



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-107

Application of a STUDENT WITH A DISABILITY, by his parent, 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:

Cuddy Law Firm, PLLC, attorneys for petitioner, by John F. Cuddy, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for the total costs of her son's tuition at the Cooke School (Cooke) for the 2021-22 school year and reduced reimbursement by the cost of a 1:1 paraprofessional. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student initially received services through early intervention (Parent Ex. F at p. 2). The student then received special education and related services during the 2012-13 school year (kindergarten) and the 2013-14 school year (first grade) before being enrolled at Cooke during the second half of first grade (id.).¹

With respect to evaluative information regarding the student, the hearing record includes a January 25, 2016 district psychoeducational evaluation, which according to the parent was

¹ Cooke has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

conducted as a result of an order issued by an IHO in a prior proceeding (Parent Ex. E; see Parent Ex. A at p. 1). According to the January 2016 evaluation report, the student's cognitive abilities were found to be within the extremely low range of functioning, the student's nonverbal cognitive abilities were found to be within the very poor range of functioning, the student's academic skills were found to be within the very low range of functioning, and the student's adaptive behavior skills were found to be within the low range of functioning (Parent Ex. E at pp. 2-5, 6-7). The student's performance on an assessment of visual-motor integration skills indicated that the student "may have significant difficulties" with visual-motor abilities (id. at pp. 5-6, 7). According to the report, the student's results on the Childhood Autism Rating Scale-Second Edition (CARS-2) placed him "within the higher end of the Mild-to-Moderate Symptoms of Autism Spectrum Disorder" (id. at p. 7).

The hearing record includes a document produced by Cooke titled "Supplemental Documentation Report for Paraprofessional Recommendation" and dated February 2019, during the student's sixth grade school year, which explains some of the student's complex medical history and indicates that due to a urological condition a health paraprofessional was needed to maintain the student's "strict bathroom schedule and to reduce his risk of infection" (id.). In addition, the student was described as having difficulties with chewing and swallowing, which put him at "high risk for choking" (id.). The document further indicated that the student would be monitored at lunch and during snack time for food intake, as well as for chewing and swallowing to maintain the student's safety at school (id.).

According to the parent, an IHO in a prior proceeding concerning the 2019-20 and 2020-21 school years awarded the parent tuition reimbursement for the cost of the student's attendance at Cooke and also awarded independent educational evaluations (IEEs) consisting of a speech-language therapy evaluation, a neuropsychological evaluation, an assistive technology evaluation, an occupational therapy (OT) evaluation, a physical therapy (PT) evaluation, a functional behavioral assessment (FBA), and a vocational assessment (Parent Ex. A at p. 2; see Parent Exs. F; G; H; I).

An independent comprehensive speech-language therapy evaluation was conducted on March 12, 2021 (Parent Ex. F).² As relevant to this matter, the March 2021 speech-language therapy evaluation included health, educational and developmental findings which reflected that the parent disclosed to the evaluator that the student had been seen by a urologist, an orthopedist, a neurologist, and a geneticist in past medical visits (id. at p. 1). At the conclusion of formal assessments, the evaluator determined that the student demonstrated severe receptive language deficits, severe expressive language delays, severe pragmatic language delays, severe literacy delays, and severe articulation delays (id. at pp. 19-20). The evaluator recommended that the student receive five 60-minute sessions per week of "individual language therapy," one 60-minute session per week of "individual speech therapy," three 60-minute sessions per week of individual

² The hearing record does not indicate if the independent speech-language therapy evaluation was shared with the May 2021 CSE; however, the hearing record also does not include a prior written notice describing the evaluative information considered by the May 2021 CSE (see 8 NYCRR 200.5[a][1], [3][iv] [when a district proposes a change in a student's educational placement it must provide the student's parents with "a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action"]). Review of the May 2021 IEP does not appear to include any evaluative information from the independent speech-language therapy evaluation (compare Parent Ex. D, with Parent Ex. F).

academic tutoring using Orton-Gillingham or Wilson multisensory reading instruction, and one 60-minute session per week of group social skills therapy (*id.* at p. 21). In addition, the evaluator recommended 12 annual goals (*id.* at pp. 21-22).

On April 15, 2021, the parent signed a reenrollment contract with Cooke for the 2021-22 12-month school year (Parent Ex. O at pp. 1, 3). The contract included delineated costs for ten-month tuition, two summer sessions, and a prorated, half-time 1:1 paraprofessional (*id.* at p. 1). Clause five of the executed contract was entitled "Health Aide or Behavior Management Paraprofessional Support," and stated that

[i]f the medical/health needs or behavior management needs of my child warrant the additional support of a Related Service Health Paraprofessional or Behavior Management Paraprofessional, I understand that such support may be recommended and arranged by the Cooke School on a full-time basis at a cost of \$36,500 or on a half-time basis at a cost of \$18,250[.] If the cost of the Paraprofessional is not already covered under this enrollment contract, I agree to enter into a new enrollment contract that includes that cost in the event Cooke decides to assign a Paraprofessional to my child.

(Parent Ex. O at pp. 1-2).

A CSE convened on May 5, 2021 and developed an IEP with an implementation date of May 19, 2021 (Parent Ex. D at pp. 1, 25). The May 2021 CSE continued to find the student eligible for special education and related services as a student with autism (*id.* at pp. 1, 25).³ The May 2021 CSE recommended that the student receive 12-month services and attend a 6:1+1 special class in a specialized school for 35 periods per week and receive one 40-minute session per week of individual counseling, one 40-minute session per week of group counseling, two 40-minute sessions per week of individual OT, one 40-minute session per week of group OT, one 40-minute session per week of individual PT, one 40-minute session per week of group PT, two 40-minute sessions per week of individual speech-language therapy, and one 40-minute session per week of group speech-language therapy (*id.* at pp. 19-21, 26). The student was also recommended to receive three periods per week of adapted physical education, along with special transportation and the support of an individual, daily, full-time paraprofessional for health and toileting (*id.* at pp. 19, 20, 24). In addition, the CSE included a recommendation for one 60-minute session per month of parent counseling and training (*id.* at p. 25). The May 2021 IEP indicated that the parent stated that the CSE's recommendations were not sufficient to provide the support that the student needed (Parent Ex. D at p. 6).

The hearing record also includes what appears to be "IEP Annual Review Notes" prepared contemporaneously with the May 5, 2021 CSE meeting by staff from Cooke (Parent Ex. W). According to the notes prepared by the Cooke staff, with regard to the student's health needs, the parent stated that her main concern was regarding toileting and "figuring out [i]f it [wa]s a medical issue or behavioral" and that addressing this need was a "[c]onstant work in progress" (*id.* at p. 4).

³ 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]).

By letter dated, June 15, 2021, the parent provided notice to the district that she was not in agreement with the CSE's recommendations for the 2021-22 school year and that she intended to unilaterally enroll the student at Cooke for the 12-month school year (Parent Ex. X).^{4, 5} On July 1, 2021, Cooke opened for in-person instruction after the school only had remote instruction for the 2020-21 school year (Parent Ex. R).

The hearing record reflects that the independent neuropsychological evaluation report was completed on July 8, 2021, the independent OT evaluation report was completed on August 1, 2021, and the independent PT evaluation was conducted on August 8, 2021, several months after the May 2021 CSE convened (Parent Exs. G at p. 1; H at p. 1; I at p. 1).⁶ The hearing record does not indicate whether the reports of the evaluations were shared with the CSE or if the parent requested that the CSE reconvene to review them.

A. Due Process Complaint Notice

By due process complaint notice dated November 29, 2021, the parent alleged that the student had been denied a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at p. 1). Specifically, the parent asserted that the district had failed to appropriately and comprehensively evaluate the student in all areas of suspected disability, failed to timely develop and provide the parent with an IEP for the 2021-22 school year, failed to recommend an appropriate program for the 2021-22 school year in offering essentially the same program as was recommended in February 2017 and May 2020, "significantly impeded the [p]arent's opportunity to determine whether the [district] had recommended an appropriate placement for the 2021-22 school year," "failed to offer a transition plan to move [the student] from his private school setting to a less restrictive environment," and "failed to recommend appropriate parent counseling and training reasonably calculated to assist [the student]'s family in enabling [the student] to make meaningful progress in light of his unique needs" (*id.* at pp. 3-5). The parent next argued that Cooke was an appropriate unilateral placement and that equitable considerations weighed in favor of granting the parent's request for direct payment of the student's tuition at Cooke for the 2021-22 school year (*id.* at pp. 5-7). As relief, the parent requested a finding that the student was denied a FAPE for the 2021-22 school year, a finding that Cooke was an appropriate unilateral placement, and an award of reimbursement or direct funding of the cost of the student's attendance at Cooke, including a half time 1:1 health paraprofessional and transportation (*id.* at p. 7).

⁴ Review of the transcript of the hearing shows that the IHO accepted the parent's representation of the dates for each of the parent's exhibits when they were entered into the hearing record; unfortunately, possibly as each exhibit was not reviewed when it was entered into evidence, there are several discrepancies between the dates listed during the hearing and in the IHO's exhibit list and the actual exhibits (Tr. pp. 16-18, 23-29; Parent Exs. S; W; Y; IHO Decision at pp. 8-9). Additionally, the parent submitted email correspondence which purports to demonstrate the district's receipt of the parent's June 15, 2021 letter; however, this email is dated June 16, 2016 in two different places (Tr. p. 29; Parent Ex. Y).

⁵ In the June 2021 letter, the parent acknowledged that she received a prior written notice regarding the district's recommended program for the 2021-22 school year (Parent Ex. X).

⁶ The report of the PT evaluation indicated the evaluation was conducted on August 8, 2021; however, the report was not dated (Parent Ex. I).

B. Impartial Hearing Officer Decision

The parties convened for a preliminary conference on May 10, 2022, and on June 29, 2022 proceeded to and concluded the impartial hearing (Tr. pp. 1-6, 15-97).⁷ During the impartial hearing, the district did not present any witnesses or documentary evidence and conceded that it failed to offer the student a FAPE (Tr. pp. 25-26, 30). The district further declined to present an opening statement, to cross-examine the Cooke consulting teacher, and to cross-examine the parent (Tr. pp. 33, 46, 55, 64-65). The district cross-examined the Cooke associate head of school; however, the cross-examination was limited to questions related to remote instruction, PT, and how Cooke generally developed the student's program (Tr. pp. 68, 86-91). The district's closing statement consisted of "[i]t's the [district]'s position that [the] [p]arents have not met their [p]rong II burden at [the] hearing. And we rely on the record for that contention. And that's it" (Tr. p. 92).

In a decision dated, July 16, 2022, the IHO found that the district "in not providing any witnesses as to the appropriateness of [it's] IEP and no evidence of presenting the parent with a school recommendation, failed in Prong I of [the] Burlington/Carter standard" (IHO Decision at p. 5).⁸ The IHO next determined that the parent had at all times cooperated with the district and further that the parent "met her Prong II and Prong III burden[s] of [the] Burlington/Carter [standard]" (*id.*). The IHO then made additional findings related to the provision and cost of "a half-time Health/Behavior Paraprofessional" (*id.*). The IHO recounted some documentary evidence in the hearing record which indicated the cost of the paraprofessional, the provision of a paraprofessional in a prior school year, and found that there was "no evidence the student had a paraprofessional for the 2021-2022 school year" (*id.*). Next, the IHO reviewed the Cooke progress report for the 2021-22 school year, and noted that it listed a health paraprofessional, however the progress report did "not list that person's name and there [wa]s no actual content... as to a para[professional] working with the student" and "no name of any para[professional] who may have worked with the student or accompanied the student during the school day" (*id.* at p. 6). As a result, the IHO found that "[t]he only conclusion [wa]s that the school failed to provide this student with a para[professional] for health for the 2021-2022 school year but included such a fee in the request for tuition" (*id.*).⁹

⁷ A status conference was held on June 9, 2022 (Tr. pp. 7-14).

⁸ The IHO's decision included a cover sheet with the date "07/16/21" (IHO Decision at p. 1); however, as the hearing took place on June 29, 2022, it is clear that the 2021 date was a typographical error.

⁹ The Office of State Review received two IHO decisions; the original IHO Decision described above, and a corrected IHO Decision. The corrected decision contained adjustments to language describing the August 6, 2021 tuition affidavit, deleted the word "not" when indicating whether the student's paraprofessional was named in the 2021-22 Cooke progress report, and deleted entirely the sentence, "[t]he only conclusion [wa]s that the school failed to provide this student with a para[professional] for health for the 2021-2022 school year but included such a fee in the request for tuition." While the corrections appear to be intended to correct a factual error in the IHO's original decision regarding the mention of a paraprofessional in the Cooke progress report, the changes themselves appear to be substantive changes to the decision. IHOs lack the authority to retain jurisdiction and materially alter their final decisions, thus the original IHO Decision is the operative decision (see Application of a Student with a Disability, Appeal No. 21-067; Application of a Student Suspected of having a Disability, Appeal No. 19-010; Application of the Dep't of Educ., Appeal No. 17-009). Nevertheless, it is worth noting that even if the corrected IHO decision were operative, the outcome of this appeal would not change.

For those reasons, the IHO directed the district to pay the cost of the student's tuition at Cooke for the 2021-22 school year, less the cost of the paraprofessional (IHO Decision at p. 6).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred by denying reimbursement in the amount of \$18,250, for the cost of the student's 1:1 paraprofessional at Cooke. The parent alleges that the hearing record demonstrated that the student required the support of a 1:1 paraprofessional, the parent was financially liable for the cost of a half time 1:1 paraprofessional, and the student was provided a half time 1:1 paraprofessional by Cooke during the 2021-22 school year.

In an answer, the district responds with general denials and argues that the IHO's decision should be affirmed in its entirety.

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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

The sole issue in this matter is whether or not the IHO correctly directed the district to pay the cost of the student's tuition at Cooke, less the cost of the half-time 1:1 paraprofessional. The parent argues that she demonstrated her financial obligation to Cooke for tuition for the 2021-22 school year, which included the cost of the student's paraprofessional. The parent also contends that the hearing record demonstrated the student's need for a 1:1 paraprofessional and that the student received and benefited from the services of a 1:1 paraprofessional during the 2021-22 school year at Cooke. The parent further asserts that the IHO's denial of the full cost of the tuition for Cooke was counter to his finding that Cooke was an appropriate placement for the 2021-22 school year, as he had found that the parent had demonstrated that Cooke was an appropriate placement for the student and that equitable considerations weighed in favor of granting the parent's request for relief. The parent also contends that there was no evidence to counter the existence of the student's 1:1 paraprofessional. Lastly, the parent argues that the IHO created a standard that does not exist by denying relief because the hearing record did not include the name of the student's paraprofessional as evidence.

In his decision the IHO found "that the [d]istrict, in not providing any witnesses as to the appropriateness of their IEP and no evidence of presenting the parent with a school recommendation, failed in Prong I of [the] Burlington/Carter standard" (IHO Decision at p. 5). The IHO then determined that "[t]he parent at all times cooperated with the [the district]... [and] met her Prong II and Prong III burden of Burlington/Carter" (*id.*).

In its answer the district concedes that the IHO found in favor of the parent regarding the appropriateness of Cooke and equitable considerations, and does not cross-appeal either finding. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). However, the district contends that the IHO's decision as to the lack of evidence regarding the 1:1 paraprofessional could be interpreted as a modification to the IHO's findings as to the appropriateness of Cooke and that the IHO correctly found that the parent bore the burden of proof on this issue. According to the district, the IHO correctly found that there was no evidence that the student was provided with the support of a paraprofessional during the 2021-22 school year and that review of the May 2021 IEP, the Cooke progress reports, and the February 2019 paraprofessional recommendation did not prove that the student required a paraprofessional at Cooke for the 2021-22 school year.

It is understandable why the district did not interpose a cross-appeal in this matter, given its anemic effort at the impartial hearing. As noted above, the district presented no evidence during the hearing, the district presented no witnesses, and the district declined to cross-examine the parent or the Cooke consulting teacher. However, review of the transcript reveals why the district may have chosen not to cross-examine the consulting teacher. Direct examination of the Cooke consulting teacher primarily focused on the May 2021 CSE meeting (Tr. pp. 48-49, 50, 51-52, 54-55) and the parent's attorney only asked the Cooke consulting teacher two questions related to the student's program at Cooke, which elicited very little evidence of specially designed instruction provided to the student at Cooke (Tr. pp. 46, 53-54). Relevant to this appeal, there was no mention of a paraprofessional for the student (Tr. pp. 53-54). The parent's second witness from Cooke, the associate head of school, testified to the general programming available at Cooke (Tr. pp. 69-82). The parent's attorney asked the Cooke associate head of school four questions specific to the

student, only one of which was programmatic and elicited information regarding the student's participation in an internship at an animal shelter (Tr. pp. 82-84, 86). As noted above, the district only cross-examined the Cooke associate head of school and questions were limited to remote instruction, PT, and to how the student's program at Cooke was generally developed (Tr. pp. 68, 86-91). Relevant to this appeal, the Cooke associate head of school testified that paraprofessionals at Cooke provide "individual or small group support for students who sort of need additional one-to-one program, and to be able to access the classroom in the community environment"; however, he did not testify that the student received support from a 1:1 paraprofessional at Cooke (Tr. pp. 72-73).

Although, it is arguable whether or not the parent's witnesses demonstrated that the student received sufficient specially designed instruction at Cooke to support a finding that it was an appropriate placement for the student for the 2021-22 school year, the parent presented documentary evidence which further supported the IHO's determination that it was appropriate. The parent provided notes prepared by Cooke staff from the May 2021 CSE meeting, a description of the Cooke upper school program, progress reports for the 12-month 2021-22 school year, a description of the student's need for a 1:1 health paraprofessional, a reenrollment contract for the 12-month, 2021-22 school year, which documented the parent's financial obligation to Cooke including for the cost of a half-time 1:1 health paraprofessional, and an affidavit describing the amount of tuition owed to Cooke (Parent Exs. J; O; P; S; U; W; Z; AA).

Contrary to the district's arguments, the IHO did not make any findings stating that the student did not require a 1:1 paraprofessional or that the provision of a 1:1 paraprofessional was not appropriate. Rather, the IHO found that there was no evidence establishing that Cooke had actually provided the contracted-for half-time 1:1 paraprofessional (IHO Decision at pp. 5-6). However, review of the hearing record shows that the hearing record did include information showing that the student was provided with the support of a half-time 1:1 paraprofessional during the 2021-22 school year (Parent Exs. O at p. 1; P; Z at pp. 1, 9, 15, 16). Accordingly, while the hearing record does not include an abundance of information about the program provided to the student at Cooke for the 2021-22 school year, the IHO determined and the district does not dispute that the program was appropriate; further, the hearing record includes sufficient, although limited, information showing that the program provided to the student by Cooke included the support of a part-time 1:1 paraprofessional. For that reason, the IHO's determination on this point must be overturned.

Finally, to the extent that the district argues on appeal that the IHO correctly denied payment for a 1:1 part-time paraprofessional because it was not a necessary service for the student to receive a FAPE, the district did not make this argument during the hearing and the IHO did not make any such finding in his decision. Accordingly, it is being raised for the first time on appeal. Additionally, such an argument relates to equitable considerations, as the Second Circuit has found in weighing equitable considerations that "parents are not entitled to reimbursement for services provided in excess of a FAPE" (*L.K. v. New York City Dept. of Educ.*, 674 Fed. Appx. 100, 101 [2d Cir. 2017]). Accordingly, the district waived any arguments as to equitable considerations by not raising them during the hearing. Additionally, although the hearing record is not voluminous as to the student's needs, and although some of the information relates to prior school years, there is evidence that the student required the support of a 1:1 paraprofessional in a school setting and within the Cooke program (see Parent Exs. D at pp. 10, 20; K; L; U).

VII. Conclusion

Based on the foregoing, the IHO erred in denying the parent's request for payment of the full cost of the student's tuition at Cooke, including the cost of a half-time 1:1 paraprofessional.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated July 16, 2022, is modified by reversing that portion which denied the parent's request for payment of the cost of a half time 1:1 paraprofessional and the district is directed to pay the full cost of the student's tuition at Cooke for the 2021-22 school year in the amount of \$108,775.

**Dated: Albany, New York
September 28, 2022**

**CAROL H. HAUGE
STATE REVIEW OFFICER**