it was available at the time of the impartial hearing and the parents did

(RFTS-LD), the services were provided by a different entity, Reach for the Stars Learning Center (RFTS-LC). However, the parents agreed to pay RFTS for services (see Parent Ex. D) and the district cites no authority for the proposition that it would be inappropriate for the company with which the parent contracted to utilize another related company to fulfill its obligation under the contract with the parent.

not provide a sufficient explanation for not submitting it at that time. Given the fluidity of the services delivered and relative unpredictability of service levels from month to month, the IHO did not abuse his discretion in declining to order funding for RFTS for the entire school year without evidence of the services delivered and costs incurred. Unlike a contract for tuition that implies a minimum amount of educational programming for the entirety of a school year, the fee-for-service structure of RTFS makes no such guarantee. Thus, I find insufficient basis to modify the IHO's decision which excluded funding for the months of April through July 2024 based on a lack of evidence.

I therefore find no error in the IHO's decision to limit the award of funding for the 2023-24 school year at RFTS to the amount of $186,684.70, representing the cost of services for the period from July 2023 through March of 2024, plus the deposit amount of $250.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's determinations that the district failed to meet its burden to prove that it offered the student a FAPE, that the parents met their burden to demonstrate that the services delivered to the student at RTFS constituted an appropriate unilateral placement, and that no equitable considerations warrant a denial or reduction of relief for the months of July 2023 through March 2024 but that, given that the contract for services did not provide for a tuition-based program with a guaranteed minimum amount of services or a set educational program, there was insufficient evidence presented to support an award of funding for services provided during April through June 2024.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 16, 2024

STEVEN KROLAK
STATE REVIEW OFFICER