The University of the State of New York

The State Education Department
State Review Officer
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No. 23-267

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 Groups, 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 to be reimbursed for, among other things, her daughter's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO conducting the impartial hearing without the respondent in attendance. The appeal must be dismissed. The cross-appeal must be 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

In a letter date June 20, 2023, the parent advised the district that she had not been informed of an IEP meeting, nor had an IEP been developed for the student for the 2023-24 school year and she intended to unilaterally place the student at iBrain for the 2023-24 extended school year (see Parent Ex. C).

The CSE subsequently convened on June 26, 2023 to develop an IEP for the student for the 2023-24 school year (see generally Parent Ex. D). Finding that the student remained eligible for special education as a student with a traumatic brain injury (TBI), the CSE recommended that she attend a 12-month 6:1+1 special class in a district specialized school and receive adapted physical education and the support of a daily full-time individual health paraprofessional (id. at p. 30-31). For related services, the CSE recommended that the student receive four 60-minute sessions of individual occupational therapy (OT) per week, one 60-minute session of group (3:1) OT per week, , five 60-minute sessions of individual physical therapy (PT) per week, four 60-minute sessions of individual speech-language therapy per week, and one 60-minute session of group (3:1) speech-language therapy per week (id. at p. 30).[1] In addition, the CSE recommended that the parent receive one 60-minute session of group parent counseling and training per month (id.).

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). The parent requested a pendency placement based upon a prior IHO's September 2022 finding of fact and decision regarding the 2022-23 school year (id. at pp. 1-2).[2] The parent asserted that the June 26, 2023 CSE failed to recommend music therapy, appropriate special transportation, and 1:1 nursing services (id. at p. 4). The parent also asserted that the recommendation that the student attend a district specialized school was not appropriate (id. at p. 4). Moreover, the parent asserted that the district did not provide her with a copy of the recommended IEP, a prior written notice, or school location letter for the 2023-24 school year (id. at p. 4-5).

An impartial hearing convened on August 9, 2023 and concluded on September 14, 2023 after two days of proceedings (see Tr. pp. 1-84).[3] In a decision dated October 20, 2023, the IHO found that the district failed to meet its burden of proof that it offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 6). The IHO further found that iBrain was not an appropriate placement as the parent did not demonstrate that the student was placed in an adequately designed program that was tailored to meet her needs (id. at p. 6). Notably, the IHO pointed out that the parent did not present an educational plan for the 2023-24 school year, a class schedule, or progress reports (id. at p. 7). Additionally, the IHO noted that the testimony presented by the parent was not more than the "rote and cursory" testimony of the iBrain deputy director that "did not account for much more than the general contours of a program, the class ratio and the types of related services" (id. at pp. 7-8). As for related services from iBrain and transportation services from Sisters Travel and Transportation Services, LLC (Sisters), the IHO found that the related services were not adequately designed and uniquely tailored to the student's needs (id. at pp. 8-9). The IHO denied the parent's request for relief (id. at p. 9).

[1] The CSE also recommended that the student receive one 60-minute session of assistive technology services per week, along with an assistive technology device (Parent Ex. D at p. 30).

[2] The issue of pendency was addressed in Application of a Student with a Disability, Appeal No. 23-240.

[3] The August 9, 2023 hearing was a pre-hearing conference (Tr. p. 2). The district did not appear at either hearing date (Tr. pp. 1, 20).

IV. Appeal for State-Level Review

The parent appeals and challenges the IHO's determinations that the parent failed to establish that iBrain and transportation services from Sisters were appropriate for the student. The district interposes an alternative argument in a cross appeal that in the event the undersigned does not uphold the IHO's determination, the matter should be remanded because the IHO erroneously held the impartial hearing without the district's representative in attendance. 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 thereto is also presumed and, therefore, the allegations and arguments will not be recited in detail here. The gravamen of the parties' dispute on appeal is whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year.

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]). 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).

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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every

> special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

The 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. FAPE – 2023-24 School Year

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 p. 6). 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]).

B. Unilateral Placement

Turning to the issue of whether iBrain was an appropriate unilateral placement, the IHO found that the parent did not demonstrate "that the Student was placed in an adequately-designed program that was tailored to her needs" (IHO Decision at p. 7). Notably, the IHO found that the parent did not present an iBrain educational plan, a class schedule related to the 2023-24 school year in question, and the parent did not provide evidence of progress reports for the current or prior school year (id.). The IHO determined that the testimony of the iBrain deputy director was "rote and cursory testimony" and "did not account for much more than the general contours of a program, the class ratio, and the types of related services" (id. at pp. 7-8). Therefore, IHO concluded that the parent did not meet "her burden with respect to the Private School program at where the Student was unilaterally placed" (id. at p. 8).

With regard to related services, the IHO found that the parent did not demonstrate "that the Student [was] receiving private related services that are adequately-designed and uniquely tailored to her needs" (IHO Decision at p. 8). The IHO held that the parent did not present any testimony from related service providers that are currently serving the student, there was no account of their qualifications, their methodologies, their goals for the student, or anything else other than a contract for $116,544 (id.). The IHO acknowledged that the deputy director "did account for the types of services and the frequency of services, but he did not state much more than that" (id.). Further, with regard to the parent's request for the costs of 1:1 nursing services for the student , the IHO determined that the parent "failed to provide any testimony or documentary evidence describing the services administered by the Nursing Service provider" and there "was no description of qualifications, capabilities, or anything else other than a contract for $292,556" (id.).

Therefore, based on the "scant level of proof," the IHO found that the parent did not meet "her burden with respect to the unilaterally-obtained related services" (id.).

