The University of the State of New York

The State Education Department
State Review Officer
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No. 22-056

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:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, 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 the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition and additional costs at the International Institute for the Brain (iBrain) for the summer portion of the 2021-22 extended 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) or a local Committee on Preschool Special Education (CPSE) that may include, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law §§ 4402, 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3; 200.4[d][2]; 200.16). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level administrative review involving the student's stay put placement for the pendency of these proceeding (see Application of a Student with a Disability, Appeal No. 21-234).

The student is non-ambulatory, non-verbal, and exhibits significant cognitive, communication, and self-help skill delays (see Parent Ex. B at p. 2).[1] He has received diagnoses of autism, Lennox-Gastaut syndrome, and epilepsy (Parent Ex. N at p. 1; Dist. Ex. 26 at p. 1). The

[1] Parent Exhibit B and District Exhibit 3 are both copies of the student's April 2021 IEP. Parent Exhibit B includes a "Summary" page, which is not included with the district's exhibit. For purposes of this decision, only the parents' exhibit is cited.

student received Early Intervention Program services and beginning July 14, 2020 he attended a specialized preschool program (see Dist. Exs. 5 at p. 1; 25 at p. 1).

A CPSE convened on April 20, 2021, to develop the student's IEP for the remainder of the 2020-21 school year and the 12-month portion of the 2021-22 school year (summer 2021) (see Parent Ex. B; see also Tr. p. 25).[2] According to the attendance page on the student's April 2021 IEP, the parent was not in attendance at the April 2021 CPSE meeting (Parent Ex. B at p. 16). The April 2021 CPSE recommended a full-time 12:1+2 special class placement in an approved preschool location (id. at p. 15).[3] Additionally, the CPSE recommended three 30-minute sessions per week of individual speech-language therapy, three 30-minute sessions per week of individual occupational therapy (OT), and three 30-minute sessions per week of individual physical therapy (PT) (id.). The CPSE also recommended a full-time individual nurse in the classroom/therapy room (id.).[4, 5]

In a letter dated June 23, 2021, the parents informed the district that they intended to enroll the student at iBrain for the 2021-22 extended school year and seek public funding for that placement (Parent Ex. D at p. 1). The parents asserted that they were rejecting the district's proposed program and placement because it would not appropriately meet the student's educational needs (id. at pp. 1-2).

iBrain staff developed an IEP for the student dated June 25, 2021 and recommended 12-month programming consisting of a 6:1+1 placement with four 60-minute sessions per week of individual OT, five 60-minute sessions per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, and three 60-minute individual sessions per week of vision education services (Parent Ex. N at pp. 1, 44).[6, 7] In addition, iBrain staff recommended that the student receive 1:1 individual paraprofessional and 1:1 individual nurse services, both daily, throughout the day and across all environments (id. at pp. 44-45). According to the IEP,

[2] On February 22, 2021, a CSE convened for a "Turning-5" meeting to determine the student's eligibility for school-age special education services as a student with a disability and to develop the student's IEP for the 10-month portion of the 2021-22 school year beginning September 2021 (see Tr. p. 25; Dist. Ex. 4). A CSE also convened on June 2, 2021 to revise the student's IEP for the 10-month portion of the 2021-22 school year (Dist. Ex. 16).

[3] The district representative testified that the April 2021 CPSE recommended a 12:1+3 special class placement and that the 12:1+2 special class recommendation was a typographical error in the April 2021 IEP (Tr. pp. 221-22; Parent Ex. B at p. 16; see Tr. pp. 118-19). A handwritten "Final Notice of Recommendation" indicated that the April 2021 CPSE recommended a 12:1+3 special class placement (Parent Ex. B at p. 18).

[4] The final notice of recommendation indicated that the April 2021 CPSE recommended a transportation nurse (Parent Ex. B at p. 18). Although the IEP indicated that the student required special transportation accommodations/services, it did not list specific accommodations or services (id. at p. 7).

[5] A prior written notice referencing the April 21, 2021 CPSE meeting was not entered into the hearing record.

[6] The June 2021 iBrain IEP also called for one 60-minute session of individual/group parent counseling and training per month (Parent Ex. N at p. 44).

[7] The iBrain IEP also reflects that it was updated on September 3, 2021 (Parent Ex. N at p. 1); the special education director at iBrain testified that, typically, changes would be minimal and that "[a]ny significant changes," such as to programming, would "usually [be] noted within the first paragraph" (Tr. p. 323).

iBrain staff also recommended assistive technology for the student and supports for school personnel (id. at p. 45). The iBrain IEP indicated that the student needed special transportation services including a nurse, oxygen, air conditioning, a lift bus/wheelchair ramp, and limited travel time (id. at pp. 43-44). Although the iBrain IEP did not include music therapy in the summary of the recommended special education programs/services beginning July 2021 (see id. at pp. 44-45), the evidence in the hearing record indicates that the student received music therapy while attending iBrain during summer 2021 (Tr. pp. 305-06; Parent Exs. J; N at p. 10).[8]

The parent signed an enrollment contract with iBrain on July 1, 2021 for the 2021-22 school year (Parent Ex. E at p. 7).[9] The contract indicated that, in addition to the "[b]ase [t]uition," the parent was responsible for "[s]upplemental [t]uition," which included the cost of related services (id. at pp. 1-2). The contract specifically provided the hourly rate and how often the student would receive each related service (id. at p. 2). In particular, the contract indicated that the student would receive two 60-minute sessions per week of individual music therapy at a specified rate per session (id.).

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2021, the parents asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at p. 1).[10] The parents only challenged the IEP created on April 20, 2021 and argued that the IEP was procedurally and substantively deficient (id. at p. 3). The parents asserted that the April 2021 IEP failed to meet the student's unique needs and failed to mandate the appropriate class size, sufficient related services, or appropriate special transportation services (id. at pp. 3-4). Moreover, the parents contended that the April 2021 CPSE was not properly composed, no school location was offered, no prior written notice was provided, the proper evaluations were not conducted, and the district did not offer extended school year services (id. at pp. 6-8).

The parents requested a finding that the student was denied a FAPE for the 2021-22 school year and an order that the district directly pay iBrain for the full cost of tuition and related services for the 2021-22 school year (Parent Ex. A at p. 9). Further, the parents requested reimbursement and/or prospective funding for special transportation services (id.).[11]

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[8] In narrative apparently added when the document was updated—insofar as there is no evidence the student received music therapy during the 2020-21 school year while attending the approved preschool program—the iBrain IEP indicates that the student "receive[d] music therapy three times per week" but elsewhere indicates that, "[s]ince starting at iBrain," the student received three 60-minute individual sessions and one 60-minute group session (see Parent Ex. N at pp. 10, 38). The iBrain IEP included three music therapy goals (Parent Ex. N at pp. 37-38); however, it is unclear whether this information was original to the document or was added when the document was updated. Other evidence in the hearing record indicates that the student received two 60-minute sessions per week of music therapy at iBrain during the 2021-22 school year (Parent Exs. E at p. 2; J).

[9] The contract was signed by iBrain on July 8, 2021 (Parent Ex. E at p. 7).

[10] A duplicate exhibit of the due process complaint notice was entered as District Exhibit 1. This decision will cite to the parents' exhibit.

[11] The parents also requested assistive technology and publicly-funded independent educational evaluations (IEEs) (Parent Ex. A at p. 9).

B. Events Post-Dating the Due Process Complaint Notice

On July 26, 2021 the parents signed a contract with Sisters Travel and Transportation Services, LLC (Sisters), for the provision of special transportation services for the student for the extended 2021-22 school year (Dist. Ex. 23 at pp. 1, 5).[12] The contract indicated that the parents would be responsible for payment whether or not the student used the transportation service (id. at p. 2). Per the terms of the contract, the student would receive transportation from the transportation provider both in the morning and afternoon each school day for the flat rate for each trip and such fees would be billed on a monthly basis (id. at pp. 1-2).

C. Impartial Hearing Officer Decision

On September 9, 2021, an impartial hearing date was devoted to determining the student's stay-put placement during the pendency of the proceedings (see Tr. pp. 1-20). In an interim decision dated October 19, 2021, the IHO denied the parents' request for pendency by finding that that the parents could not enroll the student in a new school and then invoke the stay-put provision to force the district to pay for the cost of the student's attendance at that school on a pendency basis (Oct. 19, 2021 Interim IHO Decision at pp. 2-3). The parents appealed the IHO's interim decision denying their request for pendency. In a decision dated December 29, 2021, the undersigned held that the parents were not entitled to the pendency relief that they were seeking (see Application a Student with a Disability, Appeal No. 21-234).

While the appeal of the IHO's interim decision was pending and after the State-level review decision was issued, the parties continued with the impartial hearing, which concluded on January 20, 2022, after the eighth day of proceedings (see Tr. pp. 22-388).[13, 14]

In a decision dated March 29, 2022, the IHO found that the district failed to offer the student a FAPE (IHO Decision at pp. 3, 8, 14). The IHO held that the April 2021 CPSE was not properly composed as the parents and the related services providers did not attend the meeting (id.

[12] The transportation contract was provided to the district in response to a subpoena dated October 7, 2021 (see Dist. Exs. 22; 23 at p. 5).

[13] A pre-hearing conference was held on September 17, 2021 (Tr. pp. 21-33). On September 29, 2021, the parents requested that the IHO recuse herself and the district objected to this request in a response dated October 1, 2021 (Tr. p. 35; Parent Mot. for Recusal; Dist. Reply Brief & Mem. of Law in Opp. to Parent Req. for Recusal). On October 12, 2021 the IHO found there was no basis for her to recuse herself from presiding over the matter (Tr. pp. 35-37).

[14] At the October 29, 2021 hearing date, the IHO indicated that she had received an email from the parents' attorney requesting that the July 6, 2021 due process complaint notice be withdrawn without prejudice (Tr. pp. 40, 43). The parents' attorney and the district's attorney each made arguments regarding the request to withdraw (Tr. pp. 43-48, 50-51). The IHO denied the parents' request (Tr. p. 52). During the hearing, the IHO instructed the parents to file a new due process complaint notice and indicated that she would consider whether to consolidate the two due process complaint notices (Tr. pp. 52-53). The IHO denied consolidation on November 3, 2021 (Nov. 3, 2021 Interim IHO Decision at pp. 2-3). The subsequent due process complaint notice was not entered into the hearing record. In addition, although the IHO indicated that the parties submitted briefs regarding the parents' request to withdraw (see Tr. p. 43), no such briefs were included with the hearing record filed with the Office of State Review. The district is reminded that, pursuant to State regulation, the hearing record should include "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer" (8 NYCRR 200.5[j][5][vi][b]; 279.9[a]).

at p. 4). The IHO found that the parents' failure to attend the meeting "arose from the [district's] abject failure to notify them" of the meeting (id.). According to the IHO, the hearing record demonstrated that the input of the student's related service providers would have helped the CPSE be "better informed" of the student's related service needs (id. at p. 5).

The IHO concluded that the April 2021 IEP was predetermined, finding that the district representative testified that if she wanted to recommend more related services for the student, she would have had to seek permission from her chairperson and that she recommended the maximum amount normally allowed (IHO Decision at pp. 5-6). The IHO held that this testimony demonstrated that the CPSE's recommendation was impermissibly predetermined (id. at p. 6).

Given the failure to include the necessary members of the CPSE and that the IEP was predetermined, the IHO held that the goals and services mandates were "invalid" (IHO Decision at p. 6). The IHO also determined that the district failed to conduct an assistive technology evaluation despite acknowledgment that such an evaluation would have helped the CPSE and that the district failed to evaluate the student for vision education services (id. at pp. 6-7). Next the IHO held that district failed to recommend a 1:1 paraprofessional, failed to provide appropriate devices and supports, and failed to offer an appropriate school placement (id. at pp. 7-8). Based on the findings above, the IHO held that district failed to provide the student with a "FAPE due to procedural and substantive violations" (id. at p. 8).

The IHO then addressed the privately-obtained transportation services and contract (IHO Decision at pp. 11-12). The IHO noted that the district had demanded several documents from the transportation company and that such demand included invoices or billing statements (id. at p. 11). The IHO determined that the failure of the transportation company "to generate billing statements for the services provided in July and August 2021 [was] a material breach of contract" (id.). The IHO held that the lack of billing statements prevented her from "adjudicating" the parents' claim for payment and, as such, the contract was "voided in full, thus relieving the Parents of all payment obligations under its terms" (id. at pp. 11-12). The IHO found that the transportation company could not demand payments, but then claim it did not have billing records and that if "there [we]re no records of services, then presumably services were not rendered" (id. at p. 12). As it was undisputed that the student required roundtrip transportations services, the IHO held that under "a quantum meruit claim, the amount recoverable will be based on the reasonable value of services that were provided" and limited the provider of transportation "to the New York state Medicaid rate for comparable transportation services for the actual number of days in July and August 2021 [that the] Student was transported as supported by certified contemporaneously made billing records" (id. [emphasis in original]).

The IHO found that iBrain was an appropriate unilateral placement for the student and that equitable considerations weighed in favor of an award of tuition reimbursement (IHO Decision at pp. 8-11, 12). However, the IHO determined that music therapy was not required for the student to make progress and that the student's annual goals related to music therapy could have been met through other services (id. at p. 11).

Regarding related services, the IHO noted that the hearing record did not include information as to whether the parents were asked permission for iBrain to bill their private health insurance to pay for the related services (IHO Decision at p. 13). The IHO then held that she "liken[ed] the related service providers to the Private School's teachers" as the "Private School

does not charge an hourly rate for instruction but instead charges a flat tuition" (id.). Therefore, the IHO directed the district pay "the lower of the Medicaid rate or lowest amount paid by the district to the same provider for comparable services for the corresponding CPT code during the 2020/21 school year" (id.). The IHO ordered this amount for payment of OT, PT, speech-language therapy, and vision education services, but denied the request for payment of music therapy (id. at p. 14).

IV. Appeal for State-Level Review

The parents appeal. The parents assert that the IHO's findings that the district denied the student a FAPE for July and August 2021 and that equitable considerations weighed in favor of an award of tuition reimbursement were correct. However, the parents contend that the IHO erred in her findings regarding transportation and related services.

Specific to transportation, the parents argue that the IHO "exceeded her authority by invalidating the applicable and controlling Transportation Agreement" as well as linking funding for the student's transportation to Medicaid rates. The parents contend that the IHO's discretion does not extend to having "the authority to 'step into the shoes' of a parent to a contract" or "to alter the terms of a contract." The parents assert that, since neither the IHO nor the district was a party to the transportation contract, they could not alter the terms of the contract or argue unjust enrichment. The parents allege that the IHO erred by finding a material breach of the contract and exceeded her jurisdiction by voiding the agreement. The parents contend that they are obligated to pay the fees under the contract. In addition, the parents argue that the district never raised the issue during the impartial hearing or in its closing brief that the transportation company charged excessive amounts. The parents argue that, even if the transportation company did not properly comply with the billing requirements, no payment was required because the parents were seeking funding through the impartial hearing process. The parents assert that there is no dispute that the student attended school in July and August 2021 and that the parents are obligated to pay the transportation company. The parents also contend that there is no dispute that the student received the benefit of the services. The parents allege that the IHO erred by finding that the transportation provider was limited to the Medicaid reimbursement rate for comparable services. The parents assert that the IHO made a sua sponte decision to reduce the reimbursement award without justification or basis.

Next, the parents argue that the IHO erred in reducing the rate for related services. The parents contend that, like the transportation agreement, the student received the benefit of the related services per the iBrain enrollment contract but that the IHO improperly shifted the burden from the district to the parents "for not presenting evidence that iBRAIN sought [the] Parents' permission to bill" their private insurance. The parents assert that the IHO failed to cite to any legal authority to demonstrate that a parent must also seek alternative funding when seeking funding for a unilateral placement. The parents contend the IHO tampered "with the terms of the" iBrain enrollment contract which was "clearly an abuse of discretion and [a] reversible error."

Lastly, the parents assert that the IHO erred by finding that music therapy was not a necessary component of the student's program at iBrain. The parents contend that music therapy provided the student a benefit and was part of a multi-disciplinary educational program. They argue that there was no record that the student could receive the benefits he received in music therapy through the provision of another service. The parents contend that any finding to the

contrary was arbitrary and unsupported. The parents request that the IHO's findings that the district failed to offer the student a FAPE for July and August 2021, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of an award of tuition reimbursement be affirmed. However, the parents request an order that the district must fully fund the student's special transportation service and must fully fund the student's related services in July and August 2021 pursuant to the enrollment contract, including music therapy.

In its answer, the district responds first by asserting that the parents' request for review should be rejected. The district contends that a second request for review was served on May 11, 2022, which was two days late.[15] The district argues that the parents did not provide any explanation for the late service, and it should be rejected. Further, the district contends that the second request for review served on May 11, 2022, amended the initial request for review; however, the parents did not seek leave to amend the initial request for review from the Office of State Review. As such, the district argues that the second request for review should be rejected and the district would only respond to the initial request for review.

Next, the district concedes that the IHO erred in limiting the amount of reimbursement for the student's transportation to the Medicaid rates but contends that the parents did not appeal the other transportation orders made by the IHO,[16] specifically, the finding that reimbursement was only granted for the days the student used the transportation. The district asserts that since the parents failed to appeal the IHO's order that transportation reimbursement was limited to the number of actual days it was used in July and August 2021, that finding is now final and binding. In the alternative, if deemed appealed, the district argues that the IHO's finding should be affirmed because such a finding was within the IHO's discretion under Burlington/Carter.

Turning to the parents' arguments regarding music therapy, the district argues that, even if music therapy provided the student with a benefit, reimbursement for that service is not required. The district asserts that while parents "may obtain services which maximize a Student's potential . . . reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs." The district contends that reimbursement for music therapy is not required as it goes beyond what the student needed for educational benefit and that the IHO correctly held that the benefits of music therapy could be obtained through other services.

In their reply, the parents acknowledged that they served a second request for review with "minor edits and/or notes" on May 11, 2022. The parents contend that the district was not prejudiced by this because the district requested and obtained an extension.[17] Additionally, the

[15] The district acknowledges that an earlier version of the request for review was served timely on May 9, 2022.

[16] The district also concedes that the IHO erred by limited the related service funding to the Medicaid rates.

[17] Initially, the parents filed only one version of their request for review. In a letter to the parents' counsel, sent on June 8, 2022, the undersigned requested that the parents file a copy of both requests for review with the Office of State Review so that a decision could be made on this issue. That letter from my office was incorrectly dated May 20, 2022. In response, the parents filed both versions of the request for review. In this instance, the parents did not request leave to amend the request for review and should not have unilaterally served and filed an edited request for review. In such instances, a party should file the originally (and timely served) pleading with the

parents argue that they appealed every aspect of the IHO's decision regarding transportation funding.

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]). 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; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating

Office of State Review and request leave to amend the request for review from the SRO. Moreover, counsel for the parents failed to mark the pleading as an amended version. However, the district did not assert that it was prejudiced and conceded that the arguments in the two requests for review were "substantially the same" (Answer ¶ 10). A review of the two documents filed in response to the undersigned's request supports a finding that there is no substantial differences between the two versions of the request for review. Therefore, I decline to exercise my discretion to reject the parents' amended request for review. I caution the parents' attorneys that, in future matters, they should seek leave from an SRO to serve an amended pleading upon the opposing party, and a party proffering an amended pleading has an affirmative obligation to clearly mark such amended pleading accordingly.

that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied

when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

Initially, it is undisputed that iBrain did not deliver the transportation services to the student but that, instead, the services were delivered by a separate agency and that the music therapy services were part of the supplemental tuition calculated separately from the base tuition (see Parent Ex. E; Dist. Ex. 23). A parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). Here, the IHO found that the parents met their burden to prove that the student's unilateral placement for the summer portion of the 2021-22 school year, including related services, was appropriate (IHO Decision at pp. 10-11), and the district has not appealed this finding. The IHO also found that equitable considerations supported an award of "full tuition payment for the period from July 2021 to August 2021, also known as the extended school year" (id. at p. 12). In light of these determinations, it is difficult to discern any factual or legal basis for the IHO's distinction drawn in her conclusion that the district should not be responsible for the full costs of special transportation services or related therapy services, including music therapy. Although she did not explicitly describe why, it seems that, notwithstanding her determination that equitable considerations supported a full award of reimbursement, the IHO also found to the contrary that the services were excessive in terms of their cost and/or given the student's level of need and that therefore some equitable factors did not entirely support the parents' request for relief.

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; 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., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs

charged by the private school or 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).

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, as noted above, "[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). With respect to a unilateral placement's provision of services beyond those required to address a student's needs, 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 (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"]).

A. Transportation

Both parties agree that the IHO exceeded her jurisdiction and authority by voiding in full the transportation contract between Sisters and the parents, a point with which I have no disagreement with the parties as neither the IDEA nor State law confers such authority on an IHO. Consequently, the issue does not have to be discussed further, and the IHO's finding that the transportation contract was materially breached and voided is reversed. In addition, the district does not argue that the student did not need special transportations services to get to and from school. Therefore, the only disputed issue before me is whether the funding for transportation services should be limited to the days the student actually used the service.[18]

The transportation contract indicates that the parents are responsible to pay for 218 school days, whether or not the student utilizes the transportation service unless the transportation provider was at fault for the student not utilizing the services (Dist. Ex. 23 at pp. 1-2). In a recent case, a district court reviewed similar contracts with the same transportation company and

[18] The district's contention that the parents failed to appeal the IHO's determination that funding was only for the actual days used is without merit. The parents object to the IHO's holding which did not order full funding of transportation costs in compliance with the transportation contract (Req. for Rev. ¶¶ 11-24). The parents explicitly request that full funding be ordered pursuant to the transportation contract (id. ¶ 32). Thus, it is sufficiently clear from the reading of the request for review that the parents were appealing all aspects of the IHO findings regarding transportation funding.

determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't. of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]). The district attempts to distinguish Abrams from the facts of this matter because the order of funding was made under pendency in Abrams. Although the district is correct that a district's obligations under pendency can at times be different than the substantive relief that may be owed under a Burlington/Carter analysis, the district fails to provide any persuasive reason for departing from the unambiguous terms of the transportation contract in this matter.

Instead, the district argues that the transportation costs should be limited to the amount the district would have borne in the first instance had the district offered a FAPE. In other words, the district appears to argue that funding of transportation for summer 2021 including services that the student did not use would be excessive. However, the district does not dispute that this student required special transportation services and would have received such services through the district had it offered a FAPE. Further, during the impartial hearing, the district did not offer any evidence that other transportation options were available that would have resulted in a more reasonable cost or identify any other company with whom the parents could have contracted that would not have charged for the days when the student did not utilize the services. Indeed, if the district had provided special transportation to the student, it is unlikely that the district would incur no transportation expenses on the school days that the student was unable to attend school. For instance, when a school district purchases a bus or other vehicle with which it transports students, it is not necessarily relieved of the obligation to maintain the vehicle at the ready, pay drivers, purchase insurance, or have available fuel in place, and public taxpayers bear those expenses even if a student does not attend school on a particular day. Similarly, it is logical that the transportation company is required to have a vehicle and staff to transport the student each school day per the terms of the contract, even if the student did not utilize the service on a particular day and that the parents are liable to the transportation company for those costs.

If the IHO was concerned with excessive costs, it would have been permissible for her to instruct the parties to develop the evidentiary record. Medicaid rates and the student's eligibility for similar Medicaid services may be relevant factual areas of inquiry, but simply assuming that the parents would be able to privately contract for the same services at the "lowest Medicaid" rate without evidence is an unsound basis upon which to formulate relief.[19] Based on the foregoing, the IHO erred in limiting the transportation reimbursement award to days that the student utilized the service.

[19] It may be that the IHO was relying on her own experience of the State's complex structure for determining which of the applicable coded Medicaid rate(s) would be appropriate relief (see, e.g., Division of Finance and Rate Setting available at https://www.health.ny.gov/health_care/medicaid/rates/), but she did not identify that experience in the hearing record or describe it in her decision. The IHO cannot leave it to the parties, the undersigned, and reviewing courts to guess which Medicaid rate she intended, or why such a rate would be equitable relief under the facts of the case. If an IHO wishes to explore this area, the IHO should inquire whether the student is eligible (or may be eligible) for Medicaid services and under which rate(s) in the parties' respective viewpoints. Then the IHO should provide the parties an opportunity to be heard on whether such rates would be reasonable as equitable relief in the due process hearing in light of the student's particular circumstances.

B. Related Services – Music Therapy

Here, the parties agree that the IHO erred by limiting the amount of funding for the student's related services of PT, OT, speech-language therapy, and parent counseling and training. Therefore, the IHO's decision is modified to reflect that the district is required to fund the student's PT, OT, speech-language therapy, and parent counseling and training services per the terms of the iBrain enrollment contract.

Next, I turn to the issue of music therapy. The IHO explicitly found that the student received music therapy as part of his unilateral placement at iBrain and that it had "proven to provide a benefit" but indicated the service was "not required for [the] Student to make progress" indicating that the annual goals for music therapy could be met through other related services (IHO Decision at p. 11). While the IHO was not explicit in the factual or legal basis for her rationale, it seems she excluded funding for the music therapy as a segregable cost charged by iBrain that exceeded the level that the student required to receive a FAPE (see L.K., 2016 WL 899321, at *7).

The student's 2021-22 iBrain schedule indicates that the student was scheduled to receive music therapy twice per week for one hour per session (Parent Ex. J).[20] The iBrain IEP indicates that in music therapy the student was working on maintaining his grasp of instruments and reaching towards instruments (Parent Ex. N at p. 10). During music therapy, he would participate in song, instrument exploration, music listening, and music to aid in relaxation (id.). According to the iBrain IEP, music therapy helped the student practice transitions at the end of sessions (id.). The IEP also included three music therapy goals designed to increase active participation in music by developing gross and fine motor skills, sustain active participation by musically engaging with peers, and increase interpersonal skills by developing expressive and receptive language (id. at pp. 37-38).

The special education director at iBrain (director) testified that iBrain offered music therapy as a related service and that the student received music therapy (Tr. pp. 283, 285, 290). She testified that music therapy is part of the iBrain educational curriculum and that they have board certified music therapists who use specific techniques that are designed to support a student's learning and abilities across physical and social domains (Tr. p. 305). She explained that music is processed by different parts of the brain so it can "bypass" some areas that are "challenged" or "damaged" and "instead the skill can be supported through the use of the music therapy" (id.). The student received music therapy when he started at iBrain and is motivated by auditory stimuli (Tr. pp. 305-06). The director testified that music therapy seemed to be the student's "most preferred area of getting information" (Tr. p. 306). In music therapy, he was working on "reaching, coordinating his looking and reaching towards instruments" and found the music motivating (id.). In music therapy, they have employed techniques to help the student coordinate his reach, especially across midline (id.). Also, they have been working with the student on vocalizing to instruments and he has been practicing tracking instruments as they move, which enabled him to focus his eyes and attention (id.). Further, the director testified that not all students at iBrain

[20] As noted above, there is different information in the hearing record as to how many sessions of music therapy the student received at iBrain (compare Parent Ex. N at p. 10, with Parent Ex. N at p. 38, and Parent Exs. E at p. 2; J). In the request for review, the parents asked for funding per the rates and frequencies specified in the iBrain enrollment contract and as such, the enrollment contract is controlling, and the district will not be required to fund more than two 60-minute sessions per week of music therapy for summer 2021 (see Req. for Rev. at p. 2, ¶ 32).

receive music therapy (Tr. p. 334). The director testified that she had "read a few articles geared towards . . . "understanding the benefits of music therapy" and had "extensive conversations" with iBrain's music therapists in order to understand the interventions when she observes (Tr. pp. 337-38). Notably, none of the district witnesses provided any testimony regarding music therapy.

While it is possible that the goal areas addressed in the student's music therapy sessions at iBrain could have been addressed through other related services—and that the district would not necessarily have been required to provide music therapy as a related service in order to offer the student a FAPE—iBrain's decision to address the goals through a music therapy approach amounts, at most, to a modest pedagogical difference in approach among professionals and does not, without more, support a finding that delivery of the service was so impermissibly excessive as to warrant denial of the same.

Based on the foregoing, the IHO erred by failing to order reimbursement for the costs of the student's music therapy services for the 2021-22 school year.

VII. Conclusion

The IHO erred by reducing or denying the amounts that the district would be responsible to fund for the transportation services and related services, including music therapy, that were part of the student's unilateral placement for July and August 2021.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 29, 2022, is modified by reversing those portions that reduced or denied the amount of reimbursement to be paid for the transportation and related services portions or the student's unilateral placement for July and August 2021; and

IT IS FURTHER ORDERED that the district is ordered to fund all of the student's related services per the iBrain enrollment contract, including music therapy, for July and August 2021; and

IT IS FURTHER ORDERED that the district is ordered to fully fund the student's special transportation services per the terms of the transportation contract for July and August 2021.

Dated: **Albany, New York**
July 5, 2022

JUSTYN P. BATES
STATE REVIEW OFFICER