The University of the State of New York

The State Education Department
State Review Officer
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No. 24-028

**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 Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

## DECISION

### I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO), which determined that respondent (the district) offered her daughter an appropriate educational program for the 2023-24 school year and equitable considerations did not favor the parent. The district cross-appeals from the portion of the IHO's determination that the student required 1:1 travel paraprofessional services. The appeal must be sustained in part. 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. Briefly, the CSE convened on March 23, 2023, to formulate the student's IEP for the 2023-24 school year (see

generally Parent Ex. K; Dist. Ex. 1).[1] The parent disagreed with the recommendations contained in the March 2023 IEP and, by letter dated June 20, 2023, notified the district of her intent to unilaterally place the student at iBrain and seek public funding for that placement (see Parent Ex. J).[2]

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 raising allegations related to the lack of a prior written notice or school location letter; the evaluative information relied on by the March 2023 CSE; the sufficiency of the present levels of performance identified on the student's IEP; the appropriateness of the recommended annual goals; the lack of recommendations for 12-month services, an extended school day, assistive technology services, alternate assessments, nursing services; the appropriateness of the 8:1+1 special class recommendation; the appropriateness of the related services recommendations; the failure to recommend transportation services, "including a 1:1 travel paraprofessional, air conditioning, and limited travel time"; and implementation of the recommended services within a traditional school day (see Parent Ex. A).

The parties convened for an impartial hearing before the Office of Administrative Trials and Hearings (OATH) on October 31, 2023, which concluded on December 1, 2023 after five days of proceedings (Tr. pp. 67-472).[3] In a decision dated December 11, 2023, the IHO determined that the district offered the student a FAPE for the 2023-24 school year (IHO Decision at pp. 4-11). The IHO further determined that iBrain was an appropriate unilateral placement; however, the IHO indicated that, based on equitable considerations, he would not have awarded full tuition reimbursement to the parent (id. at pp. 11-15). Finding that the district provided the student with

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] The parent's June 20, 2023 letter to the district stated that the parent had not received a school location letter (Parent Ex. J at p. 1). The hearing record includes a school location letter dated June 23, 2023 (Parent Ex. C).

[3] A pre-hearing conference was held on August 15, 2023 (Aug. 15, 2023 Tr. pp. 1-8). A pendency hearing was held on August 17, 2023 (Aug. 17, 2023 Tr. pp. 9-41). A status conference was held on September 13, 2023 (Sept. 13, 2023 Tr. pp. 42-49). The pendency hearing and two conferences referenced were held before a different IHO who transferred the case to OATH following the September 13, 2023 status conference because the parent requested that the impartial hearing occur in-person (Aug. 15, 2023 Tr. pp. 6-7; Sept. 13, 2023 Tr. p. 47). The prior IHO issued an interim decision on pendency dated August 17, 2023, in which the prior IHO directed the district to continue funding the student's placement at iBrain, including related services and transportation services retroactive to July 5, 2023 (Aug. 17, 2023 Interim IHO Decision). A new IHO held a pre-hearing conference on September 28, 2023 and then the IHO who presided over the remainder of the proceeding held a status conference on October 19, 2023 (Tr. pp. 1-66). As pagination for the hearing restarted as of the September 28, 2023 hearing when the matter was transferred to OATH, all transcripts of the hearings and conferences held prior to the transfer to OATH will be designated by date and all transcripts subsequent to the transfer to OATH will only be referenced by page number (Aug. 15, 2023 Tr. pp. 1-8; Aug. 17, 2023 Tr. pp. 9-41; Sept. 13, 2023 Tr. pp. 42-49; Tr. pp. 1-472).

a FAPE for the 2023-24 school year, the IHO dismissed the parent's due process complaint (id. at p. 15).

## IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal thereto is also presumed and, therefore, the specific allegations and arguments will not be repeated. In summary, with respect to the IHO's finding that the district offered the student a FAPE for the 2023-24 school year, the parent raises challenges related to music therapy, the appropriateness of an 8:1+1 special class for the student, 1:1 nursing services, assistive technology devices and services, an extended school day, the lack of appropriate transportation services for the student, and implementation of the recommended educational program. In addition, the parent appeals the IHO's findings regarding equitable considerations, including the reasonableness of the amounts requested for the student's enrollment at iBrain, transportation services, and nursing services.

## 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]).[4]

[4] 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).

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**

Neither party has appealed from the IHO's finding that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Therefore, that finding has 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]).

Additionally, upon careful review, other than the IHO's findings regarding transportation which will be discussed in more detail below, the hearing record reflects that the IHO in a well-reasoned and well-supported decision, correctly addressed the parent's arguments regarding the district's offer and provision of a FAPE to the student for the 2023-24 school year. The IHO carefully reviewed the March 2023 IEP, identifying the recommendations and management needs before determining that the March 2023 IEP appropriately described the student's needs, included appropriate annual goals to address the student's needs, recommended an appropriate educational program including an 8:1+1 special class placement and the support of a 1:1 paraprofessional and school nursing services along with appropriate related services and management needs (IHO Decision at pp. 3-6). Turning to the specific arguments raised by the parent, the IHO determined that music therapy was incorporated into the student's program as identified in the March 2023 IEP and that there was no evidence the student could not receive an educational benefit without the inclusion of music therapy (id. at pp. 6-7). The IHO also explained how the March 2023 CSE addressed the student's assistive technology needs and why the failure of the district to conduct an assistive technology evaluation prior to the March 2023 CSE meeting was a procedural violation that did not rise to the level of a denial of FAPE (id. at pp. 9-10). Further, the IHO addressed the parent's assertion that the student required a 1:1 nurse and explained why the hearing record supported finding that the recommendation for school nurse services with the additional support of a 1:1 paraprofessional met the student's identified needs (id. at pp. 8-9). The IHO also determined that the parent's arguments related to the assigned public school site were speculative (id. at pp. 7-8). Upon review of the findings listed above, the decision shows that the IHO carefully considered the testimonial and documentary evidence presented by both parties, and further, that

he weighed the evidence and properly supported his conclusions (id. at pp. 3-10). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is no reason appearing in the hearing record to modify the IHO's ultimate conclusions on the issues identified above (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Thus, while my reasoning may have differed from the IHO's in some respects, the conclusions of the IHO regarding the issues above are hereby adopted.

However, with respect to the district's recommendations for special transportation, the IHO's decision requires further scrutiny. Although the IHO found that the student required a 1:1 travel paraprofessional, he discounted the parent's allegations regarding transportation because the parent failed to mention special transportation in the June 2023 letter to the district and the IHO determined that the parent raised the transportation allegations in bad faith (IHO Decision at p. 10). As discussed in further detail below, the IHO erred in discounting the parent's allegations and in finding that it did not result in a denial of FAPE to the student for the 2023-24 school year.

### A. FAPE - 2023-24 School Year

Prior to reaching the substance of the dispute regarding transportation, it is worth reviewing the student's needs as known to the March 2023 CSE.

#### 1. Student's Needs and March 2023 IEP

Although the student's present levels of performance as described in the March 23, 2023 IEP are not in contention on appeal, a brief discussion of the student's needs is necessary to determine whether the March 2023 CSE's recommendations were appropriate for the 2023-24 school year. According to the March 2023 IEP and June 2023 prior written notices, the CSE considered a January 2023 classroom observation and social history update, parent and provider input, and the March 2023 iBrain Report and Education Plan (iBrain education plan) that reflected the student's progress toward her goals and current levels of performance (Parent Exs. B at p. 2; K at pp. 1-18).

The March 2023 IEP was the IEP in effect at the beginning of the 2023-24 school year (Tr. pp. 432-39; Parent Ex. K; Dist. Ex. 18 ¶¶ 10-11). The March 2023 IEP is an extensive document which greatly resembles the description of the student and recommendations for educational services set forth in the March 22, 2023 iBrain education plan (compare Parent Exs. I at pp. 1-57, with Parent Ex. K at pp. 1-44).[5] The CSE was composed of a special education teacher/related service provider, a regular education teacher, the parent, a school psychologist who served as district representative (district representative), the director of special education at iBrain, a music therapist at iBrain, the student's teacher at iBrain, a speech-language therapist, an occupational therapist, a social worker, a parent advocate, a parent advocate observer, an assistive technology provider, and a physical therapist (Tr. p. 114; Parent Ex. K at p. 44). The iBrain education plan

[5] The mere duplication of privately developed materials is not in and of itself impermissible, provided the materials are accurate and appropriate to address the student's needs.

was created with input from the student's parent, social worker, iBrain school nurse, and iBrain personnel from the following departments: special education, speech therapy, physical therapy, occupational therapy, and assistive technology (Parent Ex. I at p. 56).

The student presents with hydrocephalus and a seizure disorder, a hormone secretion disorder, asthma, and has a brain shunt (Parent Exs. K at pp. 10, 12-13; M ¶ 2).[6] According to the parent, the student is non-verbal and semi-ambulatory, and requires assistance for "all personal care and activities of daily living" (Parent Ex. M ¶ 3). The March 2023 IEP noted that due to the student's significant impairments in cognitive, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, psychosocial behavior, physical, information processing, speech, sensory, perceptual, and motor abilities, she required a significant degree of individualization of her curriculum with appropriate supports and modifications to enable her to obtain educational benefit (Parent Ex. K at p. 18).

Further, the student was described as generally happy, with relative strengths in her receptive communication and social skills evidenced by her ability to take turns with peers and respond "hello" to a communication partner, her emerging expressive communication using single words and approximations, and strengths in her cognitive abilities reflected by her receptive understanding of object permanence and environmental awareness, joint attention skills, and attention during preferred tasks (Parent Ex. K at pp. 4, 6, 10). With respect to communication, the student used total communication techniques including verbal speech, a high tech speech generating device (SGD), gestures, sign language, and facial expressions (id. at p. 4). Regarding physical development, the IEP indicated that the student was semi-ambulatory, ascended and descended stairs with support, and benefitted from the use of specialized equipment, i.e., orthotic supports (id. at pp. 12, 13).[7] With respect to adaptive skills and behavior, the IEP noted that the student verbally expressed her toileting needs using a two-word phrase, was prescribed glasses but engaged in refusal behaviors related to wearing glasses and exhibited elopement behaviors at times (id. at pp. 10, 15). According to the IEP, the student responded "really well" to a star rewards chart and earned a star for completed activities (id. at pp. 7-8).

Consistent with the iBrain education plan, the March 2023 IEP stated that the student required as part of her environmental management needs, among other things, 1:1 instruction using a direct instruction model with multisensory supports, a small class size of no more than eight students, and a small class with similar peers (compare Parent Ex. K at pp. 17-18, 34-35, with Parent Ex. I at pp. 37-39, 55). Additionally, both iBrain and the March 2023 CSE recommended a 12-month program for the student consisting of an 8:1+1 special class placement, OT, PT, speech-language therapy, parent counseling and training, 1:1 paraprofessional services, school

[6] The parent's affidavit indicated that the student had a "heart shunt"; however, the parent then testified that the student had a "brain shunt" (compare Tr. p. 203, with Parent Ex. M ¶ 2).

[7] The March 2023 IEP noted that the student used an adaptive stroller for transport, a changing table for hygiene related activities, a detachable toilet chair, ankle foot orthoses (AFOs), an augmentative alternative communication (AAC) device via direct selection (iPad), and various therapeutic equipment for related services and classroom activities and instruction (Parent Ex. K at p. 16).

nurse services, assistive technology services, and supports for school personnel (compare Parent Ex. K at pp. 34-36, with Parent Ex. I at pp. 55-56).

**2. Special Transportation Services**

Regarding special transportation services, the IHO held that the evidence supported a finding that the student required "a 1:1 travel paraprofessional, which [wa]s specifically listed on the medical accommodation forms" (IHO Decision at p. 10; see Dist. Ex. 11 at p. 13). In the request for review, the parent alleges that the IHO erred by finding that the district provided the student with a FAPE despite the district's failure to offer special transportation services for the student including limited travel time, air conditioning, 1:1 paraprofessional services, and a lift bus. The district cross-appeals from the IHO's finding that the student required 1:1 travel paraprofessional services. In a reply and answer to the cross-appeal, the parent asserts that denying the student 1:1 transportation paraprofessional services removes the student's access to "critical support and subject[s] her to unsafe and unhealthy conditions."

The March 2023 CSE recommended that the student receive special transportation accommodations, specifically, "[t]ransportation from the closest safe curb location to school" due to the student's diagnoses of hydrocephalus, holoprosencephaly, seizures, a hormone secretion disorder, asthma, a history of "tonic clonic" seizures as well as the placement of a shunt (Parent Ex. K at p. 40).

The district representative who participated in the student's March 2023 CSE meeting testified that the district's Office of Student Health evaluated the student's need for nursing services and special transportation services (Tr. pp. 136-37). Specifically, at the time of the March 2023 CSE, the student's need for nursing services and specialized transportation services was in the process of being determined by the Office of Student Health; therefore, the CSE did not have a final decision from the Office of Student Health regarding specific recommendations (id.).[8] The district representative testified that she did not know whether the CSE recommended 1:1 nursing services or 1:1 travel paraprofessional services for the student (Tr. pp. 155-56).

According to the 2022-23 Office of School Health medical accommodations request form, during school and "transport," the student may have required administration of an "[e]mergency [m]edication[]," which the form indicated due to the type of medication, "must be administered by a nurse" (Dist. Ex. 11 at p. 13). With specific regard to the health or safety of a student with a disability, a school district denies a student the benefits guaranteed by the IDEA if it proposes a placement that threatens a student's health in a manner that undermines his or her ability to learn (A.S. v. Trumbull Bd. of Educ., 414 F. Supp. 2d 152, 178 [D. Conn. 2006]; citing Lillbask v. Conn. Dep't of Educ., 397 F.3d 77, 93 [2d Cir. 2005] [noting that Congress did not intend to exclude from consideration any subject matter, including safety concerns, that could interfere with a disabled student's right to receive a FAPE]; L.K. v. Dep't of Educ. of the City of New York, 2011 WL

[8] At least one court has questioned the district's policies in that they "never required [Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings" (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464 [S.D.N.Y. 2018]).

127063, at *9 [E.D.N.Y. Jan. 13, 2011] [finding failure to identify a serious allergy to citrus fruits on a student's IEP did not constitute a denial of a FAPE]).

While the March 2023 IEP provided in-school nursing services that would have accommodated the student's need for administration of emergency medication, the district was aware that the student may require a nurse to administer a specific medication to the student on an emergency basis while being transported and failed to recommend appropriate special transportation services to meet that need resulting in a denial of a FAPE (Parent Ex. K at pp. 35, 40). Accordingly, the IHO's finding regarding the appropriateness of the district's special transportation accommodation must be reversed.

**B. Equitable Considerations**

The IHO ruled that if he had held that the district failed to provide the student with a FAPE for the 2023-24 school year, despite finding iBrain to be an appropriate unilateral placement for the student, the IHO would have reduced the relief sought by the parent due to equitable considerations. In particular, the IHO made equitable findings along a few different tracks. First, related to the parent's actions prior to filing the due process complaint notice, the IHO noted that the parent "did not give due consideration to the [district's] proposed program" and that the parent's 10-day notice did not cite any specific concerns to give the district the opportunity to resolve any issues (IHO Decision at pp. 12-13). The IHO's next equitable finding related to the parent's conduct during the hearing, in that the IHO found the parent's testimony was contradictory and inconsistent (id. at p. 13). The IHO then noted that the iBrain deputy director of special education was also not credible and specifically noted that both iBrain and the private transportation company failed to respond to subpoenas during the hearing (id. at pp. 13-14). Based on the inconsistent and contradictory testimony, the IHO determined that there was insufficient evidence to show services were actually being delivered to the student (id. at p. 14). The IHO specifically noted that the parent and the private school acted in bad faith (id.). As a final category of equitable considerations, the IHO determined that the cost of the unilateral placement consisting of a total of $670,604, broken down as a base tuition of $190,000 plus supplemental tuition of $103,464, plus transportation of $111,180, and nursing services of $265,960, was unreasonable (id. at pp. 14-15).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to

equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Overall, the IHO relied upon the evidence in the hearing record as well as assessments about the witnesses' credibility to craft equitable relief. In her request for review, the parent appeals asserting that the IHO erred in not finding that equitable considerations favored the parent. However, the parent only specifically appeals from a few of the IHO's findings related to equities. The parent asserts that she was not required to contact or tour the recommended school placement and that any finding that such a failure constituted "bad faith" was in error (Req. for Rev. ¶25). The parent further indicated that the IHO ignored the parent's testimony that she researched the school online and therefore had information about it (id. ¶26). However, the IHO specifically found insufficiencies in the parent's 10-day notice as both a factor as part of his FAPE analysis and an equitable consideration, and the parent only appealed from the IHO's finding with respect to his FAPE analysis (compare IHO Decision at pp. 10, 12-13, with Req. for Rev. ¶¶18, 23-30).

The parent further objected to the IHO's credibility findings, against both her and the iBrain deputy director (Req. for Rev. at ¶¶ 27-29). However, generally, an SRO gives due deference to the credibility findings of an IHO, unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076). In this instance, neither non-testimonial evidence in the hearing record nor the hearing record read in its entirety compels a contrary conclusion with regard to the credibility of the witnesses. Accordingly, the parent's arguments do

not provide a path for disregarding the IHO's credibility finding against her. Additionally, the parent does not appeal from the IHO's application of her lack of credibility to equitable considerations; accordingly, the IHO's determination that the parent's provision of inconsistent testimony warranted an equitable reduction must be upheld. Overall, based on the IHO's finding that the parent's 10-day notice was not sufficient and on his credibility findings with respect to the testimony of the parent and the deputy director, the IHO indicated he would have reduced any total award by 50% (IHO Decision at pp. 13-14). As there was an insufficient basis presented on appeal to depart from the IHO's indicated reduction, it will be applied to the final award.

Additionally, the IHO held that he would have denied the parent's request for direct funding of iBrain's supplemental tuition, which consisted of fees incurred for the provision of the recommended related services to the student, in the amount of $103,464 had he determined that the district denied the student a FAPE (IHO Decision at p. 14). The supplemental tuition fees covered related services as outlined in the IBrain educational plan (Parent Ex. E at pp. 1-2). The IHO's rationale for denying funding for the related services supplemental tuition was that "[d]ue to the inconsistent and contradictory testimony of the witnesses and [iBrain]'s insistence that session notes do not exist for these services, the record does not support a finding that these services are actually being provided" (IHO Decision at p. 14). The hearing record reflects that in a prior hearing held on September 26, 2023, the iBrain deputy director testified that related service providers at iBrain created session notes that were maintained in an online portal at iBrain called dashboard and that "after each session, whether it's an academic session or a related service session, our providers and our educators complete session notes based on the student's progress towards their academic goals" (IHO Ex. II at p. 6).[9] During cross-examination for the present case, the deputy director testified that he did not know whether iBrain maintained records from the student's related service providers in relation to tracking the student's performance during her related service sessions (Tr. pp. 326-27). Furthermore, the deputy director testified that session notes used to be uploaded to iBrain's dashboard, but iBrain updated its dashboard system prior to the 2023-24 school year, in approximately July 2023, and the new version did not allow for session notes to be uploaded; however, the deputy director did not explain why his prior testimony, which took place after the start of the 2023-24 school year was inconsistent with his current testimony (Tr. pp. 380-84). The IHO found that the deputy director was not able to address the inconsistencies in his testimony and, because of that, the deputy director's testimony was not credible (IHO Decision at pp. 13-14). However, in objecting to the IHO's credibility finding with respect to the deputy director's testimony, the parent ignored this part of the IHO's findings and only focused on the portion of the deputy director's testimony related to the number of hours the student was at school (see Req. for Rev. ¶29). Based on the above, and having reviewed the hearing record, I decline to disturb the IHO's credibility determinations that he relied on, in part, to find that the parent was not entitled to funding for the related services at issue because equitable considerations weighed against her with respect to that item of requested relief (see Application of a Student with a Disability, Appeal No.12-076 [declining to overturn an IHO's reduction of relief based in part of his credibility findings during the impartial hearing and noting that "I find no authority that precludes an IHO from considering the parties' conduct during the impartial hearing process while

[9] The district attorney provided the IHO with redacted pages from the September 26, 2023 hearing in order to impeach the testimony of the deputy director regarding session notes (Tr. pp. 384-86; IHO Ex. II).

exercising his or her broad equitable power to fashion relief," citing Application of a Student with a Disability, Appeal No. 09-073; Application of a Student with a Disability, Appeal No. 09-007; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

Additionally, the IHO decided that he would have denied the parent's request for direct funding of the nursing services agreement in the amount of $265,960 if he had determined that the student was denied a FAPE for the 2023-24 school year (IHO Decision at pp. 14-15). On appeal, although the parent appealed from the IHO's finding that the student did not require 1:1 nursing services, and from the IHO's finding that the amount of the parent's contract for nursing services was unreasonable, the parent did not appeal from the IHO's finding that the hearing record did not support finding that the student actually received 1:1 nursing services at iBrain for the 2023-24 school year (compare IHO Decision at pp. 13-15, with Req. for Rev. at ¶¶ 33, 25, 38). Additionally, the parent's only objections to the IHO's credibility findings regarding her own testimony relate to a prior written notice sent by the district prior to the start of the school year and the parent's research into the school the district assigned the student to attend (Req. for Rev. at ¶¶ 25-28). As discussed above, these arguments did not provide a sufficient basis to depart from the IHO's credibility finding which underpinned his related determination that equitable considerations weighed against awarding the parent any of her requested relief for nursing services.

Turning next to the IHO's finding that the cost of the student's services were unreasonable, the IHO specifically indicated he found the total cost of the student's educational program at iBrain, including base tuition, supplemental tuition, transportation services contracted for with Sisters Transportation, and the separately contracted for 1:1 nursing services to be unreasonable. The parent generally appealed from this finding, asserting that the IHO "erred when he found the contracts were 'unreasonable'" (Req. for Rev. at ¶31).

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).

Of particular note, although the parent mainly focuses her equitable consideration on the contract for transportation services and the contract for 1:1 nursing services, the IHO limited her discussion of reducing tuition on unreasonableness grounds to the base tuition portion of the enrollment contract with iBrain (see IHO Decision at p. 15). According to the IHO, a cost of $190,000 for what he described as "limited academic instruction" was excessive and unreasonable

and warranted a 50% reduction in funding for tuition (id.). The IHO's denial of funding appeared to be based more on the type and amount of service being provided rather than the rate for the service. However, an excessive cost argument inherently focuses on whether the rate charged for the service was reasonable and, as such a finding must be based on evidence in the hearing record, it requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Overall, the IHO erred by conducting a cost analysis without any fact evidence to support it. For example, the base tuition cost for iBrain is reflected in the enrollment contract, and the hearing record failed to contain any evidence—such as the amount that other nonpublic schools charged for similar instructional services—upon which to analyze whether iBrain's base tuition was excessive. Accordingly, the IHO's finding on this point must be overturned. Nevertheless, as discussed above, the IHO made a more general finding that a 50% reduction in any total award was warranted due to equitable factors and that reduction will be applied to the final award.

For the reasons indicated above, the parent's request for district funding of supplemental tuition for related services and 1:1 nursing services is denied as there is insufficient evidence in the hearing record to support finding that the student received the services requested. The parent is awarded direct funding of the student's base tuition at iBrain for the 2023-24 school year ($190,000) and the cost of the contracted for transportation services ($111,180) less a reduction of 50% based on the equitable factors identified by the IHO, from which the parent did not present a sufficient basis to depart, for a total award of direct funding to iBrain in the amount of $95,000 and direct funding to Sisters Transportation in the amount of $55,590.

## VII. Conclusion

The evidence in the hearing record demonstrates that the district failed to offer the student a FAPE for the 2023-24 school year, and that equitable considerations warranted denying the parent direct funding for the costs of the related services sought as supplemental tuition and for nursing services, as well as reducing the amount of funding for the base tuition and transportation costs for the student's attendance at iBrain.

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

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated December 11, 2023, is modified by reversing that portion which found that the district provided the student with a FAPE for the 2023-24 school year; and

**IT IS ORDERED** that the district shall directly fund 50% of the cost of the student's base tuition at iBrain for the 2023-24 school year in the amount of $95,000; and

**IT IS ORDERED** that the district shall directly fund 50% of the cost of the student's transportation services to and from iBrain for the 2023-24 school year in the amount of $55,590.

**Dated:** **Albany, New York**
**April 3, 2024**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**