The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-545

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 Peter G. Albert, 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 a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition at the International Academy for the Brain (iBrain) for the 2024-25 school year. The district cross-appeals from the IHO's interim decision on pendency. The appeal must be sustained in part. The cross-appeal must be sustained in part, and the matter remanded to the IHO for further proceedings.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The student has been the subject of a prior State-level review proceeding that addressed claims related to the student's unilateral placement at iBrain (see Application of a Student with a Disability, Appeal No. 24-028).[1] At the time of the impartial hearing, the student was nine years

[1] The SRO decision in Application of a Student with a Disability, Appeal No. 24-028 was included in the hearing record as an exhibit to the district's motion to dismiss (IHO Ex. IX at pp. 10-24).

old (see Dist. Ex. 1 at p. 1). The student began attending iBrain in 2021 (Dist. Ex. 5 at p. 4). The student initially experienced seizures as a young child and, according to the parent, later experienced a recurrence of seizures in 2020 (id.). However, according to medical accommodations request forms completed by the student's physician on February 25, 2024 and on August 8, 2024, the student had not had a seizure since 2019, and was further described as having "no seizures" and as "well controlled" (Parent Ex. E at pp. 10-11; Dist. Ex. 6 at p. 6).

A CSE convened on March 13, 2024 to develop an IEP for the student for the 12-month, 2024-25 school year, with an implementation date of March 22, 2024 (Dist. Ex. 1 at pp. 1, 44-45, 46, 50, 54). Having found the student eligible for special education and related services as a student with an other health impairment, the March 2024 CSE recommended that the student receive 35 periods per week of instruction in an 8:1+1 special class in a specialized school, along with three periods per week of adapted physical education (APE), and related services consisting of four 60-minute sessions per week of individual occupational therapy (OT), one 60-minute session per week of OT in a group of three, three 60-minute sessions per week of individual physical therapy (PT), and five 60-minute sessions per week of individual speech-language therapy, as well as daily, individual school nurse services as needed (id. at pp. 44-45, 51-52).[2, 3] The March 2024 CSE also recommended the student receive the support of a daily, full-time individual paraprofessional for health and ambulation, individual assistive technology services, and special transportation consisting of "the closest safe curb location to school" (id. at pp. 45, 50). Lastly, the CSE recommended one 60-minute session per month of parent counseling and training (id.).

In a letter, dated June 17, 2024, the parent disagreed with the recommendations contained in the March 2024 IEP and notified the district of her intent to unilaterally place the student at iBrain and seek public funding for that placement (Parent Ex. A-A at pp. 1-2). The parent also indicated that she continued to request an independent educational evaluation (IEE) of the student due to the lack of proper assessments conducted by the district prior to the most recent CSE meeting (id. at p. 2).

On June 18, 2024, the parent electronically signed a contract enrolling the student at iBrain for the 12-month 2024-25 school year beginning on July 2, 2024 and a contract with Sisters Travel and Transportation Services, LLC (Sisters Travel) for transportation of the student to and from iBrain from July 2, 2024 through June 27, 2025 (Parent Exs. A-E at pp. 1, 6; A-F at pp. 1, 7). On June 20, 2024, the parent electronically signed a contract with B&H Health Care Services, Inc. (B&H Health Care) for the provision of 1:1 private duty nursing services during the school day

[2] According to the March 2024 IEP, the parent and iBrain staff requested that the student's classification be changed from other health impairment to traumatic brain injury (Dist. Ex. 1 at p. 53). The district declined to do so absent medical documentation to support the change (id. at pp. 53-54). The district offered to change the student's classification to multiple disabilities; however, the parent did not agree (id. at p. 54).

[3] The March 2024 IEP separately listed recommendations for four individual speech-language therapy sessions and one individual speech-language therapy session resulting in a total of five sessions of individual speech-language therapy (Dist. Ex. 1 at pp. 44-45).

and a 1:1 transportation nurse for the student for the 2024-25 school year (Parent Ex. A-G at pp. 1-2, 8).

A. Due Process Complaint Notice and Subsequent Events

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 12-month, 2024-25 school year (Parent Ex. A at p. 1). The parent requested pendency based on an October 19, 2022 IHO Decision (id. at p. 2; see Parent Ex. A-C). Regarding the 2024-25 school year, the parent asserted that the March 2024 CSE failed to recommend assistive technology, hearing education services, or a 1:1 nurse, and failed to specify whether the student required such services, impermissibly deferring those decisions to agencies other than the CSE (Parent Ex. A at pp. 8, 9). The parent also contended that the March 2024 CSE failed to evaluate the student and further alleged that the CSE failed to identify appropriate present levels of performance for the student, failed to recommend appropriate annual goals, recommended an inappropriate 8:1+1 special class setting, failed to recommend sufficient related services, failed to recommend an extended school day which was necessary to implement all of the recommended related services for the student and failed to recommend appropriate special transportation services (id. at pp. 8-10). The parent also alleged that iBrain was an appropriate unilateral placement for the student and that equitable considerations warranted an award of all costs associated with the student's placement at iBrain (id. at p. 11). As relief, the parent requested direct funding for the total cost of the student's attendance at iBrain for the 12-month 2024-25 school year, including transportation and 1:1 nursing services, as well as district funding for an independent neuropsychological evaluation (id.).

The CSE reconvened on July 29, 2024 and discussed the student's transportation (Dist. Ex. 2 at pp. 54, 55). The July 2024 continued to recommend that the student be transported from the closest safe curb location to school and added adult supervision in the form of a 1:1 paraprofessional and air conditioning (id. at p. 50).

B. Impartial Hearing Officer Decision

An IHO from the Office of Administrative Trials and Hearings (OATH) was appointed on July 8, 2024, and, after denying the parent's request for an expedited hearing timeline, the IHO and parties met for a prehearing conference on August 12, 2024 (IHO Decision at p. 2). As a result of the prehearing conference, the IHO set a briefing schedule for the issue of pendency and the district submitted a written brief on pendency (Tr. pp. 1-15; IHO Ex. IX). In addition, the district moved to dismiss the proceeding due to the parent's failure to appear for a resolution session and the parent submitted a response to the district's motion (IHO Exs. VII; VIII). In an interim decision, dated August 27, 2024, the IHO denied the district's motion to dismiss and in an interim decision on pendency, dated September 12, 2024, the IHO granted the parent's pendency request finding that the student's pendency placement was based on the decision in Application of a Student with a Disability, Appeal No. 24-028 and that the reduction of costs on equitable factors ordered in that decision did not carry forward into subsequent school years (IHO Ex. XI).

The parties convened for an impartial hearing on September 12, 2024, which concluded on September 27, 2024 after two days of proceedings (Tr. pp. 16-125). In a decision dated October 15, 2024, the IHO determined that the district offered the student a FAPE for the 2024-25 school

year and denied the parent's request for relief, including their request for an independent neuropsychological evaluation (IHO Decision at pp. 2, 6-8).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2024-25 school year. The parent asserts that the IHO failed to find that the CSE improperly delegated decision-making for the provision of nursing services. The parent further contends that the CSE improperly failed to recommend hearing education services, music therapy, assistive technology devices, a transportation paraprofessional, a transportation nurse, and failed to recommend appropriate special transportation services. According to the parent, the CSE reconvened after the start of the school year to recommend the needed transportation accommodations but the reconvene was too late. In addition, the parent argues that the IHO failed to hold the district accountable for its failure to propose or conduct sufficient evaluations of the student. The parent also asserts that the school site to which the student had been assigned was not capable of implementing the student's IEP. The parent further alleges that the CSE improperly changed the student's classification to other health impairment. Finally, the parent contends that iBrain was an appropriate unilateral placement for the 2024-25 school year and that equitable considerations warrant an award of full funding for the cost of the student's attendance at iBrain. As part of her argument that iBrain was appropriate, the parent contends that the IHO erroneously precluded witness testimony in support of the parent. As relief, the parent requests funding for the full costs of the student's tuition at iBrain, as well as funding for transportation and nursing services.

In an answer with cross-appeal, the district argues that the IHO's determination that the district offered the student a FAPE for the 12-month 2024-25 school year should be affirmed. As a cross-appeal, the district asserts that the IHO erred in determining pendency. The district argues that the student's pendency services are based on a determination on the merits of the parent's claims in Application of a Student with a Disability, Appeal No. 24-028, and do not include transportation or nursing services.

In a reply and answer to the cross-appeal, the parent reasserts many of her allegations from the request for review, requests an independent neuropsychological evaluation, and argues that the student's placement for pendency should be based on an October 19, 2022 IHO Decision.[4]

[4] State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). Review of the parent's request for review indicates that the parent failed to appeal the IHO's denial of her request for an independent neuropsychological evaluation (IHO Decision at pp. 7-8). Although, the parent attempted to reassert the claim in her reply, this is not sufficient and the IHO's finding

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

---

that the parent was not entitled to an independent neuropsychological evaluation is final and binding on the parties and will not be further addressed herein or on remand (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]).

adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

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

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. Preliminary Matter

1. Conduct of Impartial Hearing

In her request for review, the parent alleges that the IHO erroneously precluded witness testimony offered by the parent. The parent's allegation is raised as part of her claim that iBrain was an appropriate placement for the student and, accordingly, it appears the parent contends that her witnesses would have offered additional support for finding that iBrain was an appropriate placement for the student for the 2024-25 school year, although the parent does not provide any explanation as to what information her witnesses would have provided (Req. for Rev. ¶¶7, 31). The district did not address the parent's claim in its answer with cross-appeal.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). State regulation further provides that parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities, that an IHO may assist an unrepresented party by providing information relating only to the hearing process, and that nothing contained in the cited State regulation shall be construed to impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (see 8 NYCRR 200.5[j][3][vii]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application

of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

In the event that an IHO does not accord one or both of the parties' due process during the impartial hearing, remand may be an appropriate remedy (8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]; see Application of a Student with a Disability, Appeal No. 22-054).

By email dated July 15, 2024, the IHO notified the parties that he had been appointed to hear the matter, described how the matter would proceed, and attached a copy of his "Hearing Rules" (IHO Ex. II at pp. 2-4). According to the IHO's rules, it was required that "testimonial affidavits," that is, direct testimony by affidavit, must be exchanged five business days prior to the scheduled hearing date (IHO Ex. VI at p. 1). In addition, the IHO required that affidavits must be signed and notarized and the affiant must be available for cross-examination and questioning by the IHO (id.). The parties convened for an impartial hearing date on September 12, 2024 (Tr. pp. 16-102). Prior to the presentation of the district's case, the IHO noted that the parent had not provided any testimonial affidavits, nor were her witnesses available to testify (Tr. p. 21). The district had made a motion to preclude the parent's witnesses from providing any testimony (id.). The IHO denied the district's request (id.). The parties reconvened for a second impartial hearing date on September 27, 2024 (Tr. pp. 103-25). The IHO noted that the parent had disclosed her witness affidavits on September 24, 2024, which was beyond the September 20, 2024 deadline (Tr. p. 105). The district again made a motion to preclude the parent's witnesses, which the IHO granted (Tr. p. 106). The parent's documentary evidence was admitted into the hearing record (Tr. p. 29; IHO Decision at p. 3).

The hearing record reflects that the IHO gave the parent a second chance to comply with his hearing rules and that she initially agreed to disclose the witness affidavits by September 20, 2024 (Tr. pp. 105-07). Nevertheless, the parent did not disclose the affidavits until September 24, 2024 and offered the same excuse the second time, which the IHO found unavailing (Tr. pp. 105-06). The IHO retains broad discretion in the efficient conduct of the hearing and is permitted to set reasonable directives for the conduct of the impartial hearing. In this instance, the hearing record shows that the IHO's interpretation and adherence to his hearing rules was not unreasonable and did not result in a denial of the parent's due process rights.

Notably, the IHO's model rules required that the parties provide a witness list "and a brief, but informative, description of the nature of the witness's testimony" (IHO Ex. VI at p. 1). The parent's exhibit lists do not appear to comply with this directive (see Parent Exhibit List Cover Letter & Exhibit List). Further, the parent has not presented any explanation on appeal as to what her proposed witnesses would have provided and merely asserts that the IHO erred in precluding her witnesses as one part of a sentence in which the parent asserts her documentary evidence was sufficient to support a finding that iBrain was an appropriate placement for the student. Accordingly, there is insufficient basis in the hearing record to disturb the IHO's decision to preclude the parent's testimonial affidavits and witness testimony.

B. Pendency

The IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[6] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"];

[6] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

As noted above, the pendency inquiry focuses on identifying the student's then-current educational placement, which "typically refers to the child's last agreed-upon educational program before the parent requested a due process hearing to challenge the child's IEP" (Ventura de Paulino, 959 F.3d at 532 [emphasis added]). There is no question that the filing of a due process complaint notice triggers pendency (see E. Lyme, 790 F.3d at 456).

Once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 532 [2d Cir. 2020]; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). Thus, it has been held that a district would not be responsible for funding a student's tuition for the time period between the start of the student's school year through the date of the pendency changing event (i.e., the unappealed IHO decision or SRO decision in favor of the parent) until the parent prevailed on the merits of the due process complaint notice (Murphy, 86 F. Supp. 2d at 367).[7]

[7] With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if an administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; S.H.W. v. New York City Dep't of Educ., 2023 WL 2753165, at *8 [S.D.N.Y. Mar. 31, 2023]; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

In this matter, the parent contended that an October 2022 IHO decision established the student's placement for the pendency of this proceeding, while the district contended that an April 3, 2024 SRO decision established the student's placement for the pendency of the proceeding (Parent Exs. A; A-C; IHO Ex. IX).

As of the date of the parent's July 2, 2024 due process complaint notice, an April 3, 2024 SRO decision had been rendered in Application of a Student with a Disability, Appeal No. 24-028 (IHO Ex. IX at pp. 10-24). The SRO in that matter determined that the district failed to offer the student a FAPE for the 2023-24 school year but reduced the relief based on equitable considerations (id. at pp. 16-23). The SRO found that the IHO had correctly made alternate findings that the parent failed to demonstrate that the related services set forth in an agreement for supplemental tuition were actually being provided to the student and that the student did not receive 1:1 nursing services during the 2023-24 school year (id. at pp. 21-22). Based on an additional reduction for equitable considerations, the SRO awarded the parent 50 percent of the cost of the student's base tuition at iBrain for the 2023-24 school year and 50 percent of the cost of the student's transportation services (id. at pp. 23-24).

The IHO, in this matter, specifically found that the decision in Application of a Student with a Disability, Appeal No. 24-028 was the basis for the student's pendency program (IHO Ex. XI at p. 7). However, the IHO also indicated that the student's pendency program consisted of tuition at iBrain, as well as transportation, nursing, and paraprofessional services (id.). The IHO noted that the district argued for a 50 percent reduction in the amount charged for services pursuant to the SRO's determination on equitable considerations; however, the IHO found that "equitable issues do not carry over into subsequent school years and are year specific" (id.).

The district cross-appeals from the IHO's pendency decision, asserting that the SRO, in Application of a Student with a Disability, Appeal No. 24-028, denied the parent's requests for supplemental tuition at iBrain consisting of related services and for 1:1 nursing services. However, in the same paragraph, the district contends that the IHO erred in including transportation and 1:1 nursing services asserting they were not ordered by the SRO in the prior matter. The district incorrectly argues that the SRO did not award transportation funding (IHO Ex. IX at pp. 23-24).

In its answer to the district's cross-appeal, the parent asserts that the IHO's decision on pendency should be upheld; however, the parent also contends that the student's pendency placement was based on an October 2022 IHO decision. In that decision, regarding the 2022-23 school year, the IHO ordered the district to fund the costs of the student's base tuition at iBrain, supplemental tuition at iBrain to cover related services, and transportation (Parent Ex. A-C at p. 6).

Pertinently, neither the April 2024 SRO decision, nor the October 2022 IHO decision directed the district to fund nursing services for the student (Parent Ex. A-C at p. 6; IHO Ex. IX at pp. 23-24). Accordingly, the IHO erred in ordering nursing services for the student as part of the student's pendency placement.

Additionally, while the October 2022 IHO decision did direct the district to fund supplemental tuition, the IHO specifically found that the basis for the student's pendency program was the April 2024 SRO decision and the parent has not appealed from this determination. The

parent contends that the student's pendency placement should be based on the October 2022 IHO decision, but does not provide any reason for this assertion and does not provide any argument as to how the IHO may have erred in finding that pendency consisted of the services listed in the April 2024 SRO decision. Accordingly, the IHO's finding that the April 2024 SRO decision is the basis for the student's pendency program is final and binding on the parties.

The district also does not cross-appeal from the IHO's refusal to apply the SRO's 50 percent reduction for equitable considerations. Accordingly, this finding is also final and binding on the parties and I will not revisit the IHO's reasoning that a reduction in tuition based on equitable considerations does not continue as part of the student's pendency placement.

Based on the above, the IHO's interim order on pendency must be modified to accurately reflect the SRO's decision in Application of a Student with a Disability, Appeal No. 24-028. Review of that decision shows that the student's pendency consists of base tuition at iBrain and transportation services (IHO Ex. IX at pp. 23-24). Accordingly, beginning with the filing of the parent's due process complaint notice on July 2, 2024, through the date of this decision, the district is responsible for funding the costs of the student's base tuition at iBrain and the student's transportation services with Sisters Travel. Pendency does not include related services or 1:1 nursing services.[8]

C. FAPE - 2024-25 School Year

Turning to the substance of the parties' dispute, the parent raises a number of issues regarding the March 2024 IEP. However, while most of the recommendations in the March 2024 IEP were continued in the later July 2024 IEP, the district July 2024 IEP added to the recommendations for AT and transportation (compare Dist. Ex. 1, with Dist. Ex. 2). The specific additions to the July 2024 IEP included daily use of an iPad, a 1:1 paraprofessional during transportation, and a vehicle with air conditioning (compare Dist. Ex. 1 at pp. 45, 50 with Dist. Ex. 2 at pp. 45, 50). The parent contends that the July 2024 recommendations were "too late" as the school year had already started.

To meet its legal obligations, a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (20 U.S.C. § 1414[d][2][A]; 34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]). In addition, the Second Circuit has made clear that parents are entitled to rely on an IEP "as written when they decide to [unilaterally] place" their child (Bd. of Educ. of Yorktown Cent. Sch. Dist. v.

[8] The IHO interim decision on pendency in this matter also explicitly included the cost of paraprofessional services as part of pendency (IHO Ex. XI at p. 7). However, review of the parent's enrollment contract with iBrain shows that paraprofessional services were included as a part of the student's base tuition for the 2024-25 school year (Parent Ex. A-E at p. 1). As this service is included as part of the base tuition at iBrain and neither party contends that the district is not responsible for the costs of the base tuition, it is unnecessary to address whether paraprofessional services were originally a part of the student's pendency program as it is now part of the student's pendency placement by agreement of the parties (see 34 CFR 300.518[a]; 8 NYCRR 200.5[m][1]).

C.S., 990 F.3d 152, 173 [2d Cir. 2021]; see R.E., 694 F.3d at 187-88 ["At the time the parents must decide whether to make a unilateral placement . . . [t]he appropriate inquiry is into the nature of the program actually offered"]).

Here, the parent sent a letter to the district on June 17, 2024 objecting to the recommendations contained in the March 2024 IEP, signed a contract with iBrain for the 12-month 2024-25 school year with iBrain on June 18, 2024 for a school year starting on July 2, 2024, and filed her due process complaint notice on July 2, 2024 (Parent Exs. A; A-A; A-E). Accordingly, at the time the parent made the decision to place the student at iBrain for the 2024-25 school year, the March 2024 IEP was the IEP in effect and the district cannot rely on the recommendations made in the later July 2024 IEP.

1. March 2024 IEP

According to the March 2024 IEP, the CSE had available to it a January 2023 classroom observation, results from a January 2023 administration of the Vineland Adaptive Behavior Scales-Third Edition (Vineland-3), a March 2024 social history update, and iBrain progress reports from March 2024 (Dist. Ex. 1 at p. 1).[9] Much of the information included in the March 2024 IEP was attributed to the iBrain report and education plan submitted to the district in March 2024 (compare Dist. Ex. 1, with Dist. Ex. 7).

According to the March 2024 IEP, the student was enrolled "in an 8:1:1 classroom with reduced visual and sound distractions" and was "provided with individual and small group instruction" (Dist. Ex. 1 at p. 4). The March 2024 IEP indicated that the student used "vocalizations, . . . sign language, gestures, facial expressions, and her [augmentative and alternative communication] AAC device" to communicate both "greetings and various wants and needs" (id.). The March 2024 IEP reported the student made "steady progress" given "a small class size, low complexity learning environment, and intensive services" (id.).

The March 2024 IEP indicated that the student demonstrated "environmental awareness in the classroom and familiar school areas" (Dist. Ex. 1 at p. 5). According to the March 2024 IEP, the student "kn[e]w her name" and recognized it in print, sometimes "turn[ed] her head towards the person [] speaking," "recognize[d] herself in the mirror," and "underst[ood] cause-and-effect" (id.). The March 2024 IEP indicated the student was able to "attend to a preferred task for [five] minutes" and "work[ed] best in a 1:1 setting" (id.). The March 2024 IEP also reported the student was able to "identify various parts of a book" and use her AAC device to "identify all alphabet letters and their sounds with visual supports" (id. at p. 6).

According to the March 2024 IEP, the student "indentif[ied] the difference between big and small," "underst[ood] 'more,'" and "identif[ied] numbers 1-20 with moderate verbal support" (Dist. Ex. 1 at p. 6). The March 2024 IEP included that the student "work[ed] on one-to-one correspondence" and "sequencing first, next, and last" (id.).

[9] The March 2024 IEP indicated the social history was completed March 10, 2023, and this date was referenced again in the school psychologist's affidavit (Dist. Exs. 1 at p. 1; 8 ¶ 11). However, the record also included the district's social history update which indicated the interview was completed March 10, 2024 (Dist. Ex. 5 at p. 1).

The March 2024 IEP indicated the student "produce[d] two-word phrases . . . given verbal models" and practiced "conversational turn-taking" during speech-language therapy (Dist. Ex. 1 at p. 7). The student "require[d] verbal models, moderate verbal cueing, as well as aided language stimulation to locate symbols on her high-tech AAC device or approximate verbalizations" (id.). The March 2024 IEP reported the student was "highly motivated to communicate and enjoy[ed] socializing with others" (id.). According to the March 2024 IEP, the student "call[ed] familiar people by name" (id.). The March 2024 IEP described that the student "benefit[ted] from moderate verbal/visual/tactile cues and verbal redirections to sustain [her] attention" and demonstrated "self-doubt and hesitancy when [she] us[ed] her high-tech [speech-generating device] S[GD]" (id. at pp. 7-8). According to the March 2024 IEP, the student "often require[d] extended processing time when using her device to make independent activations" and that on "challenging days, [the student] [] tend[ed] to randomly click icons" (id. at p. 8).

According to the March 2024 IEP, the student "benefit[ted] from . . . a multi-sensory environment to increase [her] attention, body awareness, and motivation" and "often require[d] breaks" to maintain attention and active engagement (Dist. Ex. 1 at p. 9). The March 2024 IEP also indicated the student "require[d] extended time to aid in motor planning and cognitive processing during all activities" and "benefit[ted] from modeling" (id.). The March 2024 IEP included that the student "require[d] access to a quiet, isolated environment to work towards skill acquisition before generalizing to the classroom environment as she bec[ame] easily distracted by added visual and auditory input" (id.).

The March 2024 IEP included information about the student's hearing services, which focused on "academic vocabulary" and "words and phrases relevant to her everyday life and environment" (Dist. Ex. 1 at p. 9). The March 2024 IEP indicated that during the student's hearing services she was "prompted to use her hearing to actively listen to peers and adults, use her signs and incorporate her signs to communicate" (id.). According to the March 2024 IEP, the student did "not have hearing loss" but "challenges with processing auditory information" was "a common comorbidity of traumatic brain injury" (id.). The March 2024 IEP indicated that the hearing services supported the student's "listening and communication goals" and going forward the service would address "the functional use of [] increased vocabulary" as well as "adding words to [] [the student's] vocabulary" (id. at pp. 9-10).

In music therapy, the March 2024 IEP indicated the student's sessions "consist[ed] of live, interactive, and highly individualized music exercises to help students achieve goals faster and more efficiently" (Dist. Ex. 1 at p. 10). The March 2024 IEP included that the student "benefit[ted] from breaks during sessions" as well as "a contained and distraction-free environment" (id.). According to the March 2024 IEP, the student "appear[ed] to benefit from the presence of music" and that the therapy "help[ed] to promote independence, choice, and communication skills" (id.). The March 2024 IEP indicated that the student was sometimes "impulsive and resist[ed] instructions" as well as that she sometimes demonstrated "frustration" and "low sustained attention" (id.). Regarding music therapy, the March 2024 IEP indicated "that music can be used as an instructional tool to support engagement throughout the day" but was "not [] recommended as part of the current . . . IEP" (id. at pp. 10, 53). According to the March 2024 IEP, iBrain personnel expressed concern about the lack of a recommendation for music therapy, indicating that "the student will not appropriately progress towards the identified goals without the service being provided by a certified music therapist" (id.).

Within assistive technology sessions, the March 2024 IEP indicated that the student worked on greetings and was "motivated by social interaction and auditory stimuli" (Dist. Ex. 1 at pp. 11-12). The March 2024 IEP indicated that the student required "minimal to moderate multimodal prompts and cues" to "access and activate her device with minimal to moderate processing times" (id. at p. 12). According to the March 2024 IEP, the student needed breaks "to maintain stamina, support sustained attention, reduce frustration, and prevent overstimulation" (id.). The March 2024 IEP reported that the student's "consistent use of the device [] supported her ability to initiate and navigate the device" (id.). The March 2024 IEP indicated that the CSE "explained that [the student] require[d] an [assistive technology] evaluation with [the district] to determine the specific device she [was] eligible for" and that "[t]he parent expressed an interest in this evaluation" (id. at pp. 15, 53).

Socially, the March 2024 IEP indicated the student greeted her peers, used her communication device in the classroom, "play[ed] board games with her peers," and took turns "during group activities" (Dist. Ex. 1 at p. 15). The March 2024 IEP included that the student "work[ed] on initiating and maintaining interaction with unfamiliar staff and peers" (id. at p. 16). According to the March 2024 IEP, the student "smile[d]" and "vocaliz[ed] when she [was] happy" and "engage[d] with activities when motivated" (id.).

The March 2024 IEP indicated that in terms of physical development, the student required "moderate to maximal support for completion of" daily living tasks, as well as "support . . . during all transitions and transfers throughout the day" (Dist. Ex. 1 at p. 18). According to the March 2024 IEP, the student "use[d] adapted devices and assistive technology" as well as "various therapeutic equipment" to address her physical needs (id.). The March 2024 IEP indicated that the student "demonstrate[d] sufficient head control" and was "able to maintain static sitting with supervision while at her adaptive desk" (id.). The March 2024 IEP included that the student "need[ed] assistance . . . with mobility, transfers, safety awareness, hygiene, and other activities of daily living" (id. at p. 19). The March 2024 IEP further indicated that the student "present[ed] with motor, sensory and cognitive impairments [that] impact[ed] her motor functioning and participation level within [the] school setting" (id.). The student "require[d] hands-on assistance [and] verbal cues to slow down for improved movement control" and "to safely negotiate stairs" (id. at p. 20).

The parent argues that the district failed to propose or conduct sufficient evaluations of the student. However, according to the March 2024 IEP, the district used current assessment information gathered by district staff as well as the information provided by staff from the student's private placement. The school psychologist testified that while the district did not evaluate the student in 2024, she and other members of "a team . . . conduct[ed] a classroom observation of [the student]" in 2023, and the CSE "used information from iBrain to develop the IEP" (Tr. pp. 40, 45, 64). The parent did not suggest that the information provided to the CSE by iBrain was inaccurate or no longer current.[10] As such, the CSE developed its recommendation based on an accurate representation of the student's current functioning.

[10] The due process complaint notice included an allegation that the present levels of performance included in the March 2024 IEP were not appropriate (Parent Ex. A at p. 9). However, the parent did not identify any specific inaccuracy or omission with respect to the present levels of performance other than that they did "not present a

As described in the March 2024 IEP, the student's management needs included an individual paraprofessional, repetition of verbal cues paired with physical cues, a highly structured classroom with a designated workspace, direct instruction, multisensory supports and breaks, redirection, adapted materials, an environment with limited distractions, small groups, positional aids and equipment, orthotics, AAC device, assistive technology, and monitoring for health management (Dist. Ex. 1 at pp. 20-21). The March 2024 IEP included that the student required a device to address communication needs and recommended that it also be used in the student's home (id. at p. 22). A variety of goals were included within the March 2024 IEP that addressed the student's communication using her AAC device, as well as her academic skills, social skills, active listening skills, pragmatic language skills, receptive and expressive language skills, oral-motor skills, fine and gross motor functioning, and daily living skills (id. at pp. 23-39). The March 2024 IEP also included goals for parent counseling and training and for the student's paraprofessional (id. at pp. 40-43).

The parent argues that the district's recommended placement was inappropriate as the setting was unable to implement the March 2024 IEP's 60-minute related service sessions and did not recommend an extended school day. The parent also argues the district failed to recommend hearing education services or music therapy for the student.

The March 2024 CSE recommended the student for 12-month services consisting of an 8:1+1 special class, adapted physical education, four 60-minute sessions per week of individual OT, one 60-minute session per week of group OT, three 60-minute sessions of individual PT, daily school nurse services as needed, four 60-minute sessions per week of individual speech-language therapy, and one 60-minute session per week of group speech-language therapy (Dist. Ex. 1 at pp. 44-45, 46).[11] In addition, the CSE included recommendations for the support of full-time individual paraprofessional services for health and ambulation, assistive technology services two times per week, and that the parent be provided with one 60-minute session per month of parent counseling and training (id. at p. 44).

---

valid baseline against which progress c[ould] be measured" (id.). As discussed above, review of the March 2024 IEP shows that it included copious information regarding the student provided by iBrain and there is no allegation on appeal that the information provided by iBrain and incorporated into the March 2024 IEP was either insufficient or inaccurate. Accordingly, to the extent the parent did challenge the present levels of performance in the due process complaint notice, that claim has not been advanced on appeal and has therefore been abandoned.

[11] The March 2024 IEP separately listed individual speech-language therapy on two lines. The March 2024 IEP included a recommendation for four sessions of individual speech-language therapy and, on a separate line, recommended one session of individual speech-language therapy (Dist. Ex. 1 at p. 45). The May 2024 prior written notice included the same recommendation for speech-language therapy, as did the July 2024 IEP (Dist. Exs. 2 at p. 45; 4 at pp. 2, 4). During the impartial hearing, the principal expressed confusion about this and the IHO indicated "[i]t could be a typo" (Tr. pp. 86-87). The attorney for the district later attempted to clarify this with the principal, who testified that "it would be highly unusual if the IEP was intended to be written this way" although he could not be sure "as to the actual intent of this IEP" (Tr. p. 92). The principal then testified that he "would have clarified" the type of service recommended for the student had she attended the school (Tr. pp. 92-93). Given the district's acceptance of most of iBrain's recommendations for the student and that iBrain recommended four sessions per week of individual speech-language therapy and one session per week of group speech-language therapy, it would appear likely that the district intended to recommend individual and group speech-language therapy (see Dist. Ex. 7 at p. 56).

According to the principal, the school day was from 8:00 to 2:20 (Tr. p. 82). The principal testified that he believed the school was able to implement the student's related service recommendations, and that "if for some reason there was a time constraint, [the district] would have issued an RSA" which was a means by which services could be provided at home (Tr. p. 87). The principal also offered that the related service providers and the classroom teachers worked together "[e]very day" to ensure students received appropriate academic instruction, and that both push-in and pull-out services were provided as needed (Tr. p. 94). This testimony was consistent with the March 2024 IEP recommendations for related services as each of the related services indicated it could be provided at either a separate location or in the student's special education classroom (Dist. Ex. 1 at pp. 44-45). Given the district's testimony and lack of evidence to the contrary, the evidence tips in the district's favor that the district was capable of providing the related services as recommended in the March 2024 IEP.

Regarding the parent's argument that the March 2024 IEP failed to recommend hearing education services, or music therapy for the student, the hearing record supports the IHO's determination that the student did not require these services. First, while iBrain recommended hearing education services, the iBrain education plan indicated that the student "d[id] not have hearing loss" (id. at p. 18). The iBrain education plan indicated only that a "challenge[] with processing auditory information" could not be "rule[d] out" given that "it [was] a common comorbidity of traumatic brain injury" (id. at pp. 18, 34). Further, the iBrain education plan indicated that the student's hearing goals "focused on improving her expressive and receptive language" and a future goal addressed her "functional use of [] increased vocabulary" and the March 2024 CSE recommended speech-language and assistive technology goals addressed these skills (Parent Ex 7 at p. 18; Dist. Ex. 1 at pp. 28, 30-33).

With regard to music therapy, the school psychologist testified that "the DOE d[id] not provide [music therapy] as a formalized mandated service" but "it [was] used as an instructional tool" (Tr. pp. 57, 63). The school psychologist further testified that "music therapy can be implemented in different services that the student's receiving, such as [OT], [PT], speech and language therapy, which" was "reflected" in the iBrain education plan (Tr. pp. 57-58). Further, the school psychologist testified that the student's music therapy goals addressed language and fine motor skills, and therefore music "could be incorporated into [the student's] daily recommended programs and services" and related services (Tr. pp. 58, 63). A review of the iBrain education plan confirmed that music was something the student enjoyed and was motivated by, and that music therapy focused on increasing the student's fine and gross motor skills, receptive and expressive language skills, and focused attention (Dist. Ex. 7 at pp. 1, 4, 15, 18-19, 20, 23, 36, 41, 60-63). Based on the available information in the hearing record, the student does not appear to hearing education services in order to receive a FAPE, and the district was able to incorporate music into the student's daily routine and therapies such that music therapy as a related service was not required in order for the student to receive a FAPE.

In addition to the related services, the March 2024 IEP recommended the student receive the support of a full time, individual health paraprofessional; two sessions per week of individual assistive technology services as needed; and training for staff on the use of braces/orthotics, g-tube safety, use of direct instruction, hydration intake monitoring, and shunt precautions (Dist. Ex. 1 at p. 45). The March 2024 IEP recommended the student participate in the New York State Alternative Assessment given her significant deficits in cognition, communication and language,

and adaptive behavior (id. at p. 48). Further, although checked "No," the March 2024 IEP stated that the committee had determined that the student's disability adversely affected her ability to learn a language and recommended that the student be exempt from learning a language other than English (Dist. Ex. 1 at p. 49).

The parent argues that the district failed to recommend assistive technology devices or supplementary aids for the student despite their recommended use within the March 2024 IEP. The March 2024 IEP made several references to the student's use of assistive technology (Dist. Ex. 1 at pp. 4, 6, 7, 8, 11-12, 15, 18). The March 2024 IEP recommended an AAC device and assistive technology such as "slant boards [and] built-up handles," as well as two sessions per week of individual assistive technology services (id. at pp. 21, 45). Further, the March 2024 IEP indicated that the CSE "explained that [the student] require[d] an [assistive technology] evaluation with [the district] to determine the specific device she [was] eligible for" and that "[t]he parent expressed an interest in this evaluation" (id. at pp. 15, 53). While the parent is correct that a specific device was not named within the March 2024 IEP, the IEP indicated that an assistive technology evaluation would be completed to determine an appropriate device for the student. Further, the March 2024 IEP made it clear that the student required and would access appropriate assistive technology services and devices.

2. Special Transportation

The parent contends that the district failed to recommend appropriate special transportation services, including the support of a 1:1 travel paraprofessional, air conditioning, and limited travel time (Parent Ex. A at p. 10). The parent also argues in her request for review that the student required a transportation nurse.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at https://www.nysed.gov/sites/default/files/programs/special-education/special-transportation-for-students-with-disabilities_0.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

The March 2024 IEP recommended special transportation services consisting of transportation from the closest safe curb location to the school (Dist. Ex. 1 at p. 50). According to February 2024 medical forms, the student's physician indicated that the student had not had any seizures since 2019 (Dist. Ex. 6 at p. 5). Additionally, the medical forms indicated that the request was for "nursing," "paraprofessional support," and "transportation" and that the student had "no seizures" and was "well[-]controlled" (id. at p. 6). The medical form indicated that the student may need "[e]mergency [m]edications" either "during school" or "during transport" (id.). The medication administration form indicated that if the student had a seizure during school, she required "[one] spray" of her medication, nasally (id. at p. 8).

In her affidavit, the school psychologist indicated that the student required "specialized transportation" (Dist. Ex. 12 ¶ 12). The March 2024 IEP included a recommendation for "[t]ransportation from the closest safe curb location to school" and identified that the student had "medical conditions" that necessitated "specialized transportation" (Dist. Ex. 1 at p. 50). The March 2024 IEP also indicated that 1:1 nursing services during transportation "due to seizures w[as] discussed at the meeting" (id. at p. 53). According to the March 2024 IEP, "the [d]istrict was awaiting response from [the Office of Student Health]" and the CSE would hold "a reconvene meeting" to address the issue once the information was gathered (Tr. p. 48; Dist. Ex. 1 at p. 53). At the time of the March 2024 CSE meeting, the hearing record indicated that the parent had submitted relevant medical forms, and the district was waiting for additional information from medical professionals.

According to the February 2024 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. 6 at p. 6). 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 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 2024 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 have required a nurse to administer a specific medication to the student on an emergency basis while being transported to and from school and failed to recommend appropriate special transportation services to meet that need resulting in a denial of a FAPE (Dist. Ex. 1 at pp. 45, 50).

The district acknowledged in its answer with cross-appeal that the March 2024 IEP was the operative IEP at the start of the 12-month school year and discussed the July IEP in connection with how the additional assistive technology and transportation recommendations offered the student a FAPE, as well (Answer with Cross-Appeal at p. 3 n. 1). According to the district, "[o]nce the CSE received necessary paperwork submitted by the [p]arent and a response from [the district's office of school health] . . . the CSE determined that [the s]tudent required the services of a transportation paraprofessional, and not the nurse the [p]arent requested" (id. at p. 7).

The school psychologist testified that "the purpose of [the] IEP meeting in July" was "to address [] nursing for [] transportation" (Tr. p. 52). The school psychologist testified that, based on a discussion between the district's doctor and the student's doctor, the student's "seizures [were] controlled" and, therefore, the student "did not need a one-to-one nurse for the bus, but instead" needed "a one-to-one para[professional] for the bus [] in case of an emergency" (Tr. pp. 48, 53). According to the school psychologist, "the para[professional] would have the opportunity to call 911 if it was necessary" (Tr. p. 53). The school psychologist also testified that the July 2024 CSE "recommended air conditioning" (Tr. p. 55).

The process described by the district, requiring the parent to provide the district with specific paperwork which the district examined through a separate department outside of the CSE process and then, afterwards decided if the student's IEP would be amended to include the services of a transportation nurse is a scenario that bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the 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. . . . Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—much less knowing—the services each was required to provide" (J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464-65 [S.D.N.Y. 2018]).

The CSE reconvened on July 29, 2024 to consider a "[t]ransportation [a]ccommodation and the [a]ssistive [t]echnology [e]valuation" (Dist. Ex. 2 at p. 4). The July 2024 IEP was identical to the March 2024 IEP, except for additions to the recommendations for assistive technology and transportation (compare Dist. Ex. 1, with Dist. Ex. 2). The specific additions to the July 2024 IEP included daily use of an iPad, a 1:1 paraprofessional during transportation, and a vehicle with air conditioning (compare Dist. Ex. 1 at pp. 45, 50 with Dist. Ex. 2 at pp. 45, 50).

Notwithstanding the district's addition of a 1:1 transportation paraprofessional in the July 2024 IEP, as noted above, the form indicated that the student's medication "must be administered by a nurse" (Dist. Ex. 6 at p. 6). As the hearing record supports finding that the student had a sufficient safety concern that may have required the use of the emergency medication during

transportation such that not making the medication available to the student during transportation resulted in a denial of a FAPE to the student, the district denied the student a FAPE by failing to provide for appropriately qualified personnel to deliver the student's medication during transportation, even if it were permissible to consider the July 2024 recommendation for 1:1 paraprofessional services during transportation.

D. Remand

Having found that the district failed to offer the student a FAPE for the 2024-25 school year, the next issue to be discussed is whether iBrain was an appropriate unilateral placement for the student. As the IHO determined that the district offered the student a FAPE for the 2024-25 school year, he declined to address the appropriateness of iBrain as a unilateral placement (IHO Decision at p. 7). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, as the IHO has not yet ruled on whether the parent met her burden to prove that the unilateral placement was appropriate or whether equitable considerations would support the parent's request for relief, I will remand the matter to the IHO to address these issues in the first instance.

However, it must be noted that this remand is for the IHO's consideration of the evidence before him regarding the appropriateness of the unilateral placement. As noted above, the IHO precluded the parent from presenting witnesses during the hearing due to the parent's repeated failures to follow the tribunal's rules for the presentation of witness testimony. This remand should not be used for the presentation of new evidence and the parent will have to rely on the submitted documentary evidence.

As noted above, 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).

However, neither the IDEA, State Law, nor case law provides that a party fails to meet its burden of proof simply because the evidence produced does not consist of witness testimony and instead, each party has the right to "[p]resent evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512 [a][2]). The documentary evidence must be discussed as it relates to the disputed issues as a party may prevail by producing evidence consisting of documentary evidence provided that the submitted evidence is sufficient to meet the party's burden.

Here, the IHO is directed to conduct a fact-specific analysis of the appropriateness of the unilateral placement for the student for the 2024-25 school year using the documentary evidence that has been admitted to the hearing record.

VII. Conclusion

In summary, the district failed to demonstrate how the student's special transportation needs would be addressed by the March 2024 IEP. Review of the hearing record does not support the IHO's determination that the district offered the student a FAPE for the 2024-25 school year. As the IHO did not address the appropriateness of the parent's unilateral placement or equitable considerations, this matter is remanded to the IHO to make determinations on these issues. However, the IHO incorrectly determined the student's pendency services, which, based on the April 2024 SRO decision in Application of a Student with a Disability, Appeal No. 24-028, consist of base tuition at iBrain and transportation.

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 SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated October 15, 2024, is modified by reversing that portion which found that the district offered the student a FAPE for the 2024-25 school year; and

IT IS FURTHER ORDERED that the IHO's interim order on pendency dated September 12, 2024, is modified to reflect that the student's pendency services consist of base tuition at iBrain and transportation services; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to determine whether the services unilaterally obtained by the parent were appropriate for the student for the 2024-25 school year and whether equitable considerations weigh in favor of granting funding for the costs of tuition or related expenses.

Dated: **Albany, New York**
April 8, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER