The University of the State of New York

The State Education Department
State Review Officer
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No. 23-266

Application of a STUDENT WITH A DISABILITY, by her 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 Zach Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 those portions of a decision of an impartial hearing officer (IHO) which denied in part her request for direct funding of special transportation to and from the International Academy for the Brain (iBrain) for her daughter for the 2023-24 school year. Respondent (the district) cross-appeals from that portion of the IHO decision which ordered it to fund the costs of the student's tuition and services at iBrain for the 2023-24 school year. The appeal must be sustained. The cross-appeal must dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level appeal involving a unilateral placement at iBrain for the 2018-19 school year (Application of a Student with a Disability, Appeal No. 18-114).[1] The parties' familiarity with this matter is presumed and, therefore, the facts and

[1] Two years later, the Second Circuit Court of Appeal's holding in Ventura de Paulino v. New York City Dep't of Education (959 F.3d 519, 529 [2d Cir. 2020]) abrogated the legal principles applied in that administrative proceeding.

procedural history of the case and the IHO's decision will not be recited here in detail. The student in this matter has significant global developmental delays and has been attending iBrain since the 2018-19 school year (Parent Exs. B; H ¶ 8; Dist. Ex. 11).[2, 3] A CSE convened on January 13, 2023, found the student eligible for special education as a student with a traumatic brain injury, and formulated an IEP for the student with a projected implementation date of January 27, 2023 (see generally Dist. Ex. 5).[4] In a prior written notice and a school location letter, dated March 6, 2023, the district summarized the recommendations of the January 2023 CSE and notified the parent of the particular public school site to which it assigned the student to attend for the 2023-24 school year (Dist. Ex. 2). The parent disagreed with the recommendations contained in the January 2023 IEP, as well as with the assigned public school site for the 2023-24 school year, and, as a result, in a letter dated June 20, 2023, she notified the district of her intent to unilaterally place the student at iBrain (see Parent Ex. C). 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 (see Parent Ex. A).

After prehearing conferences on August 15 and August 24, 2023, an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 27, 2023 (Tr. pp. 1-78).[5] In a decision dated October 19, 2023, the IHO determined that the district failed to offer the student a 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 district funding of the costs of the student's tuition (IHO Decision at pp. 7-11). Accordingly, the IHO ordered the district to directly fund the costs of the student's tuition, supplemental tuition, and nursing fees for the 2023-24 school year (id. at p. 12). However, regarding the private transportation, the IHO ordered the district to fund only those services "actually provided" (id. at pp. 11-12). Per the parent's request, the IHO ordered the district to conduct a reevaluation of the student to include psychoeducational or neuropsychological, speech-language therapy, OT, and PT evaluations (id.). Further, the IHO ordered the district to reconvene after the reevaluation were completed and "to add music therapy" to the student's IEP (id. at pp. 11-13).

IV. Appeal for State-Level Review

The parent appeals and the district cross-appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer with cross-appeal, and the parent's answer to the cross-appeal are also presumed and, therefore, the

[2] The hearing record contains duplicative exhibits (compare Parent Exs. A-B, with Dist. Exs. 1; 6). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content.

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

[4] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[5] The parties agreed that the student's pendency placement was based on a prior unappealed IHO decision dated December 10, 2022, and consisted of tuition and related services at iBrain, as well as transportation to and from iBrain, 1:1 nursing, and a 1:1 paraprofessional as needed (Parent Ex. F).

allegations and arguments will not be recited in detail here. The gravamen of the parent's appeal is that the IHO erred in limiting the funding for the unilaterally obtained transportation services. The crux of the district's cross-appeal is that the IHO erred in ordering the district to fund the student's tuition and services in full as the costs associated with tuition and services at iBrain were excessive and consisted of segregable services that exceeded what the district would have been required to provide as part of a FAPE.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 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]).[6]

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

[6] 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).

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

Initially, the district has not appealed from the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year and that iBrain was an appropriate unilateral placement for the student (see IHO Decision at pp. 7-11). Accordingly, these findings have become final and binding on the parties and will not be further discussed (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 only issues for review on appeal relate to equitable considerations regarding the extent of the relief directed by the IHO.

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; 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"]).

Among 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).

More specific to segregable services, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

During the impartial hearing, the district argued that the unilateral placement was excessive in terms of totality of services and cost (see Tr. pp. 38, 67-68). However, the district did not present any evidence that the costs of iBrain or the transportation and nursing costs were excessive, i.e., by reference to evidence of lower-cost programs and/or services that were comparable to and available in the same geographic areas or correlated to the length of the school day.

A. Base Tuition

In its cross-appeal, the district argues that the base tuition at iBrain is excessive, "particularly because it does not include any related services, which [we]re billed separately at substantial additional cost, and because the frequencies and durations of these related services leaves very little time for basic instruction."

The iBrain enrollment contract set forth a base tuition fee to include "the cost of an individual paraprofessional, and school nurse as well as the academic programming" (Parent Ex. D at p. 1). Specifically excluded from the base tuition was the "cost of related services, transportation paraprofessional, any individual nursing services or assistive technology devices and equipment" (id.). The contract indicated that supplemental tuition fees included the cost of related services and assistive technology (id. at pp. 1-2). The parent entered separate agreements with different agencies for the provision of transportation and nursing services (Parent Exs. E; G).

The student's daily schedule ran from 8:30 a.m. through 5:00 p.m. and thus consisted of approximately 42.5 hours per week, 21 hours of which consisted of services categorized under iBrain's supplemental tuition costs (i.e., related services), leaving 21.5 hours for instruction in activities of daily living (ADLs), 1:1 academics, literacy/math, sensory, and a classroom activity,

as well as an hour daily for lunch and a half hour daily for dismissal (Dist. Ex. 18). In addition, the student was assigned a 1:1 paraprofessional to accompany him throughout the day, the cost of which was included in the base tuition (see Parent Ex. D at p. 1).

Generally speaking, an excessive cost argument focuses on whether the amount charged for tuition was reasonable and requires, at a minimum, evidence of not only the tuition charged by the unilateral placement, but evidence of market rates charged by similar placements or providers of similar services. In this instance, the hearing record includes the parent's evidence of only the tuition charged by iBrain, as set forth in the contract and is otherwise devoid of any evidence regarding reasonable market rates (see Parent Ex. D). The student's schedule as compared to the base versus supplemental tuition costs is not enough to demonstrate that the costs of the unilateral placement were excessive.

Accordingly, while I agree with the district that the cumulative total of the base tuition, supplemental tuition, transportation costs, and nursing costs may be very high, there is an insufficient evidentiary basis in the hearing record to concluded that they were so excessive that a reduction in the award of direct funding is warranted.

B. Segregable Services

The district argues that the portions of the tuition awarded by the IHO for 1:1 nursing services and music therapy should be excluded from the total award given that they exceed what the student needed in order to receive a FAPE. The district argues that none of the assessments of the student found that she required these services and that there was nothing in the student's iBrain education plan that established why her 1:1 health paraprofessional together with school nurse services could not sufficiently address the student's medical needs and why the student needed music therapy to make educational progress. Rather, the district alleges that the provision of 1:1 nursing services and music therapy amounted to "improper efforts to maximize [the s]tudent's potential at public expense"

To resolve the issues on appeal, a brief description of the student's needs is warranted. At the time of the impartial hearing, the student was 12 years old and attending iBrain for the 2023-24 school year in a 6:1+1 special class with related services, and 1:1 nursing and 1:1 paraprofessional services (Tr. p. 50; Parent Ex. H ¶¶ 3, 7). The student has received diagnoses including seizure disorder, cerebral palsy, developmental delay, optic neuropathy, and right eye blindness (Parent Ex. B at p. 1). The student uses a g-tube for nutrition, a seizure monitor, and an augmentative and alternative communication (AAC) device, and she is nonverbal and non-ambulatory (id. at pp. 1, 2, 6). The student exhibits severe impairments in her cognitive, language, memory, and attention skills, and her "rate of progress is dictated by her physical health and well-being" (id. at p. 1).

1. 1:1 Nursing Services

On November 8, 2022, the student's physician completed a medical accommodations request form that indicated the student experienced one to two seizures per month, which were "well controlled by the current medication regimen, and recommended that the student receive "[e]mergency [m]edications" in school (Parent Ex. J at pp. 1, 4). According to the form, the student

did not require daily administration of medication during school hours, nor did she require in-school medications more than three times per day (id. at p. 1). The physician determined that the student was not "considered to be medically unstable" and did not require routine and emergency "[p]rocedures and [t]reatments" including suctioning, airway management, or vagal nerve stimulator; or "[e]quipment [m]anagement" including use of a ventilator or oxygen (id. at pp. 2, 3).

The January 12, 2023 iBrain report and education plan (iBrain plan) indicated that the student "require[d] a 1:1 nurse to administer emergency medications, aid in safety, and monitor for seizure activity" (Parent Ex. B at pp. 9, 11). Additionally, the student's 1:1 paraprofessional was necessary to support the student "during all activities in all environments and to aid in positioning, transfers, donning/doffing of splints, attention, cognitive processing, motor control, access to assistive technology, navigating environments, [activities of daily living] ADLs, and safety" (id. at p. 11). iBrain staff recommended that the student receive both full time 1:1 nursing and 1:1 paraprofessional services throughout the school day in all environments (id. at p. 70).

The student's iBrain individualized health plan (IHP) identified the following nursing interventions: develop and implement an emergency evacuation plan; refer for and coordinate special education, PT, OT, vision, and speech-language therapy services; assess need for assistance with assistive technology; use 1:1 nurse for close monitoring; observe fall and seizure precautions; obtain seizure action plan, medication administration form, and necessary medications; monitor medications for expired/used medication replacement; monitor seizure activity, g-tube feeding and tolerance, food and fluid intake, and bowel movements; observe aspiration and incontinence precautions; conduct frequent skin checks and repositioning; ensure that the "IEP" and IHP include appropriate transition planning activities; assist the family with interventions in the home setting (Parent Ex. B at pp. 45-50).

Annual goals for the student's paraprofessional included that the paraprofessional would "consistently consult with the school nurse regarding close monitoring of medical needs," with short-term objectives that the paraprofessional would observe fall and seizure precautions at all times; obtain information about the student's seizures; monitor administration of anticonvulsive medications by the nurse; observe incontinence precautions and conduct frequent skin checks and repositioning; and monitor bowel movement schedule (Parent Ex. B at p. 67).

According to the parent, the student required a full-time 1:1 paraprofessional and a full-time 1:1 nurse "to monitor [the student's] seizure activity, prevent aspiration during feeding, ensure she receive[d] the necessary asthma medication and treatment, ensure her safety during physical activity and transport, observe fall precautions, monitoring and toileting, and to attend to her medical and academic needs throughout the day" (Parent Ex. H ¶ 6).[7] In written testimony, the deputy director of special education at iBrain (deputy director) indicated that the student required the assistance of a 1:1 paraprofessional and a 1:1 nurse (Parent Ex. I ¶¶ 1, 14, 15).

[7] The iBrain plan indicated that the parent requested discontinuation of annual goals to work on oral feeding, and the speech-language pathologist indicated there was not enough data to comment on her oral/motor and feeding progress (Parent Ex. B at pp. 11, 26-27).

When asked by the IHO during the impartial hearing why the student required 1:1 paraprofessional services, the deputy director testified the services were necessary due to the student's "severe medical conditions" and her need for "intensive assistance throughout the day in all areas" (Tr. pp. 48-49). He confirmed that the "same reasons appl[lied] for the necessity of the nursing service[s]" (Tr. p. 49). According to the deputy director, because the student used a g-tube for nutrition, "it's kind of mandated that she has a nurse with her as well" and the nurse was also needed to address the student's "extensive medical conditions" (id.). In contrast to the parent's preferred programming at iBrain, the January 2023 CSE had proposed individual nursing services for the student "as needed" located in the public school "Nurses office" (Dist. Ex. 5 at p. 59).

Based on the foregoing, there is sufficient evidence under the totality of the circumstances to support the reimbursement of the services of a 1:1 nurse to meet the student's medical needs in addition to the 1:1 paraprofessional, and the evidence in the hearing record does not reveal that the nursing services provided to the student as part of the unilateral placement were so excessive that they should be excluded from the relief provided to the parent for the costs of iBrain for the 2023-24 school year.

2. Music Therapy

On November 8, 2022, the student's physician recommended that the student receive related services of OT, PT, speech-language and vision therapies and 1:1 paraprofessional services during school (Parent Ex. J at pp. 2, 3). The iBrain plan reflected that the student was "highly motivated" by music and musical activities (see e.g. Parent Ex. B at pp. 11, 12, 18, 21, 39, 41). Preferred activities of the student included listening to music, and, according to the iBrain plan, music breaks were used to "maintain attention" (id. at pp. 1, 2, 16, 17, 21, 24, 30). The student had a "number of highly preferred songs and artists" and she demonstrated increased "icon activations and independence" when selecting preferred music (id. at pp. 21, 24). She performed "best" when reading familiar repetitive texts that had a musical rhythm and exhibited increased visual attention when the display included music (id. at pp. 17, 19). The iBrain IEP reflected that music was incorporated into the student's speech-language therapy sessions when she was using her AAC device (id. at pp. 24-25).

According to the iBrain plan, the student received two 60-minute individual sessions per week and one 60-minute group session per week of music therapy (Parent Ex. B at p. 40). The iBrain plan indicated that the student "greatly respond[ed] to music, different genres, and tempos," and that she was "more motivated to participate in academic or non-musical exercises with the presence of music" (id. at pp. 40, 65). In typical music therapy sessions, the student practiced greetings and reciprocal communication, explored instruments to promote learning and neuroplasticity, and was exposed to different sounds to sustain engagement and increase arousal level (id.). The student also used her AAC device during music therapy sessions (id.). The iBrain plan indicated that the student had made progress in music therapy, demonstrated by her improved ability to sustain attention to instruments or activities, self-regulate, and vocalize with higher volume and quicker response time (id. at pp. 40-41).

The iBrain plan included annual goals for music therapy to increase the student's ability to move her right upper extremity, her "attention maintenance skills," and her expressive communication skills to indicate preferences through specific techniques (id. at pp. 63-64). As of

January 13, 2023, the student was making progress toward or had achieved some of her music therapy annual goals and short-term objectives (see Dist. Ex. 3 at pp. 9-11).

Regarding music therapy, the deputy director testified that he had "often" observed the student and that "she absolutely love[d] music therapy"; music was "an extensive motivator" for the student and she loved exploring a variety of musical instruments (Tr. pp. 50-51). According to the deputy director, music was "one of the key contributors to [the student] being able to make improvements in her ability to self-regulate," it improved her "socioemotional connection," and some of the techniques used during music therapy had helped the student improve her ability to express herself (Tr. p. 51).

With regard to the district's contention that the parent unilaterally obtained excessive services by including music therapy in the student's programming at iBrain, 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. Furthermore, in this case, I find that the district's position lacks sincerity when the evidence shows that the district's own proposed January 2023 IEP discusses the benefits of using music over 50 times in the student's programming and her responsiveness to the approach (Dist. Ex. 5 at pp. 4-9, 17-20, 26-27, 30, 34, 49), albeit the extent of that discussion in the district's IEP is likely due to the fact that the district appeared to have cut and paste large portions of the iBrain education plan into its own IEP, and only offered its reasons for rejecting music therapy on one page (id. at p. 22). Suffice it to say, the district's argument regarding excessiveness in the parent's pursuit of music therapy at the unilateral placement misses the mark in this case by a considerable margin.

Based on the foregoing, the evidence in the hearing record does not lead me to conclude that the music therapy services provided to the student as part of the unilateral placement should be excluded from the tuition award for the 2023-24 school year.

C. Transportation

The IHO effectively reduced the relief awarded for district funding of transportation for the student at iBrain for the 2023-24 school year on an equitable basis by directing the district to fund transportation services actually provided to the student during the 2023-24 school year (IHO Decision at pp. 11-12).

Initially, the parties do not dispute that this student required special transportation services and, pursuant to the recommendations in the January 2023 IEP, she would have received such services through the district had it offered a FAPE (see Dist. Ex. 5 at p. 64). In addition, it is undisputed that iBrain did not deliver the transportation services to the student but that, instead, the parent contracted with a separate company for transportation services (see Parent Ex. E). In particular, the parent entered a contract with Sisters Travel and Transportation Services, LLC (Sisters) for the provision of transportation to and from iBrain for the 12-month 2023-24 school

year (id.). The contract set forth an annual rate for the services and noted that fees would be based on school days even if the services were not used (id. at p. 2).

The parent testified that she found Sisters through iBrain, that iBrain had "always had a resource for transportation" for the student, and that, therefore, she never "had an issue . . . searching or looking" for another source for transportation (Tr. pp. 57-58). The parent stated her understanding of the costs of the transportation, which was approximately the fee stated in the contract (compare Tr. p. 58, with Parent Ex. E). She further testified that, if she did not prevail at the impartial hearing, that she understood she would be responsible to pay Sisters for the transportation services (Tr. p. 58).

As noted above, during the impartial hearing, the district argued that the unilateral placement including transportation was excessive in terms of cost (see Tr. pp. 38, 67-68). However, once again the district did not present any evidence of alternative transportation options or whether similar transportation services to those being provided to the student by the private agency could have been provided at significantly lower cost by another private company or through another public option. Moreover, while it was within the IHO's authority to inquire of the parent witnesses about the cost of the private special transportation services (8 NYCRR 200.5[j][3][vii]), he did not do so.

In finding that a reduction in the award of transportation was warranted, the IHO relied on an email in evidence from the district to iBrain (IHO Decision at p. 12, citing Dist. Ex. 16). In the email, dated May 31, 2023, a district school psychologist inquired of a director of special education at iBrain whether the school would want the district "to create a code for [iBrain] to allow for initiation of special education transportation for [the] students," noting that "[t]ypically," private schools "reached out directly to request the routing process begin[]" (Dist. Ex. 16 at p. 3).[8] In a response dated June 27, 2023, the iBrain director of special education indicated that she was "not aware of any iBrain students who w[ould] be seeking transportation through the [district]" (id. at p. 1). However, as the IHO acknowledged, "[i]t [wa]s unclear from this piece of evidence whether [the district] had the resources, equipment, or personnel to accommodate Student's transportation needs" and that "[i]t [wa]s similarly unclear whether Parent was made aware of this inquiry by the [district]" (IHO Decision at p. 12). Other than this single rationale, the IHO did not cite any other basis for the reduced award related to specialized transportation. The email makes sufficiently clear that there were no students who attend iBrain whose parents were willing to use the district's transportation, and while that fact alone is striking insofar as it again appears to be part of an "organized campaign" involving iBrain parents as one court put it (Neske v. Porter, 2022 WL 3290561, at *4 [S.D.N.Y. Aug. 11, 2022], aff'd Neske v. New York City Dep't of Educ., 2023 WL 8888586 [2d Cir. Dec. 26, 2023]), this particular campaign among most or all iBrain parents to avoid the use of public transportation when rejecting the district's proposed programming did not, at least according to the evidence in this case, similarly include an attempt by the parent to thwart the CSE process itself when carrying out its responsibility to offer a FAPE to the student.

[8] The director of special education with whom the district corresponded in the above described email is not the same individual who testified at the impartial hearing as iBrain's deputy director of special education (compare Dist. Ex. 16 at p. 1, with Parent Ex. I ¶ 1).

During the district's cross-examination of iBrain's deputy director of special education (deputy director), the district attempted to solicit testimony regarding iBrain's attendance policy, specifically inquiring whether the student would be marked as present whether the student attended in person, remotely, or had an excused absence (Tr. p. 46; see Dist. Ex. 17). However, the deputy director testified he was not aware of that practice (Tr. p. 46). To be sure, if the parent did not intend for the student to attend school in person for the 2023-24 school year, her actions of entering into a contract for the delivery of special transportation services could be considered excessive. Here, although a September 2022 progress report indicated the student was receiving "all remote instruction" (Dist. Ex. 9 at p. 5), by January 2023, the evidence in the hearing record shows that the student was "receiving a mix of in person and remote services" with prolonged absences from in-person services related to medical concerns (Parent Ex. B at pp. 1, 10; see also Dist. Ex. 3), and the hearing record is unclear as to whether the student attended iBrain in person or remotely during the 2023-24 school year.[9] The district did not ask the deputy director whether the student attended in person or remotely. Ultimately, the evidence in the hearing record is not sufficiently developed to conclude that the transportation contract was excessive based on the frequency with which the parent believed the student would attend iBrain in person.

If the IHO was concerned with excessive costs, it would have been permissible for him to instruct the parties to develop the evidentiary record. As noted by the district court in Araujo, in assessing the reasonableness of the costs attendant to the transportation contract, an IHO may consider that "there are many services one might be required to pay for regardless of whether or how much they are used," but that contracted for costs are not "automatically reasonable because they are specified by the [c]ontract" (Araujo, 2023 WL 5097982 at *5). Considering the above, the IHO's determination to reduce the award of the student's special transportation costs and that the district must only fund the student's transportation services when actually provided lacked a sufficient evidentiary basis in the hearing record and, in essence, the IHO impermissibly redrafted the terms of the transportation agreement between Sisters and the parent without any evidence of any similar, lower cost options. Accordingly, the IHO's determination to reduce the transportation costs due to excessiveness or unreasonable conduct by the parent must be reversed.

VII. Conclusion

The IHO erred by reducing the amount that the district would be responsible to fund for the transportation services that were part of the student's unilateral placement for the 2023-24 school year. In addition, the hearing record lacks evidentiary support for the district's arguments that the base tuition, 1:1 nursing services, or music therapy services were so excessive in terms of cost or as more than the student required to receive a FAPE such that a reduction of the total award of direct funding for the student's unilateral placement for the 2023-24 school year would be warranted.

THE APPEAL IS SUSTAINED.

[9] The IHO signed subpoenas for iBrain to produce, among other things, information about remote instruction for the student during the 2023-24 school year and for Sisters to produce logs and billing statements regarding the transportation services delivered to the student (IHO Exs. v at pp. 3-4; vi). There is no further discussion of the subpoenas during the impartial hearing and it is unclear if iBrain or Sisters responded to the subpoenas.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated October 19, 2023, is modified by reversing that portion that reduced the amount of reimbursement to be paid for the transportation to and from the unilateral placement for the 2023-24 school year; 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 the 2023-24 school year.

Dated: **Albany, New York**
January 18, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER