The University of the State of New York

The State Education Department
State Review Officer
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No. 18-120

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:
Arthur J. Golder, III, Esq., attorney for petitioner

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Gail Eckstein, 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 for an order directing the district to provide special transportation to and from her son's related services for the 2018-19 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

In light of the limited scope of this appeal, the student's educational history need not be recited in detail. Briefly, the student has attended the ELIJA school (ELIJA) since the 2015-16 school year, where he receives 1:1 applied behavioral analysis (ABA) throughout the school day (Parent Exs. E at p. 2; F at p. 1).[1] The student has been found to exhibit characteristics consistent with a diagnosis of an autism spectrum disorder (Parent E at p. 3). The student was described as having significant and pervasive development delays (Parent E at p. 1; Dist. Ex. 13 at p. 3). The

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

hearing record reflects that the student's cognitive potential is unknown due to his inability to participate in standardized testing (Parent Ex. E at p. 4). The student's significant behavioral needs—described as "constant self-stimulation, psychomotor agitation and hyperactivity"—require consistent intervention (id.). A CSE convened on May 23, 2018 to conduct the student's annual review and develop the student's IEP for the 2018-19 school year(Dist. Ex. 13 at p. 20; see also Parent Ex. V at p. 15). Having found the student eligible for special education as a student with autism,[2] the CSE recommended a 12-month school year program consisting of a 6:1+1 special class in a specialized school, an individual full-time paraprofessional, adapted physical education, individual occupational therapy (OT), individual physical therapy (PT), individual speech-language therapy, and individual parent counseling and training (Dist. Exs. 13 at pp. 1, 15-16, 19; 14 at p. 1). By letter to the district, dated June 27, 2018, the parent gave notice of her intention to enroll the student at ELIJA due to the district's "failure and refusal to provide an appropriate program" (Parent Ex. B).

A. Due Process Complaint Notice

By due process complaint dated June 27, 2018, the parent alleged that the district failed to produce an "adequate" IEP for the student for the 2018-19 school year and failed to make a final recommendation for summer services by June 15, 2018, pursuant to a 1982 consent order settling a federal court class action lawsuit (Parent Ex. A at pp. 2, 7-8). The parent also claimed that neither the May 2018 IEP nor the prior written notice identified a school location at which the student's IEP would be implemented (id. at pp. 7-8). Additionally, the parent alleged that "the structure and nature of the recommended class" and the "program elements" were not sufficient to meet the student's learning needs (id. at p. 8). The parent further claimed that the district "failed and refused" to provide an appropriate program and placement for the student and that the goals and objectives set forth in the May 2018 IEP did not address the student's functioning levels or current and future needs (id.). The parent also contended that the proposed IEP did not include home-based special education itinerant teacher (SEIT) services using ABA methodology, as previously found appropriate for the student (id.). Further, the parent challenged the "other related services" as insufficient to meet the student's learning needs (id.). The parent alleged that the district failed to offer the student a FAPE, that ELIJA was an appropriate unilateral placement and that equitable considerations weighed in favor of the parent's requested relief (id. at pp. 3, 7, 8).

As relief, the parent requested direct funding for ELIJA for the 12-month, 2018-19 school year (Parent Ex. A at p. 8). The parent also requested pendency at ELIJA, as well as related service authorizations (RSAs) and private tutoring eligibility (P-3 letter) for pendency services (id. at p. 8). Further, the parent requested that the district provide RSAs and a P-3 letter for following services: 20 hours per week of home-based individual ABA; weekly one-hour team meetings supervised by a board certified behavior analyst (BCBA); individual OT in a sensory gym, five times per week for one hour; individual PT in a sensory gym, three times per week for one hour; five hours per week of parent counseling and training by a BCBA; and special education

[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]).

transportation to and from school in an air conditioned mini bus accompanied by a bus paraprofessional with limited time travel of no more than 45 minutes (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

A hearing to determine the student's pendency placement was held on July 19, 2018 (Tr. pp. 1-22). By interim decision dated July 19, 2018, the IHO found that the student's pendency placement was based upon an unappealed IHO decision dated March 13, 2018 (Tr. pp. 4-10; Interim IHO Decision at pp. 4-5; see Parent Ex. D).[3] Accordingly, the IHO ordered the district to provide funding for the cost of the student's attendance at ELIJA beginning on the date of the parent's due process complaint notice, June 27, 2018 (Interim IHO Decision at pp. 5-6). The IHO further ordered the district to provide one-hour weekly team meetings to include all ABA providers, and for one of those meetings to include all other related service providers, and to be supervised by a BCBA (id. at p. 5). The IHO also ordered that as pendency the student receive 20 hours per week of ABA, RSAs for OT, PT, parent counseling and training, and speech-language therapy (id.). As part of the student's pendency placement, the IHO further ordered that the student receive air conditioned special education transportation to and from school and any service providers with travel time of less than one hour and that a transportation paraprofessional accompany the student to and from school (id. at pp. 5-6).

The parties proceeded to a one-day hearing on the merits on August 10, 2018 (Tr. pp. 23-133). By decision dated September 7, 2018, the IHO found that the district failed to offer the student a FAPE for the 2018-19 school year (IHO Decision at p. 17).[4] Specifically, the IHO found that the May 23, 2018 IEP did not identify or address the student's areas of weakness, did not include any goals to address the student's behaviors (id.). The IHO then noted that the district did not include a functional behavioral assessment (FBA) or behavioral intervention plan (BIP) as part of the May 2018 IEP or "potential offer of FAPE" despite indication in the IEP that the student needed a BIP (id. at pp. 16-17). The IHO also credited the parent's testimony regarding her visit to the assigned public school location and the reasons she found it inappropriate (id. at p. 17).

Turning to the appropriateness of the parent's unilateral placement, the IHO determined that ELIJA and the after-school services were an appropriate program and placement (IHO Decision at pp. 17-18). Specifically, the IHO noted the 1:1 teaching ratio at ELIJA, the use of a BIP for the student, the collaboration between the school and the home-based providers, testimony that the student experienced regression without ABA or with less services, and the progress the student exhibited since attending ELIJA and receiving the after-school program (id.). The IHO noted that ELIJA did not provide OT or PT services for the student but indicated that it provided parent counseling and training services (id. at p. 7). With regard to equitable considerations, the IHO conducted little analysis. The IHO indicated that the parent did provide the district notice of

[3] The IHO's interim decision is not paginated. For purposes of this decision, citations to the interim decision shall refer to the consecutive pages, omitting the cover page.

[4] The IHO acknowledged that district did not present any witness testimony and requested an adjournment of the impartial hearing that was denied (IHO Decision at p. 15). Although the district presented 15 exhibits and argued that it offered the student a FAPE, the IHO found that the district "did not present any witnesses or any evidence of any kind to contest any part of parent's allegations" (id.).

the unilateral placement but stated that, in any event, the matter was "not a unilateral placement, but merely a continuation of the appropriate placement of the Student without change" (id.).

The IHO stated that the parent presented uncontested testimony regarding her inability to pay (IHO Decision at pp. 18-19). The IHO then determined that the parent established entitlement to direct funding of the student's tuition costs at ELIJA for 2018-19 school year (id. at p. 19). In addition, the IHO granted all of the parent's other requests for relief including ordering the district to provide the parent with RSAs and a P-3 letter for the after-school services, and to provide door-to-door special education transportation for the student to and from school in an air conditioned mini bus with limited travel time of no more than 45 minutes, and the support of a bus paraprofessional (id. at p. 21).

As relevant to the present appeal, the IHO gave separate treatment to the parent's request for transportation (IHO Decision at pp. 19-20). The IHO found that testimony supported a finding that the student required special transportation (id. at p. 20). The IHO acknowledged that the parent sought special education transportation to the related service providers and that, while the transportation was "fluid depending on the reliability of the home health aid, the Student['s] schedule and location of related services," at the time, the parent did not incur personal expense to transport the student to and from related services (id.). The IHO did not explicitly deny the parent the costs of transportation to and from related services, but ultimately only ordered the district to fund the student's transportation to and from the ELIJA school (id.).

IV. Appeal for State-Level Review

The parent appeals the IHO's failure to award special transportation to and from related services delivered at locations other than school or home. The parent argues that, although she has not incurred any out of pocket expenses for transporting the student, the IHO was not precluded from ordering the district to provide transportation to the student's related services that are not provided at home or school. The parent further argues that special transportation is a related service that the district is obligated to provide at no cost to the parent. As relief, the parent requests an order for transportation to other locations.

In an answer, the district responds to the parent's appeal with admissions and denials and argues that the IHO's decision should be upheld in its entirety. The district states that it "effectively conceded that it could not prove it provided FAPE" during the hearing (Answer ¶ 3). As such, the district argues that the IHO ordered adequate relief to remedy the district's failure to offer the student a FAPE for the 2018-19 school year. The district also alleges that the parent did not request special education transportation to and from locations other than the student's home and ELIJA in her due process complaint notice. The district further argues that the parent should be precluded from raising this claim for the first time in this appeal.

In her reply, the parent contends that the issue of transportation was sufficiently raised in the due process complaint notice and that she fully comported with "minimal pleading standards.". The parent further argues that the district failed to provide any authority that supports its position that it is not required to provide transportation to locations other than the student's school or home.

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. __, 137 S. Ct. 988, 999 [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). 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., 137 S. Ct. at 1001 [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. Preliminary Matters – Scope of Review

[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., 137 S. Ct. at 1000).

The IDEA provides that "any party aggrieved by the findings and decision" of an IHO "may appeal such findings and decision to the State educational agency" (20 U.S.C. § 1415[g][1]; see 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). State regulation provides that a request for review or a cross-appeal "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate" the relief sought by the appealing party (8 NYCRR 279.4[a], [f]). An IHO's decision is final and binding upon the parties unless appealed to an SRO (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see 8 NYCRR 279.8[c][4] ["Any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer"]).

For the reasons described above, the IHO determined that the district failed to offer the student a FAPE for the 2018-19 school year and that the parent's unilateral placement at ELIJA and the after-school services obtained for the student were an appropriate program and placement for the student (IHO Decision at pp. 17-18). Neither party challenges the relief ordered by the IHO, except to the extent that the parent appeals the IHO's failure to order the district to provide special education transportation to the student's related services which are not located at ELIJA or the student's home. To the extent that neither party has appealed the IHO's determinations, they are final and binding on the parties and will not be further discussed (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

With regard to whether or not the parent adequately raised the issue of transportation to and from the student's related services, generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing, or for the first time on appeal, 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 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint 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 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parent] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also C.F. v. New York City Dep't of Educ., 746 F.3d 68, 78 [2d Cir 2014]).

The parent's due process complaint sought "[s]pecial education transportation to and from school" as well "issuance of . . . RSAs in favor of the related services requested" and "other, further and different relief as may appear just and proper under the circumstances" (Parent Ex. A at pp. 8-9), and a fair reading of the requested relief supports a finding that it provided the district with sufficient notice that the parent was seeking transportation to the student's related services that were successfully obtained though RSAs. To the extent the parent's due process complaint notice did not state the request for transportation relief with perfect clarity, this is not an instance that implicates concern that the parent would "sandbag the school district" by raising claims after the expiration of the resolution period (R.E., 694 F.3d at 187-88 n.4). Consequently, I reject the district's argument that the parent's due process complaint was insufficient because it failed to

explicitly indicate that relief was sought in the form of special transportation to all of the student's related services in her due process complaint notice (Parent Ex. A at p. 9).

B. Special Education Transportation

Turing to the parent's request for special education transportation for the student to and from the after-school related services, in this case, neither party disputes the student's need for special transportation services. The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]).

As indicated above, the IHO's determination that the parent's unilateral placement was appropriate has become final and binding on the parties, and it includes related services provided after school and delivered at locations other than ELIJA or the student's home. Consistent with a traditional application of the Burlington/Carter framework, an order for tuition reimbursement generally may include the costs of the transportation sought by the parent (see Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir 1994] [finding "that the language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]; Ne. Cent. Sch. Dist. v. Sobol, 79 N.Y.2d 598, 608 [1992] [finding that, since a FAPE included related services such as transportation, an order of reimbursement for transportation was an appropriate remedy for a denial of a FAPE]). Accordingly, there being no challenge to the student's need for special transportation or the related services ordered by the IHO, the district is required to provide special transportation to the related services at no cost to the parent.

The parent testified that a home health aide was currently transporting the student to his related service providers in her personal vehicle and that insurance covered this expense (Tr. pp. 106-07). The testimony at the impartial hearing also explored the circumstances surrounding payment for the transportation expenses at that time (Tr. pp. 94-95, 107-08, 122). In his decision, although the IHO specifically noted that the parent did not incur any expense related to the student's transportation to and from the related service providers, he did not elaborate what weight he accorded this information or whether he intended to deny the subject relief (IHO Decision at p. 20). The parent indicated—and her attorney expressed on the parent's behalf—her preference for continuing to provide private transportation for the student and seeking reimbursement from the district, should her insurance coverage be reduced (Tr. pp. 111-12, 122-23, 126, 127-28).[6] The hearing

[6] It is the district's obligation to provide related services such as special transportation to the student and at no cost to the parent. The parent testified that a Medicaid funded home health aide transported the student to his related services and the parent also eluded to the possibility of a reduction in benefits in the future; however, the record does not reflect that the district was aware of its ability to potentially access the parent's public benefits or private insurance after obtaining consent (8 NYCRR 200.5[b]; see "Parental Consent for the Use of Public Benefits or Insurance Pursuant to the Individuals with Disabilities Education Act (IDEA)," Office of Special Educ. Field Advisory [Nov. 2018], available at http://www.p12.nysed.gov/specialed/publications/parentalconsent-medicaid.htm).

record includes discussion between the parties and the IHO regarding the parties' ability to mitigate the ongoing transportation issues if the parties would work together (Tr. pp. 113-14, 121-22, 128-29). The IHO stated that "in the end, I think the parties are leaving it in my hands how to come up with some transportation solution that will make sense for the parent" (Tr. pp. 128-29). The IHO further described what appeared to be his desire to craft an order providing the parent with the transportation relief sought (see Tr. pp. 128-32). Given the ambiguity in the IHO's decision, this further supports the result in this appeal.

Under the circumstances of this case, the district must provide special transportation to and from the student's related services that meets the student's transportation needs as set forth in the student's request for medical accommodations (Parent Ex. R). The parties are encouraged to find a solution that addresses the parent's concerns about the reliability of district provided transportation and consider the IHO's suggestions of coordinating scheduling and location of services to reduce the student's travel time (Tr. pp. 113-14, 121-22, 128-29).

VII. Conclusion

Based on the foregoing, the evidence in the hearing record does not support the IHO's failure to award special transportation to and from the student's after-school related services awarded by the IHO.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 7, 2018 is modified and the district shall provide special transportation and a bus paraprofessional for the student to and from the student's afterschool related services that are not located at ELIJA or the student's home, unless the parties shall otherwise agree on transportation arrangements.

Dated: **Albany, New York**
December 21, 2018

JUSTYN P. BATES
STATE REVIEW OFFICER