Regarding special transportation services, the IHO found again that the parent did not demonstrate that the student was "receiving private transportation services that are adequately-designed and uniquely tailored to her needs" (IHO Decision at p. 8). The IHO reasoned that the parent's due process complaint notice stated that the student had "intensive needs" with respect to transportation, but that the parent "presented absolutely no testimony or other evidence describing the transportation services obtained for the 2023-2024 school year" (id.). The IHO determined that "[g]iven this absence of proof," the parent did not meet "her burden with respect to the unilaterally-obtained transportation services" (id. at pp. 8-9).

The parent, in the request for review, asserts the IHO erred in finding that the unilateral placement was not appropriate. The parent argues that the iBrain deputy director "provided extensive affidavit testimony" about the student's needs and the program she receives at iBrain. The parent also argued that the student was making progress at iBrain and that iBrain "was appropriate for [the student] for the 22/23 [extended school year]." Moreover, the parent asserts that the IHO erred in not awarding the full terms of the transportation contract.

Generally, the courts have been clear that for purposes of a tuition reimbursement claim, the student's needs and the specially designed instruction that is offered each school year must be analyzed separately (see M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]).

With regard to the parties' dispute over whether the iBrain was appropriate to address the student's needs, the IHO correctly notes that the evidence contains no education planning documents created by iBrain for the 2023-24 school year nor were there any documents such as progress reports written between the July 1, 2023 start of the 2023-24 school year at issue and the September 14, 2023 hearing date from iBrain.[4, 5] All of the planning documentation in the hearing record regarding the student's educational program at iBrain relates to the preceding school year and reflects information about the student's performance during the 2021-22 school year, rather than the 2023-24 school year that is the subject matter of this case. The evidence does tend to

[4] Documentary evidence submitted by the parent and entered into the hearing record included an iBrain IEP dated April 5, 2022 (see Parent Ex. B). It is unclear whether that IEP was created for the 2021-22 or 2022-23 school year.

[5] Although the parent argued that the district did not provide an IEP for the 2023-24 school year and submitted the district's purportedly defective IEP for 2023-24 school year into evidence (Parent Ex. D), in its reply and answer, the parent now reverses course and requests that the district's planning document be used to support the parent's requests for related services; however, the parent already rejected this IEP as inappropriate, and there is no indication that iBrain was trying to implement the district programming that the parent was challenging as inadequate and was using a different plan that the parent failed to offer into evidence.

show that iBrain created an education plan for the student in June 2023 (see, e.g., Dist Ex. 2, 5, 8), but the parent did not offer it into evidence in these administrative proceedings, and the hearing record does not indicate whether it was part of the parties' disclosures prior to the impartial hearing in August and September 2023. While the iBrain enrollment contract provides the information regarding the parent's financial obligation, it lacks any specifics of the educational program designed for the student (see Parent Ex. G).[6]

The IHO accurately described the testimony by the deputy director of iBrain (see IHO Decision p. 4).[7] The deputy director's testimony about the private school appeared general and cursory and offered insufficient insofar as it largely failed to describe why the special education services were provided to this student during the 2023-24 school year, much less any information about the services related to student's specific needs or how any related services iBrain provided to the student were designed to address her specific needs (see Tr. pp. 40-60). The deputy director confirmed that he had met the student and observed her in either academic instruction or related services (Tr. pp. 50-51). He noted that the student was nonverbal and non-ambulatory and that she required a "G-tube" for nutrition (Tr. p. 51). The deputy director listed the services provided, namely that the student was attending a 6:1+1 special class and received an "intensive regime of related services" that included four individual and one group session of OT per week, five sessions of PT per week, five sessions of speech therapy per week, two sessions of hearing education services per week, one session of assistive technology services per week, and three individual and one group session of music therapy per week (Tr. p. 53). The deputy director reported that each of the therapies was delivered in 60- minute sessions (Tr. p. 64). He further reported that the student received the support of a one-to-one paraprofessional and a one-to-one nurse throughout the day (Tr. p. 54). The director testified that the student also received the support of a one-to-one "travel" nurse while being transported (Tr. p. 55). However, the deputy director did not describe any of the skills or deficit areas that iBrain staff worked on with the student and his testimony offered no student specific rationale for why the student required a 1:1 paraprofessional, 1:1 nursing services in school or 1:1 nursing services during the time when specialized transportation services were provided (Tr. pp. 54-55). Similarly, testimony by the parent offered only general information about the student's health conditions (Tr. pp. 63-65). The lack of information in the hearing record extends not only to the program offered by iBrain, but also the related services, which includes special transportation and nursing services. The hearing record is devoid of information as to why these services were necessary and addressed the student's unique needs for the 2023-24 school year.[8]

Therefore, with regard to the parent's unilateral placement, related services obtained, and private transportation services requested, the IHO correctly concluded that the parent did not meet

[6] The enrollment contract delineates the related services included in the supplemental tuition fees, but does not provide the duration or frequency of these services (Parent Ex. G at pp. 1-2).

[7] The parent asserts in the request for review that the deputy director provided extensive affidavit testimony (see Req. for Rev. at ¶ 16). In this case, the deputy director did not provide affidavit testimony, only direct testimony, and while offering some relevant information regarding iBrain, it was by no means extensive (see Tr. pp. 42-60).

[8] The contracts for these services do not shed light as to why the services are necessary or appropriate for the student; however, they merely answer the question of cost of services (see Parent Exs. G, H, I).

her burden to establish with objective evidence that the special education services unilaterally obtained by the parent were appropriate and accordingly, there is no reason to disturb the IHO's decision to deny the request for the costs of the same.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determination that the parent presented insufficient evidence and failed to meet her burden to establish that iBrain and other related services were an appropriate unilateral placement for the 2023-24 school year, there is no reason to disturb the IHO's decision and the necessary inquiry is at an end.

I have considered the parties remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 25, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER