The University of the State of New York

The State Education Department
State Review Officer
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No. 24-417

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, attorneys for petitioners, by Laura Dawn Barbieri, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, 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 funding of the entire annual cost of the student's attendance at Reach for the Stars (RFTS) for the 2023-24 school year. Respondent (the district) cross-appeals only to the extent that the IHO determined the student's unilateral placement at RFTS to be appropriate for the entire school year. The appeal must be sustained in part, and 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

A CSE convened on March 17, 2023, determined the student to be eligible for special education as a student with autism, and developed an IESP with a projected implementation date of July 5, 2023 (Parent Exs. X ¶ 6; K at pp. 1, 28).[1] The March 2023 CSE recommended a 12-month program consisting of placement in a 6:1+1 special class along with the following supports

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

and services: five 40-minute sessions of individual occupational therapy (OT) per week; five 40-minute sessions of individual speech-language therapy per week; four 60-minute sessions of parent counseling and training per week in a group setting; various testing accommodations; and special transportation (id. at pp. 20-23, 28).

At the time of the March 2023 CSE meeting, the student was unilaterally enrolled at RFTS, a center-based services program for students with autism (Parent Exs. X ¶¶ 4-5; Y ¶¶ 1, 12; D at p. 1). In a letter dated August 22, 2023, the parents, through their attorney, stated their concerns with the district's recommended program and expressed their intent to re-enroll the student at RFTS for the 2023-24 school year (Parent Exs. X ¶ 9; C at pp. 1-2).

On August 23, 2023, the parents signed an enrollment contract with RFTS for a term beginning on September 7, 2023 and ending on June 30, 2024 (Parent Exs. X ¶ 10; T ¶ 8; D at pp. 1, 3). Under the contract's terms, the parents assumed financial responsibility for the cost of services rendered to the student at the rates and frequencies set out in the annexed payment schedule (Parent Exs. U ¶4; D at pp. 1, 3).

The student began receiving services pursuant to the above-described contract on September 7, 2023 (Parent Ex. U ¶¶ 3-4). The student's program of services at RFTS for the 2023-24 school year consisted of applied behavioral analysis (ABA) at an hourly rate of $175.00, board certified behavior analyst (BCBA) supervision at an hourly rate of $275.00, OT at an hourly rate of $215.00; speech therapy at an hourly rate of $215.00, and related service supervision at an hourly rate of $275.00 (see Tr. pp. 34-35; Parent Exs. U ¶ 5; Y ¶¶ 35-36, 39; D at p. 3; L at p. 1). The level and frequency of services provided to the student varied from week to week and month to month (see Parent Exs. G; H; J; U; V).

Under RFTS's fee-for-services model, RFTS providers "enter the service hours for each service provided to each individual student in a computerized system which is monitored by administrative staff" (Parent Ex. T ¶ 9). Then, "[o]n or about the middle of each month," "monthly services affidavit/invoices are created based on the records collected the previous month" (id. ¶¶ 9-10).

As of the end of April 2024, the total amount charged by RFTS for educational services provided to the student during the 2023-24 was $203,266.85 (see Parent Exs. G; H; U). At the time of the impartial hearing, the parent had paid RFTS only $250.00, the amount of the non-refundable deposit which, under the contract's terms, would "be credited towards the total amount owed by the [p]arents to [RFTS]" (Tr. p. 87; Parent Exs. X ¶ 15; F; D at p. 1).

A. Due Process Complaint Notice

In a due process complaint notice dated April 1, 2024, the parents, through their attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural flaws in the development of the March 2023 IEP, as well as substantive deficiencies in the IEP itself (Parent Ex. A). Among other deficiencies, the parents alleged that the March 2023 IEP did not adequately address the student's needs relative to his behavior, speech and language deficits, generalization, activities of daily living, leisure skills, community integration, and safety in the community (id. at pp. 3-4). The parents requested

pendency based on a prior IHO's decision dated July 31, 2023 and the following relief: direct and/or prospective funding of the cost of services provided to the student at RTFS during the 2023-24 school year; reimbursement of any amount paid by the parents to RTFS for the 2023-24 school year; an order that the district continue to provide appropriate special transportation including any necessary special transportation accommodations; and reimbursement of any private transportation expenses incurred due to the district's failure to provide appropriate special transportation, with all necessary accommodations, in a timely manner (id. at pp. 1, 5).

B. Impartial Hearing Officer Decision

Following a prehearing conference, an impartial hearing convened on May 31, 2024 before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) (see Tr. at pp. 1-121). The hearing concluded on June 25, 2024, after two days of proceedings (see Tr. pp. 99-121). The district offered no exhibits and presented no testimony (see Tr. pp. 23, 27). The parents presented various exhibits, each of which the IHO admitted into evidence (see Tr. pp. 19-22, 102-103). Among the parents' exhibits were affidavits by the student's mother, the educational director at RFTS, and an administrator responsible for overseeing the operations and finances of RFTS, each of whom also gave live testimony during the hearing (see Tr. pp. 22, 29-65, 66-93, 104-109; Parent Exs. X; Y; T). The IHO asked that the parents submit the end-of-year educational progress report which the educational director referenced in her testimony (Tr. pp. 62-63, 93). At the conclusion of the hearing proceedings, the IHO instructed the parties that the hearing record would be kept open for receipt of the end-of-year educational progress report, the final transcript of the proceedings, and supplemental closing arguments (Tr. pp. 109-10, 119-20). On July 9, 2024, the parents' attorney submitted the requested end-of-year educational progress report along with end-of-year OT and speech-language therapy progress reports, each of which the IHO admitted as an IHO exhibit (see IHO Ex. I-III; SRO Ex. 1 at pp. 1-2).[2] The IHO then informed the parties that the record would remain open until August 1, 2024 for submission of supplemental closing arguments and proposed transcript corrections (SRO Ex. 1 at p. 1).

In a decision dated August 12, 2024, the IHO awarded funding of the cost of the student's attendance at RFTS from September 2023 through April 2024 with deductions for overbilling and services provided in excess of those required to provide a FAPE (IHO Decision at pp. 19-21). First, the IHO determined that the district failed to meet its burden of proving that it offered the student a FAPE for the 2023-24 school year, having offered no evidence to dispute the parents' allegations (id. at p. 18). The IHO then addressed the parents' burden of proving the appropriateness of the private program of services (id. at p. 19). The IHO found that, although the private program did not meet all of the student's areas of need or remedy all of the alleged deficiencies in the district's recommended program, considering the totality of the circumstances, the private program was, indeed, appropriate for the student (id.). However, the IHO also found that, under RFTS's fee-for-services model, services varied from week to week and month to month, with no guaranteed minimum of services the student would receive (id. at p. 20). Thus, according to the IHO, the hearing record, which lacks documentation of the services provided after April

[2] Although not marked or entered into evidence as an exhibit during the impartial hearing, a chain of emails, each dated July 9, 2024, between the IHO and the parties' attorneys is a part of the hearing record on appeal as a supplemental document required to be included in the record by State regulation (8 NYCRR 200.5[j][5][vi]; 279.9[a]). For ease of reference, said email chain will be cited as SRO Exhibit 1.

2024, could not establish the appropriateness of the services provided between the end of April 2024 and the end of the school year (id.). In considering whether the equities supported the parent's request for relief, the IHO noted that the parents participated in the CSE meeting and provided a timely 10-day notice (id.). Nevertheless, the IHO determined that the equities warranted reduction of the requested award (id.). The IHO found that the record lacked evidence establishing the need for related service supervision (id.). Consequently, the IHO deducted $4,125.00 for 15 hours of related service supervision billed at $275.00 per hour between September 1, 2023 and April 30, 2024 (id.). The IHO deducted an additional $825.00 for BCBA supervision billed in March 2024 in excess of the maximum contracted amount (id.). The IHO reasoned that the record lacked evidence supporting the need for services in excess of the planned maximum and that the parents had no financial responsibility for such excess services under their contract with RFTS (id.). According to the IHO, the record lacked evidence to controvert the administrator's testimony that the rates charged by RFTS, for which the parents were financially responsible, were based on market rates (id.) Thus, the IHO declined to further reduce the award of funding (id.).

Ultimately, the IHO awarded $198,316.85, that is, $203,266.85 for services billed between September 1, 2023 and April 30, 2024 less $4,125.00 for related service supervision and $825.00 for overbilling (IHO Decision at pp. 20-21). The IHO ordered that $250.00 out of the total award of $198,316.85 shall be paid to the parents with the remainder to be paid directly to RFTS (id.).[3] The IHO declined to address the parents' request for special transportation and/or reimbursement of transportation related expenses because the parents did not request such relief during the hearing (id. at p. 3).

IV. Appeal for State-Level Review

The parents appeal for state-level review, and the district cross-appeals. The parties' familiarity with the issues raised in the parents' request for review and the district's answer and cross-appeal is presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parties' dispute is whether the IHO should have awarded full funding of all costs associated with the student's attendance at RFTS, including transportation, from September 2023 through June 2024. The parents submit additional evidence, absent from the hearing record below, for admission and consideration on appeal.

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]).

[3] The IHO declined to award reimbursement of the parents' $250.00 registration fee separately, as RFTS should have applied said fee to the total annual cost of the student's educational services (IHO Decision at p. 20).

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]).4

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. Scope of Impartial Hearing and Review

Before addressing the merits, I must determine which claims were sufficiently raised before the IHO and which claims are properly before me on appeal. As an initial matter, the district cross-appeals from the IHO's decision only to the extent that the IHO determined the student's unilateral placement at RFTS to be appropriate for the entire school year. In other words, the district contends that the IHO should have limited any determination of appropriateness to the period between September 2023 and April 2024. However, the IHO did not determine the student's unilateral placement at RFTS to be appropriate for the entire school year. Instead, the IHO determined that the record "could not establish the appropriateness of the services between the end

[4] 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).

of April and the end of the school year" (IHO Decision at p. 20). Therefore, I will not further address the district's cross-appeal.

Neither party has appealed the IHO's determination that the district failed to meet its burden of proving that it offered the student a FAPE for the 2023-24 school year. Nor has either party appealed the IHO's determination that the student's educational program at RFTS was appropriate for the period between September 1, 2023 and April 30, 2024. Those unappealed determinations have, therefore, 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 (S.D.N.Y. March 21, 2013).

1. Transportation

The parents contend, on appeal, that the district and the IHO were aware that the parents' request for relief included an order for special transportation and/or reimbursement of private transportation expenses and, thus, the IHO erred in declining to address the matter. The parents correctly assert that they requested special transportation and/or reimbursement of private transportation expenses in their due process complaint notice, a fact which the IHO acknowledged during the prehearing conference on May 13, 2024 (Tr. p. 6; Parent Ex. A at p. 5).[5] Nevertheless, the hearing record supports the IHO's determination that the parents abandoned their claim for special transportation and/or reimbursement of private transportation expenses, as the parents neither requested such relief nor presented supporting evidence during the hearing (see Tr. pp. 24-27, 115-19). Indeed, the record includes no testimony explaining how the student was transported to and from RFTS, nor does the record include documentation of any transportation related expenses incurred by the parents. Consequently, even if the parents had requested an order for special transportation and/or reimbursement of private transportation expenses during the hearing, I would be constrained to deny such relief due to lack of evidentiary support (see Application of a Student with a Disability, Appeal No. 24-039 [finding that "the IHO properly denied the parent's request for an order for transportation services" where the parent presented "no documentary or testimonial evidence pertaining to transportation . . . during the impartial hearing"]).

2. Pendency

The parents contend that the IHO should have ordered funding of the student's attendance at RFTS for the 2023-24 school year under pendency. The district does not dispute the parents' contention that pendency lies in a prior, unappealed IHO decision dated July 31, 2023. Rather, the district contends that the SRO should decline to address the parents' pendency claim on appeal, as the parents never requested a pendency order in the proceedings below. Alternatively, the district argues that the student is not entitled to funding of the 2023-24 RFTS program under pendency, as the 2023-24 RFTS program differed from the last-agreed upon program (i.e., the July 2023 IHO

[5] Under the IDEA and its implementing regulations, a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint notice is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

decision), and that any pendency entitlement should run only from the date on which the due process complaint notice was filed forward.

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[6] The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906).[7] Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can

[6] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

[7] A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]).

supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

The Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756). "[T]he pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). Nor does the pendency provision require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

The hearing record does not indicate that a request for a pendency order was ever presented to or addressed by the IHO. Nevertheless, the district's position lacks merit (see Application of the Bd. of Educ., Appeal No. 17-097; Application of the Dep't of Educ., Appeal No. 09-071 [concluding that the parents had not '"abandoned' their claim for pendency when they did not continue to raise the issue at hearing dates subsequent to the filing of their brief on the issue"]. It is well-settled that a student's entitlement to pendency arises automatically, begins on the date of the filing of the due process complaint notice, and continues until the conclusion of the matter (20 U.S.C. § 1415[j]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; Zvi D., 694 F.2d 904, 906). The parties do not dispute that pendency lies in the prior, unappealed IHO decision dated July 31, 2023, which found that RFTS provided an appropriate educational program for the student (compare Req. for Rev. at pp. 9-10, with Answer at pp. 7-8; see Parent Ex. B, pp. 1, 12, 19). Therefore, I will order that the district fund pendency services at RFTS, pursuant to the July 2023 order, from April 2, 2024 until the conclusion of the current proceedings (see Application of the Dep't of Educ., Appeal No. 23-139 [declining to disturb the IHO's award of funding under pendency to the private school which the parties agreed was the student's pendency placement]).

B. Additional Evidence

Another preliminary matter to be addressed is whether the parents' additional documentary evidence will be accepted for admission and consideration on appeal. The parents submit the following materials with their request for review: affidavits of services delivered in May and June 2024; corresponding invoices and services logs; and emails by which RFTS transmitted the May and June invoices to the parents (see Req. for Rev. Exs. AA-EE). The district objects to admission of the parents' additional evidence, arguing that such materials were available for submission to the IHO.

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]). "'The party seeking to supplement the record . . . must . . . explain why the [additional] evidence was not presented at the administrative level.'" (M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015], quoting Genn v. New Haven Bd. of Educ., 2015 WL 1064766, at *4 [D. Conn. Mar. 11, 2015]; see also 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]).

During the hearing, an RFTS administrator testified that parents are billed on a monthly basis only for the services actually provided (Tr. pp. 71, 76-77). The administrator testified that affidavits and invoices are prepared by or about the middle of each month for the previous month's services (Tr. p. 71; Parent Ex. T ¶¶ 9-10). Thus, according to the administrator's testimony, the materials pertaining to May 2024 billing should have been available on June 25, 2024, the second and final day of hearing proceedings. In any event, the parents could have offered all of the materials now submitted for admission on appeal before the record closed on August 1, 2024 (IHO Decision at p. 1). At the conclusion of the June 25th proceedings, the IHO informed the parties' attorneys that the record would be held open for submission of an educational progress report that was not yet available (Tr. pp. 109-10, 119-20). The services affidavits for May and June 2024 were notarized on July 16th and 23rd, and emails from a RFTS staff member indicate that the parents obtained the invoices for May and June 2024 on July 15th and 23rd (Req. for Rev. Exs. AA at pp. 1-2; CC at pp. 1-2). Thus, the materials submitted with the parents' request for review were available to the parents before the record closed, and the parents' attorney knew of the opportunity to submit additional evidence to the IHO. Indeed, the parents' attorney submitted progress reports to the IHO on July 9, 2024, at which time the IHO informed the parties' attorneys that the record would remain open until August 1, 2024 (SRO Ex. 1 at pp. 1-2). Despite awareness that the record would be held open until August 1, 2024, the parents' attorney did not ask the IHO to admit the materials now submitted for admission on appeal and has not explained the failure to do so. Based on the foregoing, I decline to accept the parents' additional evidence for admission and consideration on appeal (cf. Application of a Student with a Disability, Appeal No. 24-415 [accepting additional evidence that was not available at the time of the hearing for admission on appeal]).

C. Services Delivered in May and June 2024

Turning to the merits, the parties dispute whether the IHO erred in denying funding of the cost of the student's attendance at RFTS in May and June 2024. The district argues that the IHO properly limited the award of funding to invoices in the hearing record evidencing services actually delivered to the student. The parents argue that the IHO should have awarded funding for May and June 2024, upon presentation of corresponding invoices, because the hearing record

established the parents' obligation to pay for 10 months of tuition and services and because the IHO had authority to order "prospective" relief.

Given the structure of the unilateral placement, I must affirm the IHO's determination that the hearing record does not support a finding that RFTS would have provided an appropriate educational program to the student for the period between April 30, 2024 and the end of the 2023-24 school year (see Application of the Dep't of Educ., Appeal No. 23-139; Application of a Student with a Disability, Appeal No. 23-130; Application of a Student with a Disability, Appeal No. 23-054). The hearing record includes affidavits of services delivered and corresponding services logs only for the period from September 2023 through April 2024 (see Parent Exs. G; J; U; W). Given the fluidity of the services delivered and relative variability of service levels, as shown in the services affidavits and attendance records, it is not possible to find that services provided to the student beyond April 2024 were appropriate (see Parent Exs. G; J; U; W). 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 employed by RFTS makes no such guarantee. While the services plan for the student appended to the enrollment contract for the 2023-24 school year sets forth maximum frequencies for each recommend service, there was no guaranteed minimum of services that the student would receive (see Parent Exs. D at pp. 1, 3; T ¶ 6). Thus, as there is no evidence of services delivered between April 30, 2024 and the end of the school year, the parents have not met their burden to prove that services delivered to the student after April 2024 were sufficient to meet the student's educational needs and could therefore be deemed appropriate.

D. Equitable Considerations

1. Financial Obligation

The parties further dispute whether the IHO erred in reducing the award of funding of the cost of the student's attendance at RFTS from September 2023 through April 2024 to account for overbilling. Specifically, the parents contest the IHO's deduction of $825.00 for BCBA supervision billed in March 2024 in excess of the maximum contracted amount and the IHO's refusal to award separate reimbursement of the $250.00 registration fee. The district argues that the IHO properly limited funding to the cost of services for the which the parents are financially responsible under the enrollment contract.

Under the Burlington/Carter framework, proof of an actual financial risk incurred by parents is a prerequisite to obtaining funding of the cost of a student's unilateral placement (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. at 374 [stating that "financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district]; see also Forest Grove Sch. Dist., 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]).

In this case, the enrollment contract establishes the parents' financial obligation for services actually rendered to the student at the rates and frequencies set out in the payment schedule annexed to the contract (see Parent Ex. D at pp. 1, 3). As for BCBA supervision, the parents are financially responsible for up to one hour per week at a rate of $275.00 (see id.). The record

evidence further shows that, in March 2024, BCBA supervision exceeded the maximum frequency under the contract by three hours, which, billed at a rate of $275.00, equates to $825.00 (see Parents Exs. D at p. 3; G at p. 7; J at pp. 23-25). Thus, the record evidence supports the IHO's deduction of $825.00 for BCBA supervision billed in March 2024.

During the hearing, the administrator testified that the registration fee is separate and "on top of the invoices being charged" (Tr. p. 88). The administrator's testimony contradicts the terms of the enrollment contract in that regard (see Parent Ex. D at p. 1). The contract provides that the $250.00 "non-refundable deposit" "will be credited towards the total amount owed by the [p]arents to [RFTS]" (Parent Ex. D at p. 1). Thus, the record evidence supports the IHO's refusal to award separate reimbursement for the $250.00 registration fee, as the contract does not establish a separate financial obligation for said fee.

2. Excessive Services

Finally, the parties dispute whether the IHO erred in denying funding of the cost of related service supervision provided between September 1, 2023 and April 30, 2024. The district argues that the IHO properly determined that related service supervision exceeded the requirements to provide a FAPE. The parents argue that, without an appropriate placement from the district, RFTS was the only option readily available to the parents, who did not have the luxury to "pick and choose" services from the RFTS program.

Under the Burlington/Carter framework, the final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014][noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether

the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, the IHO determined that related service supervision categorically exceeded the requirements to provide a FAPE (IHO Decision at p. 20). The IHO reasoned that the record lacks evidence "that the student required related service supervision in order to make progress" (id.). The IHO further reasoned that the student's related service providers did not need supervision because they "were appropriately licensed and well-qualified" (id.). Review of the hearing record reveals a lack of evidentiary support for the IHO's cited rationale. The parents presented evidence that related service supervision was a component of an individualized program that enabled the student to make progress during the 2023-24 school year, for which the parents are financially responsible (see Parent Exs. D at pp. 1, 3; Y ¶¶ 36-39, 46-47; T ¶¶ 6, 13; P at pp. 3-7; O at pp. 3-5; Q at pp. 3-5). The record lacks evidence to rebut the parents' presentation in that regard. Moreover, the record evidence does not support a distinction between BCBA supervision, for which the IHO awarded funding, and related service supervision, for which the IHO denied funding. The record includes testimony that both the student's ABA instructors and the student's related service providers were appropriately credentialed and received training from a supervisor (see Parent Exs. Y ¶¶ 17-21, 26, 39; T ¶ 14). With regard to BCBA supervision, specifically, the educational director testified that the student "requires a BCBA to oversee the implementation of his program to appropriately identify evidence-based practices and ensure their approach is in accordance with ABA standards" (Parent Ex. Y ¶ 35). However, I am not convinced that well-qualified ABA instructors required oversight to meet the student's educational needs while the related service providers required no oversight. The record evidence establishes that the parents participated in the March 2023 CSE meeting, attempted to tour the recommended public school, and provided a timely 10-day notice (Parent Exs. X ¶¶ 6-9; C at pp. 1-2). On the other hand, the

record lacks evidence that the parents failed to cooperate with the district or otherwise acted unreasonably. For the foregoing reasons, I find that the equities largely weigh in the parents' favor and support the funding of related service supervision.

Reduction of the requested funding is nevertheless necessary to account for billing in excess of the maximum contracted amount. Under their contract with RFTS, the parents are financially responsible for up to one-half hour of related service supervision per week at a rate of $275.00 (see Parent Ex. D at pp. 1, 3). The record evidence shows that related service supervision in November 2023 and March 2024 exceeded the maximum frequency under the contract by a total of two and three quarters hours, which, billed at a rate of $275.00, equates to $756.25 (see Parents Exs. D at p. 3; G at p. 3; J at pp. 8-11, 23-25). The record evidence further shows that RFTS billed a total of $4,125.00 for related service supervision from September 2023 through April 2024 (see Parent Exs. H at pp. 1-7; V at p. 1). Therefore, I will modify the IHO's decision dated August 12, 2024 to award an additional $3,368.75 which equals $4,125.00, the cost of related service supervision provided from September 2023 through April 2024, less $756.25 for overbilling.

VII. Conclusion

In summary, I decline to disturb the IHO's determination that the parents abandoned their claim for special transportation and/or reimbursement of private transportation expenses. I further decline to accept the parents' additional documentary evidence for admission and consideration on appeal. Accordingly, as explained above, the hearing record supports the IHO's award of funding except to the extent that the IHO entirely denied funding for related service supervision provided from September 2023 through April 2024. Finally, as explained above, the student is entitled to pendency services, pursuant to the unappealed IHO decision dated July 31, 2023, from April 1 2024, the date of the due process complain notice, until the conclusion of these proceedings.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that for purposes of pendency the district shall provide direct funding to RFTS for the cost of the student's attendance at RFTS, including the cost of ABA, ABA supervision, speech-language therapy, and occupational therapy, from April 1, 2024 until the conclusion of these proceedings, within 30 days of the submission of proof of attendance, and that the student is entitled to transportation to and from home and to and from RFTS from April 1, 2024 until the conclusion of these proceedings.

IT IS FURTHER ORDERED that the IHO's decision dated August 12, 2024 is modified by reversing that portion which denied funding in the amount of $3,368.75, the cost of related service supervision, provided from September 2023 through April 2024, for which the parents are financially responsible.

IT IS FURTHER ORDERED that the district shall fund, to the extent not already funded under pendency, the cost of the student's attendance at RFTS during the 2023-24 10-month school year in the total amount of $201,685.60, $250.00 of which shall be paid to the parents with the remainder to be paid directly to RFTS.

Dated: **Albany, New York**
December 17, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER