The University of the State of New York

The State Education Department
State Review Officer
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No. 25-021

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Liberty & Freedom Legal Group, attorneys for petitioner, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 that respondent (the district) fund the costs of her son's tuition at the International Academy for the Brain (iBrain) for the 2023-24 and 2024-25 school years. The 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 student in this matter is non-verbal and non-ambulatory and has received diagnoses of cerebral palsy, epilepsy, global developmental delays, aphasia, and dysphagia (Parent Ex. F at p. 1, Dist. Ex. 12 at p. 1).[1]

[1] The student and his family moved to the United States in 2020, and the student reportedly was "not enrolled in any school" prior to 2022; the student began attending iBrain in September 2022 "for certain therapy sessions to see if he like[d] it" (Parent Ex. F at p. 25; Dist. Exs. 14 at p. 5; 28 at p. 28).

On February 18, 2022, the district received an initial referral from the parent to determine whether the student was eligible for special education services (Dist. Ex. 28 at p. 28). On April 2, 2022, the district conducted a psychoeducational evaluation of the student, which included administration of the Vineland Adaptive Behavior Scales, Third Edition (Vineland-3) (see Dist. Exs. 8; 12).[2] A classroom observation was attempted on December 20, 2022 but the student was not registered and not attending school at that time (Dist. Ex. 11).

On August 17, 2023, a CSE convened to conduct an initial review and found the student eligible for special education services as a student with multiple disabilities (see Dist. Ex. 3).[3, 4] The August 2023 CSE recommended that the student attend a 12:1+(3:1) special class for math, English language arts (ELA), social studies, sciences, and activities of daily living (ADLs) in a district specialized school and receive individual "non 1-1 skilled nursing" services "[a]s recommended" (id. at pp. 14-15, 20). The CSE additionally recommended that the student receive 12-month services and special transportation (id. at pp. 15, 19-20). A prior written notice of the student's initial eligibility and recommendation for special education services was sent to the parent on August 18, 2023, along with a form for the parent to sign to consent to services (see Parent Ex. M; Dist. Ex. 28 at p. 20).[5]

The student attended iBrain for the 2023-24 school year beginning "full time" in September 2023 (Dist. Ex. 14 at p. 5; see generally Parent Exs. F; H-K). On September 14, 2023, the parent entered into an annual nursing service agreement with B&H Health Care, Inc. – d/b/a Park Avenue Home Care (Park Avenue) for a transportation nurse and school nurse for the time period of September 18, 2023 through to June 21, 2024 (see Parent Ex. E). The parent also signed a school transportation annual services agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) on March 15, 2024 for the transportation of the student to and from iBrain beginning on September 18, 2023 and continuing through to June 30, 2024 (see Parent Ex. D).

The parent notified the district on March 20, 2024 that she had not received a school location letter for the 2023-24 school year which constituted a denial of a free appropriate public education (FAPE) and stated her intent to unilaterally place the student at iBrain for the 2023-24 extended school year and seek public funding for the costs of the student's placement (Parent Ex. B at pp. 1-2).

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[2] In April 2022, the parent informed the district that she wished to apply for home instruction and the district emailed home instruction forms to the parent (Dist. Ex. 28 at p. 27). The district followed-up with the parent in June 2022 (id.at p. 25). It is unclear if and when the parent communicated to the district her desire for a public school placement for the student.

[3] The August 2023 IEP had a projected implementation date of September 7, 2023 and a projected annual review date of August 17, 2024 (Dist. Ex. 3 at p. 1).

[4] The student's eligibility for special education is not in dispute but the parent contended that the disability category of multiple disabilities was not the most appropriate (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[5] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content.

On March 21, 2024, the parent entered into an annual enrollment contract for the student's placement at iBrain for the 2023-24 school year beginning on September 18, 2023 and ending on June 21, 2024 (see Parent Ex. C).

By prior written notice dated March 28, 2024, the district notified the parent of its proposal to conduct speech, occupational therapy (OT), physical therapy (PT), and assistive technology evaluations of the student, along with a social history update (Dist. Ex. 5). On April 14, 2024, the district conducted a social history update interview with the parent (see Dist. Ex. 14).[6]

In a prior written notice, dated April 29, 2024, the district again summarized the recommendations made at the August 2023 CSE meeting, and, in a school location letter also dated April 29, 2024, the district identified the particular public school site it assigned the student to attend to receive the program identified on the August 2023 IEP (Dist. Ex. 6). The district sent another prior written notice and school location letter on May 9, 2024 identifying a different assigned public school location (compare Dist. Ex. 7, with Dist. Ex. 6).

By letter dated June 17, 2024, the parent notified the district, among other things, that she "reject[ed] . . . the most recent proposed" IEP and "school placement" for the student for the 2024-25 school year and stated her intent to unilaterally place the student at iBrain for the 2024-25 school year and seek public funding for the costs of the student's placement (Parent Ex. N at pp. 11-12).

On June 17, 2024, the parent entered into an annual nursing service agreement with Park Avenue for both a transportation nurse and school nurse for the time period of July 2, 2024 through June 27, 2025 (Parent Ex. N at pp. 34-41).

A. Due Process Complaint Notices and Intervening and Subsequent Events

In a due process complaint notice dated June 18, 2024, the parent alleged that the district denied the student a FAPE for the 2023-24 school year (see generally Parent Ex. A). The parent requested a pendency hearing, asserting that the student's pendency placement consisted of iBrain as well as transportation and nursing services (id. at p. 2). As for the district's alleged failure to offer the student a FAPE for the 2023-24 school year, the parent asserted that the district failed to assess the student in all areas of disability; failed to have a special education teacher or related service provider at the CSE meeting; failed to provide the parent all required notices and denied the parent meaningful participation in the development of the student's IEP; failed to classify the student as a student with a traumatic brain injury (TBI); failed develop an appropriate IEP for the student with an appropriate statement of needs and appropriate annual goals and accommodations; failed to recommended an appropriate class size in the least restrictive environment (LRE); failed to recommend related services including PT, OT, speech-language therapy, vision education services, assistive technology services, and music therapy; failed to recommend appropriate special transportation services including a 1:1 transportation nurse and limited travel time; and failed to timely notify the parent of the assigned public school site (id. at pp. 4-8). The parent claimed that

[6] A level I vocational assessment of the student was conducted on May 21, 2024 and on June 17, 2024 the student underwent a PT evaluation (see Dist. Exs. 13; 15). Additionally, the student underwent an assistive technology evaluation on July 16, 2024 and a speech-language evaluation on July 22, 2024 (see Dist. Exs. 10; 16).

iBrain was an appropriate placement for the student to make meaningful progress and equitable considerations favored an award of tuition and related services at iBrain for the 2023-24 school year (id. at p. 8). As relief, the parent requested direct funding of the student's iBrain tuition, transportation services, and nursing services for the 2023-24 school year (id. at p. 9). The parent also requested a CSE meeting, reevaluation of the student, and for the district to provide assistive technology devices and services to the student (id.). Lastly, the parent requested district funding of an independent educational evaluation (IEE) for "education[] and transition" to include psychological and neuropsychological assessments (id.).

On June 20, 2024, the parent entered into a school transportation annual services agreement with Sisters Travel for the transportation of the student to and from iBrain from July 2, 2024 through June 27, 2025 (Parent Ex. N at pp. 27-33). On June 24, 2024, the parent signed an annual enrollment contract for the student's placement at iBrain starting on July 2, 2024 and ending on June 27, 2025 (id. at pp. 20-26).

In a second due process complaint notice, dated July 12, 2024, the parent alleged that the district failed to offer the student a FAPE for the 2024-25 school year (see Parent Ex. N at pp. 1-10). At the outset the parent requested consolidation of the June 18, 2024 and July 12, 2024 due process complaint notices (id. at p. 2).[7] Additionally, the parent requested pendency at iBrain with transportation services and nursing services (id. at pp. 2-3). The parent alleged the same procedural and substantive violations for the 2024-25 school year as she did with respect to the 2023-24 school year (compare Parent Ex. N at pp. 5-8, with Parent Ex. A at pp. 4-8). The parent asserted that iBrain was an appropriate placement for the student for the 2024-25 school year and that equitable considerations favored an award of iBrain tuition (id. at p. 8). As relief, the parent requested direct funding of the iBrain tuition in accordance with the enrollment agreement, special education transportation services pursuant to the transportation agreement, and nursing services per the nursing services agreement for the 2024-25 school year (id. at p. 9). In addition, the parent again requested that the CSE reconvene and that the district fund a neuropsychological IEE (id.).

In response to the July 15, 2024 due process complaint notice, the district generally denied the material allegations and raised various defenses (see Dist. Response to Due Process Compl. Not.).

Thereafter, a CSE convened on August 13, 2024 to conduct an annual review of the student's programming (see Dist. Ex. 27). The August 2024 CSE recommended that the student attend a 6:1+1 special class and an adapted physical education class in a State-approved nonpublic school (id. at pp. 38-39, 44).[8, 9] In addition, the August 2024 CSE recommended five 60-minute sessions

[7] The IHO issued an interim decision on September 10, 2024 in which she found that the matters should be consolidated (Sept. 10, 2024 Interim IHO Decision at pp. 1-3).

[8] The August 2024 IEP reflected a projected implementation date of August 22, 2024 and a projected annual review date of August 13, 2025 (Dist. Ex. 27 at p. 1).

[9] The district made two recommendations with respect to the 6:1+1 special class: an interim placement in a district specialized school and a placement in a State approved nonpublic school (Dist. Ex. 27 at p. 39). The school

per week of individual PT, five 60-minute sessions per week of individual speech-language therapy, individual school nurse services as needed, and one 60-minute session per month of parent counseling and training (id. at p. 39). The August 2024 CSE also recommended the student receive the support of a group paraprofessional for health, ambulation, and feeding (id.). For assistive technology, the CSE recommended a static display, speech generating device and switches with once weekly individual assistive technology services (id. at pp. 39-40). The August 2024 CSE continued to recommend 12-month services and special transportation (id. at pp. 40, 44).

B. Impartial Hearing and Impartial Hearing Officer Decision

After a prehearing conference on September 17, 2024 (Sept. 17, 2024 Tr. pp. 1-35), an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on October 10, 2024 and concluded on November 14, 2024 after six days of proceedings (Oct. 10, 2024 Tr. pp. 36-212; Oct. 30, 2024 Tr. pp. 1-62; Oct. 31, 2024 Tr. pp. 63-98; Nov. 7, 2024 Tr. pp. 99-280; Nov. 8, 2024 Tr. pp. 281-498; Nov. 14, 2024 Tr. pp. 499-581).[10]

Throughout the proceeding the parent made several motions including: a motion for partial summary judgment on October 16, 2024; a motion to deny any extension of the compliance dates on October 16, 2024; motions to preclude the issuance of a subpoena compelling the parent to testify at the impartial hearing on both October 30, 2024 and November 12, 2024; and a motion for

psychologist testified that, although a district specialized school could implement the student's IEP and was appropriate, the CSE recommended an approved nonpublic school that would be "more supportive to meet the student's needs" (Nov. 7, 2024 Tr. pp. 230-31).

[10] In her decision, the IHO stated that the parent failed to appear on November 14, 2024, and the IHO concluded the hearing; however, the IHO indicated in the decision that she received the November 14, 2024 transcript on November 29, 2024 (IHO Decision at pp. 9, 15). Upon initial receipt of the hearing record, the November 14, 2024 transcript was not submitted to the Office of State Review and, therefore, a copy of the November 14, 2024 hearing transcript was requested from the district. In response, an attorney from OATH stated that he reviewed the IHO's decision and the November 8, 2024 transcript and concluded that it "appear[ed] that there was no actual appearance on 11/14" and that "no hearing took place on 11/14, but there was one scheduled, which is what is referred to in the [findings of fact and decision] FOFD" which was a poor assumption that was inconsistent with the text of the IHO decision itself. Upon further inspection of the request for review and contrary to the response provided by OATH, this office sent another letter to the district stating that the parent's request for review showed specific quotations to the transcript of the proceedings that took place on November 14, 2024 with citations to specific pagination (Nov. 14, 2024 Tr. pp. 503, 568, 572-74, 580), which were well beyond the pages submitted by the district as part of the hearing record on appeal, which consisted of pages 1-498 (see Req. for Rev. at p. 6 n.4; Parent Mem. of Law at p. 10; SRO Ex. 6 [December 24, 2024 email from the parent's attorney to the IHO]). Finally, on March 4, 2025, the district provided this office with the November 14th transcript, which showed that the parent's counsel appeared, the parent did not, and that further witness testimony was taken (see Nov. 14, 2024 Tr. pp. 499-581).

summary judgment dated November 13, 2024 (see SRO Exs. 1-5). [11, 12] During the impartial hearing, there was much discussion about the parent appearing to testify, including the district's request for a subpoena therefor, which the parent's attorney opposed (Oct. 10, 2024 Tr. pp. 43, 65-66; Oct. 30, 2024 Tr. pp. 4-9; Oct. 31, 2024 Tr. pp. 86-92; Nov. 7, 2024 Tr. p. 102-05, 249-50, 255-58; Nov. 8, 2024 Tr. pp. 283-86, 467-68, 477-80, 483-86, 491; Nov. 14, 2024 Tr. pp. 554-56, 558-60, 563, 566-67, 574-76, 578). On November 6, 2024, the IHO issued an order directing the parent to appear remotely to testify on November 8, 2024 (Nov. 6, 2024 Interim IHO Decision). Thereafter the IHO signed a subpoena for the parent appear remotely to testify on November 14, 2024 (Subpoena). Ultimately, the parent did not appear to testify.

In a decision dated November 29, 2024, the IHO found that the district offered the student a FAPE for the 2023-24 and 2024-25 school years (IHO Decision at pp. 9, 11-14).[13] The IHO did not conduct an analysis of whether iBrain was an appropriate unilateral placement for the student for

[11] With the request for review, the parent submits additional evidence as follows: parent motion for partial summary judgment (SRO Ex. 1); parent motion opposing extension of compliance (SRO Ex. 2); parent motion opposing issuance of subpoena dated October 30, 2024 (SRO Ex. 3); parent motion opposing issuance of subpoena dated November 12, 2024 (SRO Ex. 4); parent motion for summary judgment (SRO Ex. 5); emails between the IHO and parties from November 30th and December 1-2, 2024 (SRO Ex. 6); emails between the IHO and parties from December 9-10, 2024 (SRO Ex. 7); emails between the IHO and parties from June 25, 2024 and July 8-10, 2024 (SRO Ex. 8); emails between the IHO and parties from November 12-13, 2024 (SRO Ex. 9); emails between the IHO and parties from October 4, 10-11, 14, 16-18, 21-22, 30, 2024 and November 6-8, 12, 2024 (SRO Ex. 10); emails between the IHO and parties from October 4, 10-11, 14, 16-18, 21-22, 2024 (SRO Ex. 11); and emails between the IHO and parties from September 10, 2024 (SRO Ex. 12). State regulation provides that the hearing record includes copies of "all briefs, arguments or written requests for an order filed by the parties for consideration by the impartial hearing officer," as well as "all written orders, rulings, or decisions issued in the case" (8 NYCRR 200.5[j][5][vi]; 279.9[a]). The motions made by the parent should have been included by the IHO as part of the hearing record and the email correspondence submitted includes arguments pertaining to motions, scheduling, and compliance dates which also should have been included as part of the hearing record and will be considered as part of the hearing record on appeal.

[12] The motion for partial summary judgment was denied by the IHO because the district witnesses had not yet completed their testimony (Oct. 30, 2024 Tr. pp. 12-15; Oct. 31, 2024 Tr. pp. 73-74; Nov. 8, 2024 Tr. pp. 486-87). The motion to deny extensions of the compliance dates was essentially denied as the impartial hearing continued for six days although the case was out of compliance (Sept. 17, 2024 Tr. pp. 29-30; Oct. 30, 2024 Tr. pp. 18-19, 51-53; Nov. 8, 2024 Tr. p. 488; Nov. 14, 2024 Tr. pp. 560, 566-67; see Extension Order Reports dated September 10, 2024 and September 17, 2024). The IHO also denied the parent's motions to preclude the issuance of a subpoena for the parent to testify and motion for summary judgment (Nov. 14, 20224 Tr. pp. 504, 555-60; SRO Ex. 9 at p. 3).

[13] The IHO issued two decisions on November 29, 2024: Findings of Fact and Decision and Amended Findings of Fact and Decision. The basis for the amended decision was related to the ordering clause in the original decision which stated "that Parent's request for tuition costs for Student to attend Private School for the 12-month 2024-2024 School Year is denied" and "that Parent's request for transportation costs for Student to attend Private School for the 12-month 2024-2024 School Year is denied" (see IHO Decision at p. 16). The amended decision stated as follows: "that Parent's request for tuition costs for Student to attend Private School for the 12-month 2023-2024 School Year is denied" and "that Parent's request for transportation costs for Student to attend Private School for the 12-month 2024-2025 School Year is denied" (Amended IHO Decision at p. 16). The amended decision corrected the school years in the ordering clause to reflect the years under review - 2023-24 and 2024-25 school years (id.). For purposes of this appeal, the amended IHO decision will only be referenced as "IHO Decision."

the 2023-24 or 2024-25 school years but did conclude in the alternative that equitable considerations would have barred an award of funding for the student's attendance at iBrain for the two school years at issue (id. at pp. 14-16). In terms of pendency, the IHO found that the student's pendency was the "public school" and denied pendency funding of the student's iBrain tuition (id. at pp. 6 n.14, 10-11, 16).

In connection with the determination that the district offered a FAPE, the IHO found the testimony of the district witnesses to be credible and supported by the hearing record (IHO Decision at p. 9). The IHO found that the district developed IEPs that were based upon available information at the time the IEPs were developed and were "sufficient to provide a FAPE" for the student for the 2023-24 and 2024-25 school years (id. at pp. 12, 13-14).[14] The IHO then found no evidence in the hearing record that the parent cooperated with the district or timely provided consents to evaluate the student (id.). Additionally, the IHO found that the parent did not "consent or reject" the August 2023 IEP and, specific to the 2023-24 school year, issued a late ten-day notice in March 2024 when the student started at iBrain in September 2023 (id. at p. 13). The IHO further found that the "[p]arent failed and refused to cooperate with the [d]ue [p]rocess proceedings" and, therefore, the IHO "issue[d] an adverse ruling against [the] [p]arent and in favor of [the district] on [the district's] burden to show that it provided Student a FAPE for the 2023-[]24 school year" (id. at pp. 13-14). Also related to equitable considerations, the IHO stated that the parent failed to produce any witnesses to explain why the "excessive costs" at iBrain were "necessary or reasonable" to meet the student's needs (id.). The IHO summarized the equitable considerations, finding that, because the parent failed to cooperate, failed to provide timely consent, failed to provide a timely ten-day notice, failed to appear at the resolution meeting, violated an order and a subpoena by refusing to appear and testify at the impartial hearing, and arranged for a unilateral placement from iBrain at an excessive cost, tuition and transportation for the 2023-24 and 2024-25 school years would have been denied in its entirety (id. at pp. 14-16). Lastly, the IHO denied the requested IEE at public expense, finding no evidence that the parent disagreed with an evaluation conducted by the district (id. at pp. 7, 16).

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 2023-24 and 2024-25 school years and that equitable considerations did not weigh in favor of the parent's requested relief. The parent also asserts that the IHO erred in failing to issue a pendency order for the district to fund the iBrain tuition, transportation services, and nursing services. Furthermore, the parent argues that the IHO did not permit the parents to complete the cross-examination of the district's witnesses.

In connection with the IHO's finding that the district offered the student a FAPE for both school years at issue, the parent claims that the August 2023 IEP recommendations were not safe for the student because of the district's failure to recommend a 1:1 paraprofessional. The parent also claims that the IHO erred in "forgiving" the CSE's determination that the student was eligible for

[14] Specific to the August 2024 IEP, the IHO found the "CSE had evaluations, medical accommodation forms, and information from [iBrain] regarding [the] [s]tudent's needs" and developed "a detailed IEP" for the student in August 2024 (IHO Decision at p. 13).

special education as a student with multiple disabilities rather than with a TBI. Next, the parent argues that the IHO erred in finding that the recommended related services and class size were appropriate for the student for the 2023-24 school year when the student was not recommended for PT, music therapy, assistive technology, speech-language therapy, vision education services, OT, a 1:1 nurse, or a 1:1 paraprofessional. The parent asserts that the IHO ignored witness testimony that the August 2023 IEP was not appropriate for the student. Lastly, the parent argues that the IHO ignored the fact that the district failed to send a timely school location letter to the parent for the 2023-24 school year and that one of the district witnesses testified that the school location letter that she knew about could not implement the IEP. The parent also argued that the August 2024 IEP was not in place until September 2024, "well after the start of the" 2024-25 school year and, further, that the IHO erred in not finding a denial of FAPE based on the August 2024 CSE's failure to recommend music therapy, vision education services, OT, a 1:1 nurse, or a 1:1 paraprofessional.

Next, the parent argues that the IHO should have made a finding that iBrain was an appropriate unilateral placement. The parent argues that the IHO erred in finding that equitable considerations did not favor the parent because the parent cooperated with the district. Additionally, the parent argues that the IHO was biased and incorrectly issued adverse rulings against the parent.

In an answer, the district generally denies the material allegations contained in the request for review and argues that the IHO's decision should be upheld in its entirety. In a reply, the parent responds to the arguments set forth in the district's answer.

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]).[15]

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

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

VI. Discussion

A. Pendency

The parent asserts that the IHO erred in not issuing a pendency order for the district to fund the student's attendance at iBrain as well as transportation and nursing services. The parent's position with respect to pendency is that iBrain was the student's "operative placement." The district argues that pendency lies in the August 2023 IEP.

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

[15] 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).

449, 455-56 [S.D.N.Y. 2005]).[16] 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. 46,709 [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"]; 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

[16] 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 (959 F.3d at 532-36).

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).

Here, it is undisputed that the student had not applied for admission to public school prior to the time of the referral of the student for special education (Dist. Ex. 28 at p. 28). The IDEA provides that, for a student who is "applying for initial admission to a public school," for pendency purposes, the student "shall, with the consent of the parents, be placed in the public-school program until all . . . proceedings have been completed" (20 U.S.C. § 1415[j]; see Educ. Law § 4404[4][a]; 34 CFR 300.518[b]; 8 NYCRR 200.5[m]). Under the circumstances, this provision governs the student's pendency placement and, therefore, the proposed program and placement identified in the August 2023 would have constituted the student's pendency placement for the duration of the proceedings, subject to the parent's consent.

However, instead of consenting to the initial provision of special education services by the public school as pendency, the parent elected to unilaterally place the student at iBrain without the consent of district officials. The parent argues that iBrain was the student's "operative placement" for purposes of pendency and that the district is therefore responsible to fund it in the first instance. Contrary to the parent's arguments, the operative placement test is not applicable in these circumstances and the parent's unilateral enrollment of the student at iBrain—a placement that the district has not agreed to and which has not been found appropriate in any administrative proceeding—before the filing of the due process complaint notice did not change pendency (Ventura de Paulino, 959 F.3d at 536). In declining to apply "operative placement" as requested by the parents in Ventura de Paulino, the Second Circuit Court stated that:

> It bears recalling that the term "operative placement" has its origin in cases where the school district attempts to move the child to a new school without the parents' consent, or where there is no previously implemented IEP so that the current placement provided by the school district is considered to be the pendency placement for purposes of the stay-put provision.

(Ventura de Paulino, 959 F.3d at 536 [internal footnotes omitted]). As to the latter circumstance, since the district did not arrange for or agree to the student's placement at iBrain, it was not a placement provided by the district as described by the Second Circuit. Moreover, as authority for the circumstance described, the Second Circuit cited Thomas v. Cincinnati Board of Education, 918 F.2d 618, 625-26 (6th Cir. 1990), which determined a student's private home instruction constituted pendency rather than the student's initial unimplemented IEP (see Ventura de Paulino, 959 F.3d at 536 n.72). However, as explained by the Court itself, the Sixth Circuit's decision in Thomas regarding the "operative placement" test was abrogated by the subsequent promulgation of the federal regulations governing the IDEA (N.W. v. Boone Cty. Bd. of Educ., 763 F.3d 611, 618 [6th Cir. 2014] ["The Thomas court's approach may have been correct in 1990, but the Department of Education's promulgation of § 300.116 renders that interpretation obsolete"]).

The parent in this matter may have preferred to unilaterally place her son at iBrain instead of availing herself of the option of placing her son in the district's recommended programming during the pendency of the proceedings, which she was free to do, but she may not recoup such expenses for private schooling on a pendency theory. Accordingly, I find no basis to disturb the IHO's pendency finding.

B. Conduct of Impartial Hearing

Before turning to the merits, it must be determined if the impartial hearing was conducted in a manner that comported with due process.

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 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]). In addition, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

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 (Letter to Anonymous, 23 IDELR 1073). 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.

1. Parent's Failure to Testify

Given the manner in which the impartial hearing unfolded, the IHO relied heavily on the parent's failure to testify to rule on the material issues in the case, noting, for example, that she "issue[d] an adverse ruling against [the p]arent and in favor of [the district] on [the district's] burden to show" that it offered the student a FAPE for the 2023-24 and 2024-25 school years (IHO Decision at pp. 12-13).

In its due process response, the district requested that the parent "be ordered to appear" (Dist. Response to Due Process Compl. Not. at p. 2). Then, when discussing the number of witnesses that each party would call at the impartial hearing, among other witnesses, the parent's attorney represented that "we have the parent if time permits and necessary" (Oct. 10, 2024 Tr. p. 43). Before

the district's attorney made an opening statement, he inquired whether a subpoena was needed for the parent to appear and testify at the hearing (Oct. 10, 2024 Tr. p. 65). Counsel for the parent stated that the parent would be available for questioning if they got to her testimony and if she was needed and that he would object to any subpoena for the parent (Oct. 10, 2024 Tr. pp. 65-66). In response, counsel for the district stated that he wanted to ask the parent questions, and the IHO responded that, if the parent did not appear as a witness, district's counsel would need to subpoena her for testimony (Oct. 10, 2024 Tr. p. 66). Upon later discussions pertaining to the parent's testimony, counsel for the parent stated that "it depends" whether the parent will testify because there is "a lot of testimony to still proceed and make a determination as needed" (Oct. 30, 2024 Tr. p. 4). The IHO asked parent's counsel if a subpoena was needed and whether the parent required a translator, and counsel responded that it just depended on whether the parent's testimony was "necessary" for her case (Oct. 30, 2024 Tr. p. 5). The IHO responded that she would sign a subpoena if the district wanted to question the parent (id.). Discussion then surrounded whether the subpoena for the parent to testify required specifics as to what the parent would be testifying about during the impartial hearing (Oct. 30, 2024 Tr. pp. 5-8). Then, the IHO directed parent's counsel to provide a date on which the parent would appear under subpoena (Oct. 30, 2024 Tr. pp. 8-9). Counsel for the parent stated that he would provide a date by the end of that day (Oct. 30, 2024 Tr. p. 9).

At the next scheduled appearance, the IHO once again brought up the subpoena for the parent to testify and stated that she had questions for the parent and would subpoena the parent to testify (Oct. 31, 2024 Tr. p. 86). The IHO acknowledged that the parent made a motion objecting to the subpoena, but stated she had the authority to issue subpoenas and would subpoena the parent (id.). Parent's counsel stated that he would not accept service of the subpoena on the parent's behalf and further advised the IHO that even if the subpoena was served there would have to be an enforcement mechanism to direct the parent to appear for testimony (Oct. 31, 2024 Tr. pp. 86-88). Counsel for the district then represented that, if the parent failed to appear, he would make a motion to dismiss the parent's case (Oct. 31, 2024 Tr. pp. 88-89). Next, the IHO stated that it was "very troubling to me that the parent is not willing to appear in this case and that the parent['s] counsel, instead of cooperating with the process and fostering the ability to serve the parent with the subpoena to appear, you're objecting and suggesting that we need to challenge the IHO's authority to issue subpoenas and that the subpoena won't be enforceable and the parent won't appear" (Oct. 31, 2024 Tr. p. 89). The IHO requested that she be provided with the parent's correct address for the subpoena (Oct. 31, 2024 Tr. pp. 90, 92).

The IHO issued an order for the parent to testify on November 8, 2024, which was discussed at the hearing on November 7, 2024 (Nov. 7, 2024 Tr. p. 102; see Nov. 6, 2024 Interim IHO Decision at p. 1).[17] Counsel for the parent stated that the order did not specify what the parent would be testifying to at the hearing, and in response the IHO stated that she had questions and did not need to provide a "script" of the questions prior to the testimony (Nov. 7, 2024 Tr. p. 103). Next, the IHO questioned the reasons why the parent would not appear (Nov. 7, 2024 Tr. p. 104). Parent's counsel responded that "the parent []makes [the] determination on how to best present their case" and if it was "unnecessary for the parent to appear" then she would not testify (Nov. 7, 2024 Tr. pp.

[17] On November 6, 2024, the IHO issued an order commanding the parent to appear remotely to testify at the impartial hearing on November 8, 2024 through a Webex meeting link (Nov. 6, 2024 Interim IHO Decision).

104-05). At the conclusion of the impartial hearing on November 7, 2024, the IHO reminded parent's counsel that the parent was under an order to appear at the hearing the next day on November 8th (Nov. 7, 2024 Tr. pp. 249-50, 255). In response to the IHO's inquiry of whether the parent needed a translator for her testimony, parent's counsel stated that "if the parent actually is going to testify" he would let the IHO know about the need for a translator (Nov. 7, 2024 Tr. p. 255). Further, parent's counsel stated that the parent's appearance at the hearing would depend on whether her testimony was necessary for the presentation of her case (Nov. 7, 2024 Tr. pp. 255-56). The IHO stated that there would be "adverse consequences" if the parent did not appear as directed (Nov. 7, 2024 Tr. pp. 257-58).

At the beginning of the hearing on November 8, 2024, the IHO asked if there was an affidavit from the parent, and parent's counsel responded that there was no affidavit and that whether the parent would testify either live or by affidavit was still unknown (Nov. 8, 2024 Tr. pp. 283-84). Further discussions ensued as to whether the parent would appear at 3:00 pm as ordered by the IHO as the district had questions for the parent (Nov. 8, 2024 Tr. pp. 284-85). The IHO also indicated that she arranged for a translator for the parent, but parent's counsel stated that the parent did not need a translator and "there [wa]s no obligation for the parent to testify th[at] afternoon" (Nov. 8, 2024 Tr. pp. 285, 467). In response the IHO stated that, if the parent did not appear, it was at the "peril" of her case and that she could consider remedies such as a dismissal for the failure to prosecute or she could draw an adverse inference against the parent (Nov. 8, 2024 Tr. pp. 285-86). Parent's counsel responded that he "repeatedly" asked what information was being sought through questioning of the parent and reiterated his position that the IHO could not "compel the parent to appear" (Nov. 8, 2024 Tr. pp. 286, 477). He further stated that the parent would not appear pursuant to the IHO's order and that the district had yet to rest its case (Nov. 8, 2024 Tr. pp. 467-68). The IHO then inquired if the parent's iBrain witness was available to testify and parent's counsel stated that the witness would not be available until the district rested its case (Nov. 8, 2024 Tr. pp. 470-72). The IHO stated that she had the right to take witnesses out of order and it would not affect the burden of proof that is on the district (Nov. 8, 2024 Tr. pp. 472-73).

Following this exchange, counsel for the district provided a list of inquiries that he would ask the parent, including: whether the parent withheld consent for the initial provision of special education services; why the parent did not respond to the district from August 2023 through March 2024; why the parent did not provide vaccination records; why the parent was contemplating home schooling; and why the student was attending related services at iBrain in 2022 but not attending school (Nov. 8, 2024 Tr. pp. 478-80, 483). The IHO agreed to sign a subpoena for the parent to testify to which parent's counsel objected (Nov. 8, 2024 Tr. pp. 483-84; see Subpoena). The IHO stated to parent's counsel that she found "it extraordinarily confusing, if not suspicious that the parent is not agreeing to appear in a case that the parent has brought" (Nov. 8, 2024 Tr. p. 486). Parent's counsel once again stated that he would present his witness once the district rested its case (Nov. 8, 2024 Tr. p. 491). The IHO made further arrangements for the parent's witness to testify on November 14, 2024 (Nov. 8, 2024 Tr. pp. 491-92, 497).

The subpoena signed by the IHO for the parent's appearance was served on the parent and parent's counsel by email on November 12, 2024 (SRO Ex. 9 at p. 4; see SRO Ex. 10 at p. 2). The IHO denied the parent's motion opposing the district's subpoena (SRO Ex. 9 at p. 3).

On November 14, 2024, counsel for the parent and counsel for the district appeared for the scheduled hearing (Nov. 14, 2024 Tr. pp. 499-581). After some testimony from a district witness, the IHO discussed the subpoena of the parent and whether she would appear at the impartial hearing (Nov. 14, 2024 Tr. pp. 554-56). Counsel for the parent continued to argue with the IHO regarding whether the parent should have to testify, noting that the IHO solicited a subpoena for the parent from the district, in response to which the IHO provided citations to the hearing record where the district sought to subpoena the parent (Nov. 14, 2024 Tr. pp. 556, 574-76). As during the prior hearings, parent's counsel stated that the parent would not testify because it was not necessary (Nov. 14, 2024 Tr. pp. 558-59). The IHO stated that she had "broad authority to decide how to run these hearings" and further that the district could compel the parent to testify (Nov. 14, 2024 Tr. pp. 559, 563). The IHO also stated that the November 14th hearing was scheduled to give the parent another opportunity to appear for the district's case in chief and be questioned by her (Nov. 14, 2024 Tr. pp. 559-60, 566, 578). Because parent's counsel refused to have the parent appear and testify, the IHO stated that she was going to conclude the hearing and that the hearing was out of compliance (Nov. 14, 2024 Tr. pp. 560, 566-67). The IHO excused the other two district witnesses because she was not continuing with the hearing and there would be no closing arguments (Nov. 14, 2024 Tr. p. 560). Additionally, the IHO reiterated her warning that the parent's failure to appear would result in consequences to the parent's case (id.). After further discussions regarding pendency and the district's motion for summary judgment, parent's counsel stated that the parent did not have the opportunity to present her case and the IHO's failure to permit parent's counsel the opportunity to re-cross the witness showed bias on the part of the IHO (Nov. 14, 2024 Tr. pp. 566, 573). The IHO ended the hearing and closed the record (Nov. 14, 2024 Tr. p. 580).

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). "IHOs have the inherent authority 'to manage hearings to avoid needless waste and delay.'" B.G. v. City of Chicago Sch. Dist., 299, 243 F. Supp. 3d 964, 979 [N.D. Ill. 2017], aff'd. B.G. v. Bd. of Educ. of City of Chicago, 901 F.3d 903 [7th Cir. 2018]). As noted above, the parties to an impartial hearing have the right to compel attendance of witnesses (see 34 CFR 300.512[a][1]-[2]; 8 NYCRR 200.5[j][3][xii]). Further, an IHO may ask questions of attorneys or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]). If a witness refuses to appear to testify, the IHO may issue a subpoena to compel the witness's testimony (see 8 NYCRR 200.5[j][3][iv]). A parent is not shielded from being compelled to testify by the issuance of a subpoena. To the contrary, "[t]he IDEA envisions a 'cooperative process' between parents and educators, who are expected to work together to determine whether the child has a disability, whether that disability requires special education, and what any special education should look like." (Schaffer, 546 U.S. 53). This extends to the impartial hearing process as reflected in requirements such as the resolution process (see 34 CFR 300.510[b]; 8 NYCRR 200.5[j][2]).[18] While a parent is

[18] While there had been a dispute between the parties regarding the scheduling of the resolution meeting, I do not find the issue determinative of the issues in this matter. Indeed, the district admitted that it did not timely hold a resolution session (see SRO Ex. 8). Instead, I mention the resolution process only to reflect the degree to which

permitted to be "accompanied and advised" by counsel or an individual with special knowledge or training regarding students with disabilities (see 34 CFR 300.512[a][1]; 8 NYCRR 200.5[j][3][vii]), enlisting the aid of such a representative does not absolve a parent of all responsibility as a party to the proceeding.

Contrary to the parent's arguments on appeal, the IHO did not solicit the subpoena from the district and, even if she had, the IHO acted within her broad discretion to issue the subpoena. The parent also claims that the IHO did not give her an opportunity to respond to the district's proposed subpoena; however, as set forth above, the parent's counsel had ample warning and opportunity to consider the matter and set forth his position regarding the order and subpoena for the parent to appear to testify.

Thus, the IHO had the authority to direct the parent's appearance in this matter. When the IHO directed the parent to appear during the impartial hearing so that the IHO could complete the hearing record, parent's counsel outright refused to produce the parent to testify (see Nov. 7, 2024 Tr. pp. 104-05; Nov. 8, 2024 Tr. pp. 285, 467-68; Nov. 14, 2024 Tr. pp. 558-59).

The IDEA does not "specify what particular remedies, including penalties or sanctions, are available to due process hearing officers or to decision makers in State-level appeals. The specific authority of hearing officers and appeal boards, including the types of sanctions that are available to them, generally will be set forth in State law or regulation" (Letter to Armstrong, 28 IDELR 303 [OSEP 1997]). IHOs and SROs may assert appropriate discretionary controls over the due process and review proceedings and, as noted, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]); however, in New York, IHOs have not been expressly granted contempt powers (Application of the Bd. of Educ., Appeal No. 02-056; Application of a Child with a Disability, Appeal No. 02-049). Nevertheless, SROs have noted that adverse inferences may be drawn when private agencies, which contracted for services with the parents in the proceeding, failed to respond to subpoenas (Application of a Student with A Disability, 24-394; Application of a Student with A Disability, Appeal No. 24-237; Application of a Student with A Disability, Appeal No. 24-031). The same is true if the parent, a party to the matter, refuses to respond to a subpoena, especially when the parent is the party who brought the proceeding.

In light of the parent's attorney's refusal to cooperate in securing the parent's appearance at any impartial hearings especially after an IHO order and subpoena, I do not find that the IHO erred in applying an adverse inference against the parent (IHO Decision at pp. 13-14). The context and impact of the permissible adverse inference is further discussed further below.

2. Parent's Opportunity to Cross-Examine District Witnesses and to Present Witnesses

On appeal, the parent argues that the IHO erred in prematurely concluding the hearing and in preventing the parent from completing cross and/or re-cross of the district's witnesses. As noted above, State regulation provides that all parties shall have an opportunity to present evidence,

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the parent's participation in the due process proceedings is expected under the IDEA's implementing regulations.

compel the attendance of witnesses and to confront and question all witnesses at the hearing (8 NYCRR 200.5 [j][3][xii]). It was within the IHO's discretion to allow the district to call each of its witnesses before the examination of any one witness was completed so long as the prior witnesses returned and the parent was provided the opportunity to cross-examine the witnesses subject to reasonable limitations on the amount of time the attorney spent on cross-examination and on the scope of the examination based on considerations such as relevance and redundancy.

While the IHO's management of the hearing process could have been more efficient, under the circumstances, the IHO's decision to end the impartial hearing does not warrant remand for further proceedings in this case.

The parent argues that her counsel should have been allowed to engage in further cross examination of the witnesses; however, she does not proffer any specifics on appeal as to any strategic advantage that could be gained by further cross-examination of the district's witnesses. The district presented three witnesses' testimony by affidavit in lieu of direct testimony (Dist. Exs. 24-26). The parent's counsel cross-examined the assistant principal from the assigned public school site on October 10, 2024, and completed his cross-examination and engaged in re-cross examination of the witness on November 8, 2024 (Oct. 10, 2024 Tr. pp. 99-121; Nov. 8, 2024 Tr. pp. 292-334, 356-72, 426-64). On October 10, 2024, October 30, 2024, and November 7, 2024, parent's counsel engaged in cross-examination of the district school psychologist who served as the district representative at the August 2024 CSE meeting; at the conclusion of her testimony it was indicated that she may have to return and parent's counsel stated he did not have much more questioning (Oct. 10, 2024 Tr. pp. 130-209; Oct. 30, 2024 Tr. pp. 20-27; Nov. 7, 2024 Tr. pp. 167-239, 243). When the school psychologist returned on November 14, 2024, the IHO only permitted the district to engage in re-direct examination (see Nov. 14, 2024 Tr. pp. 505-53). On November 7 and November 8, 2024, the parent's counsel cross-examined the district school psychologist who served as the district representative at the August 2023 CSE meeting; towards the end of her testimony, the IHO warned the parent's counsel of the time left for cross-examination and that counsel should "get whatever territory you want to cover[]" within that time frame (Nov. 7, 2024 Tr. pp. 112-60; Nov. 8, 2024 Tr. pp. 373-425).[19]

Based on the foregoing, although there was some open question as to whether the parent's counsel would be afforded further opportunity to continue to cross-examine the district's witnesses, and in particular the school psychologist who attended the August 2024 CSE meeting, at the close of the proceedings on November 8, 2024 and November 14, 2024, the parent's counsel stated that "there is already enough in the record both on prong one and prong two" (Nov. 8, 2024 Tr. p. 486; see Nov. 14, 2024 Tr. p. 559). Similarly, by motions dated October 16, 2024 and November 13, 2024, the parent requested summary judgment on the ground that the testimony presented thus far established that the district denied the student a FAPE and that the parent met her burden to prove the appropriateness of the unilateral placement (SRO Exs. 1; 5). The parent's counsel continued to object to any extension of the hearing deadline on the ground that further extension would be prejudicial to the parent and the district had already had a fair opportunity to present its case (see

[19] At the end of the school psychologist's testimony, the IHO stated that she and the parties would "have a discussion . . . offline about what next steps [we]re going to be taken" regarding further testimony (Nov. 8, 2024 Tr. p. 425).

SRO Ex. 2). Further, as set forth below, I find that the district failed to meet its burden to establish that it offered the student a FAPE and, therefore, further cross-examination was not necessary to highlight the weaknesses in the district's evidence.

As to the claim that the parent was deprived of the opportunity to present a case, the hearing record does not support the allegation. During the hearing, the parent's counsel refused to produce the parent for the district to question and, although the IHO afforded him the opportunity, declined to present the testimony of the witness from iBrain until the district had rested (see, e.g., Nov. 8, 2024 Tr. pp. 283-87, 476-81, 491; Nov. 14, 2024 Tr. pp. 573-74). Thus, the parent's counsel had the opportunity to present witnesses but elected not to do so under the circumstances presented. That was the strategic choice of the parent's counsel and does not reflect that the IHO deprived the parent of due process.

3. IHO Bias/Parent's Request for the IHO's Recusal

The parent asserts that the IHO erred by not recusing herself from the matter given that she "was unable to manage to complete" the hearing within statutory timelines and demonstrated bias against the parent. The hearing record does not support the parent's allegations.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

The parent argues that the IHO demonstrated bias by signing the district subpoena for the parent's testimony before the parent had an opportunity to respond; however, as set forth above, the parent's counsel repeatedly set forth his views regarding any directive for the parent to appear to testify. Nor was it bias, as the parent alleges, for the IHO to warn the parent that an adverse ruling could result from the parent's refusal to testify. To the contrary, it would be ill-advised for an IHO to impose a sanction upon a party without warning. As for the hearing timelines, although it appears that there were some delays in scheduling the appearances, it in no way reflects that the IHO acted with bias against the parent.[20] Further, the hearing record reflects that the IHO tried to accommodate

[20] While the parent cites the hearing timelines only to support an allegation of bias, I also note that courts have found that, as long as the student's substantive right to a FAPE is not compromised because of the late decision, an untimely administrative decision, by itself, does not deny the student a FAPE (Jusino v. New York City Dep't of Educ., 2016 WL 9649880, at *6 [E.D.N.Y. Aug. 8, 2016] ["Case law's emphasis on substantial vindication of

requests and factors in tension with one another, including the witness's schedules, the parent's counsel's desire to continue to cross-examine the district's witnesses, and the parent's counsel objection to any further extensions to the hearing timelines and requests that the hearing be closed.

With respect to the IHO's decision, although the parent argues that the IHO went outside the record to render her decision, she offers no example thereof and none is apparent. Finally, the parent's disagreement with the IHO's determinations does not provide a basis for finding actual or apparent bias (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] ["Generally, claims of judicial bias must be based on extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]).

Overall, the hearing record demonstrates that the parent had the opportunity to present evidence and arguments in support of her request for relief and that the IHO conducted the impartial hearing in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514[b][2][i], [ii]; 8 NYCRR 200.5[j]). Accordingly, my review of the hearing record does not lead me to the conclusion that the IHO exhibited bias against the parent or the parent's counsel such that the parent was prevented from developing the hearing record or otherwise deprived of a full and fair opportunity to be heard (see Withrow v. Larkin, 421 U.S. 35, 47 [1975] [holding that administrative hearing officers are entitled to "a presumption of honesty and integrity"]; Mr. & Mrs. V. v. York Sch. Dist., 434 F. Supp. 2d 5, 12–13 [D. Me. 2006]).

C. FAPE

Turning to the merits, initially, the August 2023 IEP is the operative IEP to be reviewed in connection with determining whether the district offered the student a FAPE for both the 2023-24 and 2024-45 school years, as that is the IEP that was in effect when the parent made her decisions to place the student at iBrain in September 2023 for the 2023-24 school year and in July 2024 for the 2024-25 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist., 990 F.3d at 173; R.E., 694 F.3d at 187-88). Indeed, the parents June 2024 and July 2024 due process complaint notices pre-dated the development of the August 2024 IEP (see Parent Exs. A; N). Accordingly, the IHO erred in ruling on the appropriateness of the August 2024 to determine that the district offered the student a FAPE.

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substantive rights and ensuring a fair opportunity to participate is equally present in resolving disputes arising out of the decision deadline date. With respect to the 45-day deadline, 'relief is warranted only if. . . [a] forty-five-day rule violation affected [the student's] right to a free appropriate public education'"] [alterations in the original], quoting J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]; see A.M. v. N.Y.C. Dep't of Educ., 840 F. Supp. 2d 660, 689 n.15 [E.D.N.Y. 2012] [same], aff'd, 513 Fed. App'x 95 [2d Cir. Mar. 12, 2013]). According to the courts, the substance of an administrative decision is not flawed just because it is issued late (J.C. v. New York City Dep't of Educ., 2015 WL 1499389, at *14 n.12 [S.D.N.Y. Mar. 31, 2015] [noting that "[t]he untimeliness of the SRO's decision does not suggest a flaw in its logic and reasoning"], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; M.L. v. New York City Dept. of Educ., 2014 WL 1301957, at *13 [S.D.N.Y. Mar. 31, 2014] ["Although the Court agrees with Plaintiffs that the State Review Office's routine delays in issuing decisions is problematic, it has found no authority in IDEA cases that allows it to declare the SRO's decision a nullity"]).

In arriving at the determination that the August 2023 offered the student a FAPE, the IHO made broad conclusions about the CSEs' recommendations without grappling specifically with the parent's claims. For example, the IHO found that the CSEs developed IEPs for the student, "based upon information available . . . at the time the IEPs were created, that were sufficient to provide a FAPE" (see IHO Decision at p. 12). The IHO also seemed to consider the parent's lack of cooperation with the CSEs and during the hearing process, considerations more relevant to a weighing of equitable considerations (see id. at pp. 12-13).[21]

The IHO did not address with specificity with allegations contained within the due process complaint notices related, for example, to the sufficiency of evaluative information before the August 2023 CSE; CSE composition; parent participation; the appropriateness of the IEP, including the multiple disabilities eligibility category, present levels of performance, annual goals, special education programming and services, and special transportation; or the identification or appropriateness of an assigned school location (see Parent Exs. A at pp. 4-8; N at pp. 5-8).

The hearing record reflects that the August 2023 CSE convened for the student's initial review (see Dist. Ex. 3). Attendees at the meeting included a district school psychologist who served as the district representative, a general education teacher, a related service provider/special education teacher, and the parent (id. at p. 23). According to the August 2023 prior written notice, the CSE considered a March 2022 physical examination, an April 2022 social history, an April 2022 psychoeducational evaluation, a June 2022 transportation accommodations form, a December 2022 classroom observation, and a July 2023 nursing referral (Dist. Ex. 4; see Dist. Exs. 11-12; 17).[22]

According to the August 2023 IEP, the student was 13 years old and had received multiple diagnoses, including cerebral palsy, epilepsy, and global developmental delay (Dist. Ex. 3 at pp. 1, 3). The student was non-verbal, non-ambulatory, and had never attended school (id. at pp. 1-2). The IEP reported that the student required close adult supervision and support for all activities of daily living (ADLs), benefited from hand-over-hand assistance, and had significant delays in receptive and expressive language, gross motor, and fine motor skills, with cognitive functioning is estimated to be within the extremely low range (id. at pp. 2-4). The student's adaptive behavior scores were in the low range, with significant delays in communication, daily living skills, and socialization (id. at pp. 2-3). The IEP reported information from the parent that the student experienced three to five seizures daily, which were unpredictable and required constant supervision to prevent injury (id. at pp. 3-4). In addition, the IEP reported information from a nursing referral

[21] As the Second Circuit has explained, it is not appropriate for an IHO to "conduct[] reimbursement calculations in [the] appropriateness analysis"; rather, "[t]he first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any" (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024]).

[22] The hearing record does not include copies of the social history, physical examination, or transportation accommodations form. The classroom observation simply stated that the student was not attending school and that an observation would be conducted once the student was attending a school (Dist. Ex. 11).

that the student was dependent on a nasogastric tube for nutrition and medication and was in the process of having a permanent G-tube placed (id. at p. 3).

As noted above, the August 2023 CSE found the student eligible for special education services as a student with multiple disabilities and recommended that the student attend a 12:1+(3:1) special class and receive individual "non 1-1 skilled nursing" services "[a]s recommended" (see Dist. Ex. 3 at pp. 1, 14-15, 20).

With respect to related services, according to the district school psychologist who attended the August 2023 CSE meeting, the CSE did not recommend services such as speech-language therapy, OT, PT, assistive technology services, or parent counseling and training "because the time frame, dictated in large part by parent's failure to indicate consent to the necessary assessments that would have supported the same, was not provided" (Dist. Ex. 25 ¶ 14). However, during the impartial hearing, the district school psychologist also indicated that, for an initial referral, consent from the parent for evaluations "would have been obtained by the social worker with the social history update" (Nov. 8, 2024 Tr. p. 383). She further testified that she did not know why the district did not conduct speech, OT, or PT evaluations of the student prior to the August 2023 CSE meeting and indicated that, based on the information in the psychoeducational evaluation and the student's history, it appeared the student needed related services such as speech-language therapy, OT, and PT (Nov. 8, 2024 Tr. pp. 389, 394-95, 398).[23]

As for nursing services and transportation, the district school psychologist testified that determinations regarding such supports were made by individuals in different offices or departments within the district who did not participate in the CSE (Nov. 8, 2024 Tr. pp. 405-09). The school psychologist acknowledged that the medical accommodation form considered by the CSE reflected that the student required continuous supervision monitoring during school and transport (Nov. 8, 2024 Tr. pp. 410-13; Dist. Ex. 17 at p. 5). However, the psychologist could not recall why a 1:1 paraprofessional was not recommended for the student (Nov. 8, 2024 Tr. p. 416). She testified that the nursing services recommended would not be a 1:1 nurse for the student and would not be "continuous" but would consist of a nurse "coming to him . . . and seeing him one on one, as needed" (Nov. 8, 2024 Tr. pp. 419-22). Instead of a 1:1 nurse, the psychologist opined that the adults in recommended special class would provide sufficiently continuous monitoring for the student (Nov. 8, 2024 Tr. pp. 424-23).

Based on the foregoing, the district failed to establish that it conducted sufficient evaluations of the student leading up to the August 2023 CSE meeting and failed to meet its burden to prove that the programming included in the August 2023 IEP was appropriate. An initial evaluation of a student must include a physical examination, a psychological evaluation, a social history, a classroom observation of the student and any other "appropriate assessments or evaluations," as necessary to determine factors contributing to the student's disability (8 NYCRR 200.4[b][1]). A district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR

[23] According to the IEP, the parent stated that she planned to request evaluations to assess the student's needs related to speech-language, OT, and PT (Dist. Ex. 3 at p. 2).

300.303[a]; 8 NYCRR 200.4[b][4]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things, the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see S.F., 2011 WL 5419847 at *12 [S.D.N.Y. Nov. 9, 2011]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Application of the Dep't of Educ., Appeal No. 07-018).

Here, the district failed to adequately assess the student's related service needs and, as a result, the August 2023 CSE failed to recommend any related services for the student. The district also failed to demonstrate that, in the absence of 1:1 paraprofessional and/or nursing support, the IEP was reasonably calculated to enable the student to make progress.

With respect to the IHO's application of an adverse inference against the parent on the issue of the district's offer of a FAPE (see IHO Decision at pp. 13-14), the IHO did not offer sufficient specificity as to what the inference pertained in terms of the district's burden.[24] On the one hand, the IHO noted that the parent did not testify at the impartial hearing to explain why she did not respond to the district's requests for information and consent (IHO Decision at p. 12), but again that testimony would be relevant to equitable considerations, discussed further below, but would not replace the district's burden of production and persuasion on the issue of whether it offered the student a FAPE. On the other hand, the IHO also found the parent "failed to consent" to services, which could potentially exonerate the district. That is, according to the IDEA and federal and State regulations, a district "must obtain informed consent" from the parent of a student with a disability "before the initial provision of special education and related services" to the student (20 U.S.C. § 1414[a][1][D][i][II]; 34 CFR 300.300[b][1]; 8 NYCRR 200.5[b][1][ii]; 200.16[h][7]). When a parent fails to respond to a request for consent or refuses to consent to the provision of special education and related services, the district will not be considered to be in violation of the requirement to make a FAPE available to the student because of the failure of the district to provide the student with the special education and related services for which district sought consent (20 U.S.C. § 1414 [a][1][D][ii][III][aa]; 34 CFR 300.300[b][3][ii]; 8 NYCRR 200.5[b][4][i]). However, the district

[24] After being duly warned about the inappropriate conduct and after lesser measures have been unsuccessful, one possible sanction for careful consideration that is within an IHO's discretion would be to shift the burden of production during the impartial hearing to the party that is engaging in misconduct. The IHO did not appear to do that in this proceeding.

must make "reasonable efforts to obtain informed consent" from the parent, which requires that the district keep a record of attempts to secure such consent through "detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent to the parent and any responses received; and detailed records of visits made to the parent's home or place of employment and the results of those visits" (34 CFR 300.300[b][2], [d][5]; 300.322[d]; see 8 NYCRR 200.5[b][1]; Parental Consent for Services, 71 Fed. Reg. 46633-34 [Aug. 14, 2006]). Here, while there is evidence that the district sent the parent a consent form (see Dist. Ex. 4 at pp. 5-6), there are insufficient records of its efforts thereafter and the parent's testimony on the topic could not have made up for the lack of records in this regard.

Based on the foregoing, the IHO did not sufficiently engage with the parent's allegations of a denial of a FAPE, and, given the lack of related services or 1:1 paraprofessional or nursing services included in the August 2023 IEP, the hearing record does not support a finding that the IEP was reasonably calculated to enable the student to make educational progress. In light of these deficiencies, I find it unnecessary to address the parent's remaining claims that she asserts resulted in a denial of a FAPE for the 2023-24 and 2024-25 school year.

D. Unilateral Placement

Having found that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 and 2024-25 school years, the next issue to be determined is whether the parent met her burden to prove that iBrain was appropriate for the student for both school years.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8

NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

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

In the appeal, the parent asserts that the deputy director of special education at iBrain "provided extensive testimony about what [the student] requires in a special education program and what he receives at iBrain" and that the iBrain educational plan also evidences the appropriateness of the placement (Req. for Rev. ¶ 26, citing Parent Exs. F-G); however, as noted above, the parent's counsel chose not to call the deputy director from iBrain to testify at the impartial hearing.[25] Accordingly, the appropriateness of iBrain for both the 2023-24 and 2024-25 school years must be assessed by reference to the documentary evidence alone.

1. 2023-24 School Year

As relevant to the 2023-24 school year, the hearing record includes documentary evidence detailing the student's needs and the specially designed instruction provided to the student at iBrain (see Parent Ex. F; see also Parent Exs. H-K). According to September 2023 iBrain education plan, the student was enrolled in a 12-month program in a 6:1+1 class setting, with a 1:1 paraprofessional and nurse to support his needs throughout the day (Parent Ex. F at pp. 11, 53-55). At the time of the plan, the student received one-on-one academic sessions daily, focusing on language and literacy, math, and social skills (id. at p. 1). Instructional materials were modified for multi-sensory engagement, including items like play dough and puzzles (id. at p. 2). Sensory activities with visual and audio stimulation were included in most sessions to engage the student (id.). According to the iBrain education plan, for the 2023-24 school year, the student would receive assistive technology

[25] Parent exhibit G cited by the parent is a copy of the August 2023 IEP developed by the district's CSE, not an affidavit.

services once a week for 60-minute sessions, during which he would trial various forms of assistive technology, including mid-tech switches and a high-tech speech-generating device, with a focus on cause-and-effect tasks to practice switch activation (id. at p. 3). The plan indicated the student would receive vision education services twice a week for 60 minutes and that he benefited from backlit materials, spotlighting techniques, and bright colors to enhance visual attention (id. at pp. 5-6, 39). In addition, the plan reflected the student would receive five 60-minute sessions per week each of OT, PT, and speech-language therapy to address sensory regulation techniques, motor planning; functional activities, muscle strength, joint stability, and mobility; and expressive and receptive language skills (id. at pp. 14-15, 25-26, 40-43). The iBrain plan provided for one 60-minute session per week of music therapy, focusing on sensorimotor and cognitive goals (id. at pp. 47-48). Finally, the iBrain plan provided for provision of monthly parent counseling and training to support skill carryover at home (id. at pp. 49-50).

The hearing record also includes iBrain quarterly progress reports from October 2023, January 2024, April 2024, and July 2024, which reflected the gradual introduction of benchmarks and the student's progression towards achieving goals (Parent Exs. H-K).

Based on the evidence in the hearing record, the documentary evidence presented is sufficient to demonstrate that iBrain was specially designed to meet the student's needs during the 2023-24 school year.

2. 2024-25 School Year

Although the hearing record includes an iBrain education plan for the 2023-24 school year (Parent Ex. F), there is no such plan included in the hearing record for the 2024-25 school year. With respect to the 2024-25 school year, in the motion for summary judgment, the parent contended that the August 2024 CSE's reliance on documents developed by iBrain and adoption of the same recommendations satisfies the parent's burden regarding the appropriateness of iBrain for the 2024-25 school year (SRO Ex. 5 at p. 16). However, the iBrain documents purportedly relied upon by the August 2024 CSE are not in the hearing record and, therefore, there is no evidentiary support for the parent's statement in this regard. Indeed, there is no evidence whatsoever regarding the student's program at iBrain for the 2024-24 school year. Accordingly, the parent failed to meet her burden to demonstrate that iBrain provided the student with specially designed instruction during the 2024-25 school year.

E. Equitable Considerations

As the parent met her burden to demonstrate the appropriateness of iBrain for the 2023-24 school year, the next issue to be addressed is whether equitable considerations support the parent's request for district funding of the student's attendance at iBrain for the 2023-24 school year.

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"]).

Although the adverse inference applied by the IHO due to the parent's failure to appear at the impartial to testify was not sufficient to support the IHO's finding that the district offered a FAPE, I find no basis to disturb the IHO's finding that the adverse inference and other factors warrant a complete denial of relief on equitable grounds. The district stated that the issues to be asked of the parent included but were not limited to whether the parent withheld consent for the initial provision of special education services and why the parent did not respond to the district from August 2023 through March 2024 (see Nov. 8, 2024 Tr. pp. 478-80, 483). Thus, the district sought to question the parent regarding her engagement in the process and an adverse inference regarding the parent's cooperation is supported by the administrative hearing record.

The parent's failure to abide by the IHO's reasonable directive to appear at the impartial hearing as set forth both in an order of the IHO and a subpoena further demonstrates a lack of cooperation in the hearing process. At least one court has found that conduct occurring at the impartial hearing may be considered as an equitable consideration (B.D. v. Eldred Cent. Sch. Dist., 661 F. Supp. 3d 299, 317 [S.D.N.Y. 2023]). The parent's counsel's strategy in refusing to produce the parent to appear and testify at the impartial hearing appeared to be for the purpose of obstructing the hearing process and aimed to confound the district and the IHO, and as such was impermissible. While the parent's counsel was free to strategize by deciding whether to ask the parent questions of his own during her testimony, he was not at liberty to impede the opposing party's right to call witnesses as envisioned by the IDEA, nor was it justifiable to disregard the IHO's directives.[26]

[26] The parent's counsel was correct that enforcement of the subpoena in a court of competent jurisdiction was an available remedy to the district (Oct. 31, 2024 Tr. pp. 86-88), which, in theory, could result in contempt proceedings, monetary damages, or criminal penalties that go beyond the authority of administrative hearing officers. However, that remedy is not exclusive, and the parent's counsel overlooks the inherent sanctioning authority of an IHO, who can, within the limits of their authority under IDEA and State law, control the due process proceeding itself. Accordingly, striking certain defenses, drawing adverse inferences, limiting or precluding certain evidence, shifting the order of presentation of evidence, shifting the burden of production, and dismissal of the proceeding in appropriate circumstances may all be options for an IHO to consider, while ever mindful that the remedy should be proportionate to the wrong, reasonably related to vindicating the public and private interests at hand, and imposed with caution only after incentivizing compliance prior to the imposition of a sanction.

The IHO also found that the parent's notice to the district of her intent to unilaterally place the student at iBrain for the 2023-24 school year was untimely. 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).

As the IHO found, the parent's notice to the district of her intent to unilaterally place the student at iBrain for the 2023-24 school year and seek public funding for the costs of the student's placement was dated March 20, 2024, whereas the student purportedly began attending iBrain approximately six months earlier in September 2023 (compare Parent Ex. B at pp. 1-2, with Parent Ex. C). This is yet another ground to support the IHO's determination that equitable considerations do not support an award of funding for the student's attendance at iBrain for the 2023-24 school year.

VII. Conclusion

Based on the above, iBrain was not the student's stay-put placement during the pendency of these proceedings. Further, the manner in which the impartial hearing was conducted does not warrant remand or a determination in the parent's favor. Based upon an independent review of the hearing record, I find that the district failed to meet its burden to demonstrate that it offered the student a FAPE for the 2023-24 and 2024-25 school years, the parent met her burden to demonstrate the appropriateness of iBrain for the student for the 2023-24 but failed to do so for the 2024-25 school year, and equitable considerations warrant a denial of an award of funding for the costs of the student's attendance at iBrain for the 2023-24 school year. Although my reasoning differs from the IHO's in some respects, the outcome is the same and, therefore, there is no reason to disturb the IHO's determination to deny the parent's request for district funding for the student's attendance at iBrain for the 2023-24 and 2024-25 school years.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 30, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER