The University of the State of New York

The State Education Department
State Review Officer
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No. 23-262

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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, 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 for respondent (the district) to fund the costs of the student's transportation services during the 2023-24 school year. For reasons explained herein, the appeal must be sustained in part and the matter must be remanded to the IHO for further administrative proceedings.

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

Given the limited issues on appeal, a full recitation of the student's educational history is not warranted. Briefly, the student began attending the International Academy for the Brain (iBrain) for the 2018-19 school year and has continuously attended iBrain since that time (see Parent Ex. I ¶ 7).[1]

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

On March 14, 2023, a CSE convened to conduct the student's annual review, and, finding the student eligible for special education as a student with a traumatic brain injury, developed an IEP for the student with an implementation date of March 27, 2023 (see Parent Ex. B at pp. 1, 78, 81). The March 2023 CSE recommended a 12-month program for the student consisting of a 12:1+(3:1) special class placement in a specialized school (Parent Ex. B at pp. 71, 73, 78). The student's March 2023 IEP recommended one 60-minute session per month of parent counseling and training, and that the student receive: three periods per week of adapted physical education; five 60-minute sessions per week of individual occupational therapy (OT); five 60-minute sessions per week of individual physical therapy (PT); five 60-minute sessions per week of individual speech-language therapy; five 60-minute sessions per week of individual vision education services; and individual school nursing services as needed (id. at pp. 71-72). The March 2023 IEP recommended that the student receive the following special transportation accommodations and services: "[t]ransportation from the closest safe curb location to school;" 1:1 paraprofessional services; a lift bus; accommodation for a regular sized wheelchair; limited travel time; and climate control (id. at pp. 77-78).

On June 26, 2023, the parent executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year from July 5, 2023 through June 21, 2024 (see Parent Ex. E at pp. 1, 6).

In a due process complaint notice dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural and substantive violations (see Parent Ex. A at pp. 1-8). As relief, the parent sought an order directing the district to directly pay iBrain for the costs of the student's tuition in addition to the costs of his related services and the services of a 1:1 paraprofessional; to directly or prospectively fund the costs of the student's special education transportation services with "limited travel time, a 1:1 transportation paraprofessional, air conditioning, a lift bus, and a regular-sized wheelchair"; to fund the costs of an independent educational evaluation (IEE) consisting of a neuropsychological evaluation; and to reconvene a CSE meeting to "address changes if necessary" (id. at p. 8).

The evidence reflects that the parent executed a "School Transportation Annual Service Agreement" (transportation agreement) with Sisters Travel and Transportation Services, LLC (Sisters Travel) to provide the student with round-trip transportation between his home and iBrain during the 2023-24 school year beginning on July 1, 2023 and concluding on June 30, 2024 (Parent Ex. F at pp. 1, 6).[2] According to the transportation agreement, the parent was responsible to pay for approximately 218 school days during the 2023-24, 12-month school year, whether or not the student utilized the transportation service on a particular day unless the transportation provider was at fault for the student not utilizing the services (id. at pp. 1, 2). The transportation agreement allowed for each party to terminate the agreement "for cause" and allowed the parent to terminate the agreement if the student "relocate[d] outside of [the] local school district or due to health reasons [the student] [wa]s no longer requiring special school transportation services" (id. at p. 3). In addition, the terms of the transportation

[2] The transportation agreement does not include the date the parent executed the agreement (see generally Parent Ex. F). During testimony, the parent affirmed that she recalled signing the transportation agreement on July 7, 2023 (see Tr. pp. 25, 98).

agreement allowed the parent to terminate the agreement if the parent had "exhausted all legal remedies available to them to secure third party funding"; however, the parent "remain[ed] responsible for any balance due to the [transportation provider] on the date of such termination" (id.). The total amount of the transportation services was listed as $128,620, with payments due in three installments on July 5, 2023; September 1, 2023; and January 1, 2024 (id. at p. 2). The transportation agreement noted that the provider would "not take any deductions, omissions, or refunds for unexcused absences, withdrawal, suspension or for any other reason except as outlined" therein (id. at p. 2).

On September 8, 2023, the district submitted subpoenas to the IHO requesting information from iBrain and from Sisters Travel (Dist. Ex. 1).

An impartial hearing convened on September 26, 2023 and concluded on October 12, 2023 after two days of proceedings (Tr. pp. 17-136).[3] At the outset of the hearing, the district conceded that it could not defend its program because it did not provide the parent with a school location where the student's IEP would have been implemented (Tr. pp. 30-31). During the September 26, 2023 hearing following the testimony of the parent's witnesses, the district indicated that some of the testimony concerned information that was requested in the district's subpoenas and requested that the IHO sign the subpoenas (Tr. pp. 103-04). The IHO indicated that he had not signed the subpoenas because he believed they related to the parent's burden and were overbroad, later adding that he was waiting for the parent's presentation of evidence before signing the subpoenas (Tr. pp. 104, 107, 108-09). The IHO then indicated that if the district wrote "narrowly targeted subpoenas" on the issues explored during the hearing, the IHO would review them and sign them if he concluded that they were appropriate (Tr. pp. 110-11). On September 26, 2023, the district submitted an updated subpoena requesting information from iBrain, but not an updated subpoena requesting information from Sisters Travel, and the parent objected to the subpoena (Dist. Ex. 2 at pp. 1-2, 4). The IHO addressed the district's request and the parent's objections in an interim decision dated September 26, 2023 and signed the district's proposed subpoena on the same day (September 26, 2023 Interim IHO Decision at p. 2; Dist. Ex. 2 at p. 4). iBrain responded to the district's subpoena on October 10, 2023 (Dist. Ex. 3). The parties then reconvened for the final hearing date on October 12, 2023 and presented their closing arguments (Tr. pp. 116-36).

In a decision dated October 18, 2023, the IHO determined that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of funding for the cost of the student's tuition (IHO Decision at pp. 21-24). As relief, the IHO ordered the district to fund the cost of the student's tuition at iBrain for the 2023-24 school year (id. at p. 26-27). However, although the IHO found "that the student was recommended for, and required, specialized transportation services" he ruled that "[t]he equities require that the amount to be reimbursed or paid by the district not be unreasonably above the range of fair market rates" (id. at pp. 24-25). The IHO ordered that the district was:

[3] A pendency hearing was held on July 25, 2023 (Tr. pp. 1-7). A pre-hearing conference was conducted on August 25, 2023 (Tr. pp. 8-16).

> obligated to pay no more than the highest of three objective measures: (1) the approved Medicaid rate for a trip such as the one between the student's home and the school utilizing comparable vehicle and staff; (2) the approved Medicare rate for a trip such as the one between the student's home and the school utilizing comparable vehicle and staff; or (3) the actual rate paid by the district during 2023-24 for comparable services in comparable vehicle with comparable staff provided to its Office of Pupil Transportation by entities contracting with the district to provide such services
> (id. at p. 25)[4]

Further, in ordering funding for transportation, the IHO ordered that the district fund the cost of the student's transportation "for each day actually transported during the 2023-2024 school year up to the date of th[e] [IHO] Decision" (IHO Decision at p. 27). For the remainder of the 2023-24 school year, the IHO ordered the district to either fund transportation at the IHO's specified rates or provide the student with transportation through the district (id.). In his decision, the IHO also found that the district failed to prove that it had timely evaluated the student prior to the March 2023 CSE meeting (id. at p. 26). As such, the IHO ordered that the district evaluate the student in all relevant or suspected areas of disability before the next reconvene of the CSE (id. at p. 27).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer with cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred by not awarding the full cost of the transportation contract between the parent and Sisters Travel;

2. Whether the IHO erred in directing the district to conduct evaluations of the student in all areas of suspected or actual disability.

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]).

[4] At least a portion of the IHO's transportation cost reduction rationale was requested by the district representative during the hearing (Tr. pp. 31-32, 129-30).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

[holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

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

VI. Discussion

A. Transportation

At the outset, the parties have not appealed from the IHO's findings that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year, and that the parent was entitled to an award of direct funding for the costs of the student's tuition at iBrain for the 2023-24 school year (see generally Req. for Rev.; Answer). As a result, these determinations have

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The final criterion for a reimbursement award is that the parent's 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"]).[6]

It is uncontested that the student requires special transportation, including a transportation paraprofessional, in order to attend school (see Parent Ex. B at pp. 77-78). The parent testified that the sole reason she chose Sisters Transportation for the student was because "[i]t was suggested through [iBrain]" (Tr. p. 97). When questioned whether she had been presented with any "alternative or additional transportation options," the parent replied that she

[6] In support of the parent's contention that the IHO erred by failing to award the parent the full cost of the transportation contract with Sisters Travel, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company and 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]). In opposition, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO properly limited the award of transportation costs to be within the range of fair market rates, as opposed to the amount the parent contracted to pay in the transportation agreement. In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023). It is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred in reducing the award of transportation funding, as all three of the matters cited by the parties involved implementation of either pendency orders or a final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a review of the administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

had used "a yellow school bus" in the past, "but it ha[d] not been appropriate for [the student]" (Tr. pp. 97-98). The parent confirmed that the March 2023 CSE included transportation services in the student's March 2023 IEP, but she testified that she did not get a call from the Office of Pupil Transportation to set up the student's transportation through the district (Tr. p. 101). The parent testified that the last time the student received transportation through the district was "maybe in 2014, maybe 2015" but that the student had "only utilized Sisters transportation" since beginning at iBrain in the 2018-19 school year (Tr. pp. 101-02). The parent testified that she had not received any invoices from Sisters Transportation for the 2023-24 school year (id.).

It is concerning that the parent testified that she did not review any other transportation companies to compare availability and pricing before signing a contract with Sisters Transportation with the intent that it would obligate the district to pay $128,620 to Sisters Transportation for the 2023-24 school year, while there is no indication that the parent ever expected to make any payments (Tr. pp. 97-98, 101; Parent Ex. F at p. 2). The parent noted that the March 2023 "CSE also agreed with iBRAIN's transportation recommendations for [the student]" and the student's March 2023 IEP recommended all the transportation accommodations and services recommended by iBrain (Req. for Rev. at p. 2 ¶ 5; compare Parent Ex. B at pp. 77-78 with Parent Ex. C at p. 81). State law provides that districts must generally provide transportation for children residing in the district "to and from the school they legally attend" (Educ. Law § 3635[1][a]). A request for transportation must be made by April 1 of the preceding school year, except that a district may not deny a late request "where a reasonable explanation is provided for the delay" (Educ. Law § 3635[2]).

In this case, the IEP for the student's 2023-24 school year was finalized in March 2023, well before the April 1 deadline for the parent to request that the district provide the student with transportation to iBrain pursuant to the transportation recommendations contained in the March 2023 IEP. It is important to note that although the parent disagreed with other portions of the March 2023 IEP, she agreed with the CSE's recommendations for special transportation. The parent is correct to quote N.Y. Educ. Law §4402(4)(d) which directs that school districts in New York State are mandated to provide special education to students with appropriate transportation to and from a nonpublic school within fifty miles (Req. for Rev. at p. 7 ¶ 3). But I repeat my concern with the parent's admission that she accepted iBrain's recommendation to utilize Sisters Transportation and entered into a contract that essentially obligates the district to pay over $100,000 a year without attempting to contact any other transportation companies or the district itself to see if the district could have provided the same or similar transportation free to the parent.

The concerns above alone may not have resulted in the outcome of this proceeding. However, after conducting an independent review of the evidence in the record, I have additional concerns regarding the parent's transportation reimbursement request. Although not part of the student's 2023-24 school year, the iBrain quarterly progress report dated April 21, 2023 noted that the student had "just started at the school" and that progress towards his music therapy goals "could not be assessed due to all remote instruction model currently in use" (Dist. Ex. 4 at pp. 15-17). The iBrain quarterly progress report dated July 7, 2023 noted that "[f]or this school year, we will be working on recalling information he has also learned at home" but also stated that the student "really like[d] his classmates" and for most of the student's music

therapy comments it is noted that there were "[l]imited opportunities to address this goal this quarter and will continue to be targeted next quarter" (Dist. Ex. 5 at pp. 1, 4, 11-12).[7] The deputy director of special education at iBrain (deputy director) testified that the student had five students in his class (Tr. pp. 38, 42-43). When asked how often the deputy director interacted with the student the deputy director answered that he observed the student specifically "at least once a week" although he did not indicate if that observation occurred remotely or in person (Tr. p. 54). Additionally, the parent testified that the student had excellent attendance and was rarely absent (Tr. pp. 98-99). However, other than testifying that Sisters Transportation provided transportation services for the student and that the student had a transportation paraprofessional for the 2023-24 school year, there is little evidence as to how frequently the student actually attended school in-person during the 2023-24 school year. Accordingly, the conflicting evidence contained in the hearing records prevents me from finding with reasonable confidence that the student is attending iBrain fully in-person for transportation purposes, such that it would have been reasonable to enter into a contract for transportation services that required payment whether or not the student was present in school.

It is worth noting that much of the above discrepancies in the hearing record could have been resolved had the district been permitted to subpoena records from Sisters Transportation as originally requested, or had the parent sought to produce a complete hearing record by producing that information within the control of the transportation contractor she selected. In particular, the district had requested invoices or billing information pertaining to the student, including "invoices, dates of service, and billing summaries for the 2023-2024 School Year" (Dist. Ex. 1 at p. 5). Had the district submitted a subpoena seeking information from Sisters Transportation for the IHO's signature on September 26, 2023, I may have been inclined to authorize it had the IHO decided not to do so, but since the district failed to pursue its subpoena as related to Sisters Transportation, that issue has become moot.

As noted above, there are significant concerns regarding the student's in-person attendance during the 2023-24 school year, whether the parent contacted any alternative service providers in order to determine a reasonable rate for a private provider of special transportation, whether the parent had a full understanding that she would be responsible for payment to Sisters Transportation if the district is not ordered to make payments, and why the parent did not seek to have the district transport the student to iBrain considering the district was offering the same special transportation as what was being sought privately. Rather than deny relief that may be warranted, to address these questions, the matter is being remanded to the IHO for further proceedings.

Nevertheless, I must also address the IHO's finding that the transportation services were excessive in terms of their cost and that, therefore, equitable factors did not support the parent's request for relief. The IHO acknowledged that there was no foundation in the hearing record to define a reasonable rate for transportation (IHO Decision at p. 25). The IHO then capped the amount of funding for transportation to an amount determined by "three objective measures" rather than calculated by the contract between the parent and the private transportation agency she contracted with (IHO decision at p. 25; see Parent Ex. F). Among

[7] The student's extended 2023-24 school year started on July 5, 2023 (Parent Ex. E at p. 1).

the factors that may warrant a reduction in tuition based on 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).

In the absence of any documentary or testimonial evidence regarding the reasonableness of the costs of the transportation services, the IHO's finding that "the district is obligated to reimburse or directly pay for the costs of these services, but this obligation is capped by the highest of three objective measures of market rates" has no support in the hearing record (see IHO decision at pp. 25-26).[8] In so finding, the IHO seemed to improperly rely on his own knowledge of the markets for special transportation services (i.e., judicial notice).[9] Accordingly, this finding was without merit. The IHO may address any concerns regarding excessive costs by instructing the parties to further develop the evidentiary record with respect to that issue upon remand. Should the IHO remain committed to introducing a government reimbursement rate through judicial notice, at the very least the IHO must first disclose the specific rate(s) in dollar figures or method of calculation upon which a rate is based including how or where the parties may access the same information, then provide the parties a reasonable opportunity to respond with fact arguments or rate information of their own.

B. Evaluations

The district cross-appeals from the IHO's directive that it conduct evaluations of the student "in all areas of suspected disability." Although the district claims that the parent failed

[8] The IHO may have considered the terms of the contract with Sisters Travel to be excessive or constitute price gauging, and it may be the IHO is correct in his assumption; however, without evidence in the hearing record to support the IHO's assumption of excessiveness of cost, it is just that and there is no basis for upholding it.

[9] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

to request that the district conduct evaluations of the student in the due process complaint notice or at the impartial hearing, the district is incorrect. In the parent's due process complaint notice, the parent alleged that the district failed to evaluate the student in all areas of disability, asserted that she disagreed with the district's evaluations or lack thereof, and formally requested "an order directing [the district] to fund [an] independent educational evaluation ("IEE") in the form of an independent neuropsychological evaluation to be conducted by a qualified provider" (Parent Ex. A at pp. 7, 8).

The IHO was careful in crafting his order to only direct that the parent "may seek" IEEs "in areas not assessed by the district or with which the family disagrees, at reasonable market prices" (IHO Decision at p. 27). Otherwise, the IHO directed that "prior to the 2023-24 annual review the district shall ensure the student has been fully evaluated in all areas of actual o[r] suspected disability" (id.). Despite the student's current placement at iBrain, it is the district's responsibility to have the student properly evaluated prior to the next time the CSE convenes so that the CSE be fully informed as to the student's needs before developing an IEP for the student.

A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

Upon review of the March 2023 IEP, it appears that the most recent reports used by the March 2023 CSE were: a February 7, 2023 and March 2, 2023 Dynamic AAC Goals Grid assessment, a March 2, 2023 Communication Function Classification System assessment, a March 2, 2023 pediatric evaluation of disability inventory, and a March 3, 2023 Level 1 vocational assessment parent interview, but the remaining information reviewed by the CSE were iBrain reports, iBrain's educational plan and evaluative information from 2022 and 2021 (Parent Ex. B at pp. 1-3). It is apparent from the IHO's decision that he was deeply dissatisfied

with the district's failure to defend its March 2023 IEP and that the IHO believed that once the district "conceded [its] inability to meet [its] burden [it] need[ed] [to] immediately turn [its] attention to working together with the family and the decision-maker as problem solvers to develop an appropriate alternative" (IHO Decision at p. 19). The IHO found that "[t]he district did not here make any showing of having timely conducted an evaluation of the student," which he determined was a substantive denial of FAPE, that "create[ed] the need that it do so, immediately" (id. at p. 26). The March 2023 IEP documented that the parent "expressed that she would like the audiological evaluation to be conducted for [the student]" (Parent Ex. B at p. 80). The IHO noted that "there [wa]s no indication about what, if anything, the district did in response to this request" and, therefore, the IHO ordered that the district "ensure that the student will have been fully evaluated utilizing assessments no older than three years prior to the next review, in all areas of actual or suspected disability, prior to the student's next CSE review" (IHO Decision at p. 26). Because it is the district's responsibility ensure that a student is appropriately assessed in all areas of suspected disability, the IHO's order is permissible and will not be disturbed.

VII. Conclusion

Having found that the IHO erred in his reasoning behind the limit of the award of transportation costs to fair market value rates, but also having found that the evidentiary record lacks sufficient evidence about the student's in-person attendance at iBrain during the 2023-24 school year to determine the reasonableness of the parent entering into the transportation contract for the 2023-24 school year, on appeal, the matter must be remanded to the IHO.

Having found that the district failed to provide any evidence that it had evaluated the student within the regulatory timelines, I decline to reverse the IHO's order directing the district to conduct evaluations of the student in all areas of suspected disability.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 18, 2023, is modified by reversing that portion which ordered the district to fund the student's transportation for days the student was transported to and from iBrain capped by the highest of the three measures outlined by the IHO in his decision; and,

IT IS FURTHER ORDERED that the matter shall be remanded to the IHO for further proceedings consistent with this decision.

Dated: **Albany, New York**
January 12, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER