The University of the State of New York

The State Education Department
State Review Officer
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No. 23-060

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:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Institute for the Brain (iBrain) for a portion of the 2021-22 school year and reduced the amount of requested reimbursement for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that iBrain was an appropriate unilateral placement and the IHO's award of partial reimbursement for the 2022-23 school year. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

At the time of an August 2019 social history, the student was nine years old and had recently immigrated to the United States (Dist. Ex. 7 at pp. 1, 2). The August 2019 social history reflected that the parent had referred the student for special education due to his diagnoses of spastic quadriplegic cerebral palsy, language delay, and seizure disorder (id. at p. 1). The parent reported that prior to immigrating to the United States the student had never attended school but he had been evaluated and received speech-language therapy, occupational therapy (OT), and

physical therapy (PT) (id. at p. 2). The parent further reported that, at the time of the August 2019 social history, the student's preferred language was Spanish (id.). The hearing record reflects that the student was evaluated by the district during the 2019-20 school year (Dist. Exs. 3-7).

According to an October 20, 2020 IEP, a CSE determined that the student was eligible for special education programming as a student with multiple disabilities and recommended 12-month services consisting of 12:1+(3:1) special class instruction to be delivered remotely, with related services to be implemented in "[a]ll [s]chool [l]ocations" (Parent Ex. G at pp. 1, 19-20, 25-26).[1] A May 25, 2021 CSE developed an IEP to be implemented on May 25, 2021, which recommended 12-month services consisting of a 12:1+(3:1) special class placement and related services in a specialized school (Dist. Ex. 1 at pp. 20-22, 26-27).

A CSE convened on April 26, 2022 to develop an IEP to be implemented on May 11, 2022 (Dist. Ex. 2 at pp. 1, 27). The April 2022 CSE continued to find the student eligible for special education and related services as a student with multiple disabilities (id. at p. 1). The April 2022 CSE recommended that the student receive 12-month services consisting of a 12:1+(3:1) special class placement in a specialized school with the related services of OT, PT, and speech-language therapy (id. at pp. 21, 22, 26, 27-28). The April 2022 CSE further recommended an assistive technology device, special transportation and individual health paraprofessional services (id. at pp. 21-22, 26).

The student was evaluated by iBrain in April and May 2022, on April 27, 2022 the parent executed a contract with iBrain for the student's attendance for the remainder of the 2022-22 school year, and the student began attending iBrain on May 2, 2022 (Parent Ex. H at pp. 4-7, 15, 23; Dist. Exs. 13 at pp. 10, 17; 14 at p. 1).[2] On June 11, 2022, the parent signed an enrollment contract for the student's attendance at iBrain for the 12-month 2022-23 school year (Parent Ex. B at pp. 7, 8, 13). The parent signed a school transportation service agreement with Sisters Travel and Transportation Services (Sisters) on June 16, 2022, to provide transportation to and from iBrain for the 2022-23 school year (Parent Ex. C at pp. 1, 5). By letter dated June 17, 2022, the parent provided the district with ten-day written notice rejecting the district's "proposed [IEP] to be implemented during the 2022-2023 extended school year" and of her intention to unilaterally enroll the student at iBrain for the 2022-23 school year and seek public funding (Parent Ex. D at pp. 1-2).

A. Due Process Complaint Notice

By due process complaint notice dated October 18, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 school years (Parent Ex. A at p. 1). Specifically, the parent asserted that the district failed to conduct a CSE meeting and failed to offer the student a "program or placement" for the 2021-22 and 2022-23 school years (id. at p. 3). In addition, the parent contended that the district failed to

[1] The student's eligibility for special education and related services as a student with multiple disabilities is not in dispute on appeal (34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

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

conduct appropriate and timely evaluations, failed to recommend appropriate related services, and failed to recommend appropriate special transportation for the 2021-22 and 2022-23 school years (id. at pp. 3-5).

The parent further asserted that iBrain was an appropriate unilateral placement and that equitable considerations favored full reimbursement (Parent Ex. A at p. 5). As relief, the parent requested findings that the district failed to offer the student a FAPE and that iBrain was an appropriate unilateral placement for the 2021-22 and 2022-23 school years (id. at p. 6). The parent further requested direct payment for the cost of full tuition, the cost of related services, and a 1:1 paraprofessional, as well as the cost of special transportation for the 2021-22 and 2022-23 school years (id.). The parent also requested an independent neuropsychological evaluation to be conducted by a provider of the parent's choosing at a reasonable market rate (id.). Lastly, the parent requested that the district convene a CSE and that the district conduct all other necessary evaluations of the student (id.).

B. Impartial Hearing

On January 23, 2023, the IHO issued a prehearing conference summary and order, which indicated that the parties had convened via WebEx on January 23, 2023 for a prehearing conference (Pre-Hr'g Conf. Summ. & Order). On January 24, 2023, the IHO signed two document subpoenas directing iBrain to respond to 29 document requests by the close of business on February 7, 2023 (IHO Ex. I at pp. 4-6; SRO Ex. A at p. 5).[3] On January 25, 2023, the IHO signed a document subpoena directing Sisters to respond to seven document requests by the close of business on February 8, 2023 (IHO Ex. I at p. 3; SRO Ex. A at pp. 6-7).

The parties reconvened for an impartial hearing on February 3, 2023, February 28, 2023 and March 1, 2023 (Feb. 3, 2023 Tr. pp. 1-19; Feb. 28, 2023 Tr. pp. 1-173; Mar. 1, 2023 Tr. pp. 1-38).[4] According to the transcript, the parties convened on February 3, 2023 for "a limited due process hearing on the issue of the parent[']s request for an IEE," which had been discussed during the January 23, 2023 prehearing conference and scheduled in the IHO's prehearing conference

[3] The parent has attached proposed SRO exhibit A to her request for review, which includes email correspondence between the parties and the IHO regarding the request for and issuance of these subpoenas, some but not all of which overlap with emails included in evidence (compare SRO Ex. A, with IHO Ex. I). As discussed more fully below, the email correspondence documents the lack of compliance with certain subpoenas and the IHO's ruling on how he would address noncompliance. The proposed exhibit also includes the parent's request for an additional hearing date, which was later denied by the IHO and is now raised as an issue in the parent's request for review. State regulation specifically requires that, in addition to exhibits and the transcript of the proceedings, "any response to the [due process] complaint," "all briefs, arguments or written requests for an order filed by the parties for consideration by the [IHO]," as well as "all written orders, rulings or decisions issued in the case including an order granting or denying a party's request for an order" are part of the hearing record (8 NYCRR 200.5[j][5][vi][a], [b], [c], [e]-[f]). Thus, proposed SRO exhibit A does not constitute additional evidence presented for the first time on appeal and will be considered as its contents fall within the categories required to be made part of the hearing record as per the regulation cited above. Further, I note that, while the submitted SRO exhibit A contains 38 pages, upon review, pages 20-38 are duplicates of the email correspondence on the prior pages (compare SRO Ex. A at pp. 1-19, with SRO Ex. A at pp. 20-38).

[4] The transcripts were not paginated consecutively. Therefore, for purposes of this decision, the transcript cites will be preceded by the hearing date.

summary and order (Feb. 3, 2023 Tr. pp. 4, 6-17; Pre-Hr'g Conf. Summ. & Order at p. 1). By interim decision dated February 3, 2023, the IHO granted the parent's request for an independent neuropsychological evaluation at public expense at a specified maximum rate (Interim IHO Decision at p. 5).

By email dated February 8, 2023, the district's attorney wrote to the IHO and the parent's attorney indicating that the document subpoenas issued to iBrain and Sisters had return dates of February 6, 2023 and February 7, 2023, and that neither recipient had responded to the subpoenas (IHO Ex. I at p. 2). The district's attorney requested that, if iBrain and Sisters did not comply with the subpoenas by the close of business that upcoming Friday (February 10, 2023), the IHO deem iBrain and Sisters "to have not complied with the IHO's so-ordered subpoena" (id.). The district's attorney further "reserve[d] the right to argue their lack of compliance should carry a negative inference" regarding the appropriateness of the unilateral placement of the student (id.).

On February 8, 2023, the parent's attorney replied to the district's attorney and the IHO stating that he would contact iBrain and Sisters, but that "as neither . . . [wa]s a party to this matter, there [wa]s no 'negative inference' that c[ould] be taken against [p]arent, who [wa]s a party to this matter" (IHO Ex. I at p. 2). The parent's attorney further noted that the district could pursue enforcement of the subpoenas in State court (id.). In additional correspondence, the parties confirmed between themselves and to the IHO that the two document subpoenas had been sent to and received by iBrain, and the document subpoena issued to Sisters had been sent by the district (SRO Ex. A at pp. 11-12, 13).

By email dated February 8, 2023, the IHO wrote to the parties reiterating that the subpoenas were issued without any objections and further stated that, if iBrain and Sisters did not comply with the subpoenas, the district could initiate an enforcement proceeding in State court (IHO Ex. I at p. 1; see id. at pp. 4-5). The IHO then stated that, with regard to the impartial hearing, if iBrain and/or Sisters did not comply with the subpoenas, he would "not allow any evidence (documents or witness testimony)" from iBrain and/or Sisters to be admitted into the hearing record by either party (id. at p. 1).

In an email dated February 17, 2023, the district's attorney wrote to the IHO and the parent's attorney to advise that he had just received iBrain's response to the document subpoenas "despite a return date of February 6" and that he had received no response from Sisters (SRO Ex. A at p. 13). As a result, and in accordance with the IHO's February 8, 2023 email, the district's attorney stated that he would "seek to preclude the admission of any evidence from Sisters . . . concerning this student for the relevant school year" (id.). Next the district's attorney wrote that he "reserve[d] the right to object to any testimony or documentary evidence . . . concerning categories of disclosure that iBrain's general counsel has averred do not exist" (id.). On February 22, 2023, the IHO signed four witness subpoenas requiring four employees of iBrain to appear via video conference on February 28, 2023 (id. at pp. 17-18).[5]

[5] The district's attorney requested the witness subpoenas by email dated February 21, 2023, to which the parent's attorney objected arguing that the subpoenas were not relevant or material to the district's burden to prove it offered the student a FAPE or the parent's burden to prove that the unilateral placement was appropriate (SRO Ex. at pp. 14-15). In an email dated February 22, 2023, the district's attorney advised the IHO and the parent's

By email dated February 27, 2023, the parent's attorney wrote to the IHO and the district's attorney "to request clarification and to propose some agenda items for" the hearing scheduled for the next day (SRO Ex. A at p. 18). The parent's attorney further wrote that he intended to request an additional hearing date to present the testimony of the individual conducting the independent neuropsychological evaluation along with the report, which would not be completed until mid-March (id.). Next, the parent's attorney indicated that two of the individuals subpoenaed from iBrain were no longer employees and would not appear at the impartial hearing scheduled for the next day (id.). With regard to the student's OT provider, the parent's attorney requested that she be allowed to testify "via affidavit subject to cross-examination, on the date chosen for [the independent evaluator] to appear" (id.). The parent's attorney further stated that the parent would testify about the transportation contract and enrollment contract and therefore any additional testimony subpoenaed by the district from witnesses no longer employed by iBrain was "unduly repetitious, irrelevant, and immaterial" (id.). Next the parent's attorney argued that "as previously proposed" the preclusion of any testimonial or documentary evidence about iBrain and the student's transportation services would prevent the parent from having a full and fair opportunity to present her case (id.).

In an email reply dated February 27, 2023, the district's attorney objected to "adjourning" the impartial hearing for any testimony (SRO Ex. A at p. 19). The district's attorney argued that the independent neuropsychological evaluation and the testimony of the evaluator was not necessary and would not address any issue, as the district was not presenting any documentary or testimonial evidence to prove that it offered the student a FAPE, and the parent was not seeking any compensatory education (id.). The district's attorney further took issue with the parent's attorney's untimely requests and objections to the subpoenas, noting that the district intended to call the witnesses from iBrain and was not asking the parent's attorney to call them (id.). The district's attorney further argued that he sent the witness subpoenas to iBrain's general counsel, not the parent's attorney, and the general counsel did not respond and did not communicate that any of the witnesses were unavailable for any reason (id.). He also questioned why iBrain did not forward the subpoenas to the witnesses since they were recent employees if not current employees, and stated that no information had been provided with regard to a fourth subpoenaed witness (id.). The district's attorney requested that any document signed by this unaccounted for fourth witness be precluded and that "[i]f this case proceeds without these four witnesses' testimony . . . that the IHO take a negative inference towards iBrain with respect to the parent's . . . burden" to prove the appropriateness of the unilateral placement (id.). In closing, the district's attorney stated that "the unopposed and executed subpoenas addressed to non-party witnesses and organizations strikes at the heart of whether iBrain's program is providing appropriate educational services under the Gagliardo and Frank G. standards" (id.).

When the parties reconvened for the February 28, 2023 impartial hearing date, the IHO permitted the parties' attorneys to reiterate their positions and respond to the email correspondence from the previous day (Feb. 28, 2023 Tr. pp. 6-12). In accordance with his preconference summary and order requiring that all motions be made at least five days prior to an impartial hearing date, the IHO determined that the parent's request was untimely, and he declined to adjourn the hearing

attorney of the district's purpose for calling the witnesses, the issues he would question them about, and the relevance of the testimony (id. at p. 17).

(Feb. 28, 2023 Tr. pp. 12-13). The IHO further determined that the independent neuropsychological evaluation was not needed to decide the merits of the parent's claims (Feb. 28, 2023 Tr. p. 13). The IHO then stated that he wanted "to move forward today" and turned to the parties' proposed exhibits (id.).

The district's exhibits 1-20 were admitted without objection from the parent (Feb. 28, 2023 Tr. pp. 13-14). District Exhibit 11 was iBrain's written response to the two document subpoenas and the documents produced by iBrain were also admitted as separate district exhibits (see Dist. Exs. 11-20).[6] Next the parent offered eight exhibits, and the district's attorney objected to parent exhibit C, the Sisters transportation contract, requesting that it be precluded in accordance with the IHO's February 8, 2023 email (Feb. 28, 2023 Tr. p. 17). The district's attorney further argued that transportation agreements were subpoenaed from both iBrain and Sisters, and iBrain had "averred that there were no existing responsive documents" and Sisters had not responded (id.). The IHO responded that the parent had disclosed the transportation contract within the five business day disclosure rule, that it concerned the parent's burden, and that the parent could put "their case in . . . however way they like" (Feb. 28, 2023 Tr. pp. 17-18, 20). However, the IHO also stated that he had very serious concerns that iBrain produced documents that were being used as parent exhibits and were responsive to the subpoena after initially averring that such documents did not exist (Feb. 28, 2023 Tr. p. 22). Ultimately, the IHO declined to admit the transportation contract until the parent could authenticate it and the exhibit was marked for identification (Feb. 28, 2023 Tr. pp. 3, 23-24).

Turning to the witness subpoenas, the IHO noted that he had signed subpoenas compelling the appearances of the student's iBrain OT and PT providers, the iBrain program director, the signatory for iBrain on the 2021-22 and 2022-23 enrollment contracts, and the registered agent for Sisters (Feb. 28, 2023 Tr. pp. 28-30). The district's attorney advised the IHO that he had not received any responses to any of the witness subpoenas (Feb. 28, 2023 Tr. pp. 30-31). The IHO noted that the parent had not disclosed any documentary evidence related to the student's OT and PT services and that the OT and PT providers had not responded to the witness subpoenas (Feb. 28, 2023 Tr. p. 31). The IHO then determined that he would not allow any testimony or documentary evidence with regard to the student's OT or PT services as it would be prejudicial to the district (id.). The parent's attorney then argued that the parent would be prejudiced because the district already "failed this child" and that the iBrain IEP was a comprehensive document that would explain the student's needs, present levels of performance, and programming (Feb. 28, 2023 Tr. p. 32). The parent's attorney further argued that iBrain's director of special education would testify about the student's special education program and related services and that the parent would also present the student's occupational therapist as a witness (Feb. 28, 2023 Tr. pp. 32-33). The IHO noted that the district had a right to challenge the appropriateness of the parent's unilateral placement and stated that the director of special education could not testify about services she provided to the student because she was not a service provider (Feb. 28, 2023 Tr. pp. 33, 34). The IHO further noted that the iBrain IEP had been admitted as an exhibit and he would give it "the

[6] Although the written subpoena response provided by iBrain's general counsel was dated February 6, 2023, the hearing record reflects that the district received it on February 17, 2023 (compare Dist. Ex. 11 at p. 4, with Feb. 28, 2023 Tr. p. 15; SRO Ex. A at p. 13). The parent's attorney did not challenge the district's attorney's representations regarding the timing of the subpoena response during the February 17, 2023 through February 21, 2023 email exchange or during the impartial hearing (Feb. 28, 2023 Tr. pp. 15-16; SRO Ex. A at pp. 13-15).

appropriate weight, because we don't have the providers here to testify as to how that was appropriate, what needs it addressed" (Feb. 28, 2023 Tr. p. 34). Further discussion followed about the non-responsiveness of the iBrain witnesses and the district's desire to call these witnesses as district witnesses so that they would not be limited to cross-examination (Feb. 28, 2023 Tr. pp. 35-37, 39-40). In response to the parent's attorney's renewed request to adjourn, the IHO stated that given the prior failure to respond, he had no confidence that the witnesses would appear at a later date (Feb. 28, 2023 Tr. pp. 37-39, 41). With regard to the former iBrain employee who signed the iBrain enrollment contracts and the former iBrain employee who signed the tuition affidavit, the IHO denied the district's attorney's request to preclude the documents because the parent could testify to her understanding of her financial obligation (Feb. 28, 2023 Tr. pp. 42-46). The IHO also stated that he would consider the two different dates on the iBrain enrollment contracts within the context of equitable considerations (Feb. 28, 2023 Tr. p. 46). The impartial hearing then proceeded with the district calling the student's iBrain occupational therapist as its only witness (Feb. 28, 2023 Tr. pp. 62-97). The parent called iBrain's director of special education as a witness (Feb. 28, 2023 Tr. pp. 98-170) and also provided testimony herself (Mar. 1, 2023 Tr. pp. 9-28).

C. Impartial Hearing Officer Decision

By decision dated March 2, 2023, the IHO found that the district failed to meet its burden to demonstrate that it had offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 6-7). The IHO further found that while "not entirely clear what [iBrain]'s program consist[ed] of," the evidence indicated that iBrain's recommended special education program and services would provide "instruction specifically designed to meet" the student's unique needs (id. at p. 8). The IHO also found that the parent had established "the bare minimum in meeting" her burden (id.). The IHO noted that the parent had offered testimony from the student's OT provider and the director of special education at iBrain but did not offer testimony from any other provider (id.). The IHO determined that the evidence demonstrated that iBrain met the student's needs (id. at p. 9). The IHO next determined that the student required special transportation to and from school and directed the district to fund the student's special transportation for the 2022-23 school year (id.).

With regard to equitable considerations, the IHO determined that the parent did not provide the district with a ten-day written notice of her intention to unilaterally enroll the student at iBrain for the 2021-22 school year and as a result the IHO found that the parent was not entitled to any relief for the 2021-22 school year (IHO Decision at p. 10). Next, the IHO found that the parent "failed to provide any credible evidence with regard[] to the appropriateness of [iBrain]'s program and how the instruction was tailored to meet [s]tudent's specific needs, except for [the] OT Provider's testimony" (id.). The IHO noted that the iBrain director of special education and the student's OT provider testified that the iBrain IEP was a "living document" and was continuously updated (id.). The IHO stated that the iBrain IEP indicated on the first page that it was updated on February 13, 2023 and found that the IEP had "no evidentiary value with regards to the 2021-2022 school year" (id.). In addition, the IHO noted that the district had subpoenaed documents from iBrain and that iBrain responded by stating that the requested documents did not exist (id. at pp. 10-11). The IHO found that iBrain's response to the document subpoena was contradicted by the testimony of the student's OT provider and iBrain's director of special education (id. at p. 11). The IHO noted that the iBrain director of special education testified that evaluations, related service notes, and teachers' notes were regularly compiled and stored on an electronic device that was

readily available to iBrain (id.). The IHO further indicated that the student's OT provider testified that she took related service notes after each session and stored them on the same system (id.). The IHO found that iBrain was not truthful in its responses to the document subpoena, the requested documents were relevant, and the parent "could have submitted [them] to complete the record" (id.). The IHO further found that the failure of the parent and of iBrain to produce the documents prevented the district from challenging the appropriateness of iBrain and "precluded the IHO from making a comprehensive determination as to the facts and issues in this case" (id.). The IHO next addressed the failure of four witnesses to appear after being subpoenaed by the district (id.). The IHO noted that the four witnesses did not appear at the impartial hearing and did not respond at all to the subpoenas (id.). The IHO also stated that iBrain failed to notify the district that three of the subpoenaed witnesses were no longer employed by iBrain and it was only after the IHO stated that he would draw negative inferences against the parent did the parent's attorney offer to produce the student's OT provider (id.). The IHO indicated that the parent's attorney repeatedly argued that iBrain was not a party and that the parent had no control over the actions of iBrain (id.). Nevertheless, following a short recess, the parent's attorney produced the student's OT provider (id.). The IHO drew a negative inference "as to why documents were not produced and why witnesses were not made available" and determined that the "evidence was withheld because the evidence could have been detrimental to [the p]arent's case" (id.). The IHO further found that the parent and iBrain failed to cooperate with the district and did not act in good faith. Therefore, the IHO determined that awarding the parent her requested relief for the 2021-22 school year was not appropriate (id.).

For the 2022-23 school year, the IHO found that the parent had provided the district with ten-day written notice of her intention to unilaterally enroll the student at iBrain for the 2022-23 school year; however, for all of the remaining reasons detailed above with respect to the 2021-22 school year, the IHO determined that a reduction in the amount of the parent's requested relief was appropriate (IHO Decision at pp. 11-12). The IHO found that the parent's request for tuition should be reduced by 65 percent and the parent's request for the cost of related services should be limited to OT (id. at pp. 12-14). The IHO found that parent did not offer any testimony related to the provision of PT, speech-language therapy, assistive technology services, music therapy, or parent counseling and training (id. at p. 13). The IHO further noted that the iBrain director of special education testified that the physical therapist and music therapist listed on the iBrain IEP were not employed by iBrain as of summer 2022 (id.). The IHO also stated that the iBrain director of special education was unable to identify the student's current providers at iBrain when questioned on cross-examination (id. at p. 14). The IHO further noted that the iBrain director's inability to identify the student's providers given that she had previously testified to the student's progress by observing him receiving services rendered her testimony not credible (id.). In addition, the IHO found that, due to iBrain's failure to respond to the document and witness subpoenas, the IHO could not "with any degree of certainty, determine what related services (with the exception of OT) were provided to [the s]tudent, the quality and quantity of those services, [the s]tudent's progress with related services, and how the related services were tailored to meet [the s]tudent's specific needs" (id.). As relief, the IHO directed the district to provide direct funding of 35 percent for the student's base tuition for the 2022-23 school year, the cost of OT for the 12-month 2022-23 school year (but not the cost of other supplemental services listed on the iBrain contract), and the cost of the student's special transportation for the 2022-23 school year (id. at p. 15).

IV. Appeal for State-Level Review

The parent appeals and argues that the IHO erred in denying all relief for the 2021-22 school year and in awarding partial reimbursement for the cost of the student's attendance at iBrain for the 2022-23 school year. The parent alleges that the IHO made inappropriate and excessive reductions in the parent's award of reimbursement. The parent contends that the student was not offered an IEP or school location during the 2022-23 school year and therefore the IHO's 65 percent reduction in base tuition and denial of supplemental tuition for all related services with the exception of OT was unwarranted, unlawful, and unconscionable. Additionally, the parent asserts that she did not obstruct the district or fail to cooperate. The parent further alleges that the IHO disregarded the iBrain IEP and failed to consider how the services the student was receiving from iBrain met the student's needs. The parent also asserts that the IHO erred by imputing bad faith to iBrain and by drawing adverse inferences against the parent. The parent argues that the IHO erred in failing to schedule an additional hearing date for the independent neuropsychologist to testify and further erred by excluding the independent neuropsychological evaluation that the IHO had ordered. The parent has also annexed to the request for review email correspondence, a purported ten-day notice letter related to the 2021-22 school year, and the independent neuropsychological evaluation report, and requests that the documents be considered as additional evidence in her appeal. As relief, the parent requests reimbursement of the cost of the student's attendance at iBrain for a portion of the 2021-22 school year and for the 2022-23 school year.

In an answer and cross-appeal, the district alleges that the IHO correctly found that equitable considerations weighed against an award of full tuition reimbursement; however, the district cross-appeals the IHO's award of partial relief for the 2022-23 school year and asserts that the IHO should have denied all of the parent's requested relief on equitable grounds. The district also objects to the parent's request that a ten-day notice letter related to the 2021-22 school year and the independent neuropsychological evaluation report be accepted as additional evidence. The district does not object to the acceptance of the email correspondence.

Next, the district cross-appeals the IHO's determination that iBrain was an appropriate unilateral placement and argues that the parent did not meet her burden for the 2021-22 and 2022-23 school years. As relief, the district requests reversal of the IHO's determination that iBrain was an appropriate unilateral placement and reversal of the IHO's partial award of reimbursement for the 2022-23 school year.

In an answer to the district's cross-appeal, the parent denies the district's allegations, reasserts the claims in her request for review, and reiterates her requests for relief.

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]).[7]

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. Preliminary Matters

1. Conduct of Impartial Hearing

Initially, the parent asserts that the IHO erred in denying her request for an additional hearing date. The parent alleges that the IHO ordered an independent neuropsychological evaluation of the student that was not completed at the time of the impartial hearing. The parent contends that the IHO erred in finding that the neuropsychological evaluation was not necessary to determine the merits of the parent's claims in the due process complaint notice and that an additional date should have been scheduled for the parent's independent evaluator to testify and

[7] 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).

for the parent to offer the completed independent neuropsychological evaluation report into evidence. The district argues that the IHO's refusal to grant an adjournment was not unreasonable or an abuse of discretion.

During the February 28, 2023 impartial hearing, the IHO determined that the parent's request for an additional hearing date was untimely, as it did not comport with his preconference summary and order, which required that all motions be made at least five days prior to an impartial hearing date (Feb. 28, 2023 Tr. pp. 12-13). The IHO further determined that the independent neuropsychological evaluation was not needed to decide the merits of the parent's claims and therefore declined the parent's request (Feb. 28, 2023 Tr. p. 13). In his decision, the IHO stated that the impartial hearing "was not adjourned to allow time for the completion of the independent Neuropsychological Evaluation because it d[id] not have any probative value with regard[] to the issues and relief being sought in this case" (IHO Decision at p. 3).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial hearing in order that they may "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. 46704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice]). State regulation sets 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" or issue a subpoena if necessary (8 NYCRR 200.5[j][3][xii], [xiii][a], [xii][c]-[e]; see 8 NYCRR 200.5[j][3][iv]).

As detailed above, the IHO considered the email correspondence from February 27, 2023 and further allowed the parties to present argument on the issue of adjourning the February 28, 2023 impartial hearing date and scheduling an additional date to allow the parent to present the independent neuropsychological evaluation and testimony from the independent evaluator. The IHO explained his rationale for denying the parent's request on the record during the impartial hearing and again in his decision. The IHO was well within his discretion to find that the neuropsychological evaluation was not relevant to the proceedings and to decline to schedule an additional hearing date.

2. Additional Evidence

Turning to the remaining two proposed SRO exhibits attached to the parent's request for review, the parent has offered an April 22, 2022 ten-day written notice letter and the above-mentioned independent neuropsychological evaluation report. The district objects to the consideration of both proposed exhibits as additional evidence.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not

have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

With regard to the neuropsychological evaluation report, while not available at the time of the impartial hearing, I agree with the IHO that it is not relevant to the issues at hand, specifically, the appropriateness of the unilateral placement or equitable considerations, and, therefore, is not necessary to render a decision in this matter. The parent's other proposed exhibit, the purported ten-day written notice letter, dated April 22, 2022, was available at the time of the impartial hearing. The parent argues in her request for review that the ten-day notice was served upon the district, however it was "inadvertently not included" in the parent's disclosure (Req. for Rev. ¶ 20).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the proposed additional evidence from withholding what the party either knew or should have known was relevant evidence during the impartial hearing and thereby shielding the additional evidence from cross-examination or later attempts to spring it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

Here, the parent concedes that the April 22, 2022 ten-day written notice letter was available at the time of the impartial hearing and was omitted from her documentary evidence at the hearing in error. Further, there is no evidence that the letter was sent to the district, and, as the letter was not presented during the impartial hearing, the district did not have the opportunity to argue that it was not received.

Based on the foregoing, I decline to exercise my discretion and do not accept the parent's proposed SRO exhibits B and C as additional evidence.

B. Unilateral Placement

The district cross-appeals the IHO's determination that iBrain was an appropriate unilateral placement. The parent argues that the IHO's finding that iBrain was appropriate for the 2021-22 and 2022-23 school years should be upheld.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ

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

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

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

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

1. Student Needs

While the student's needs are not in dispute on appeal, a discussion thereof is necessary to evaluate the appropriateness of the parents' unilateral placement of the student at iBrain from May 2022 through the end of the 2021-22 school year and for the 2022-23 school year.

The student was evaluated by the district during the 2019-20 school year (Dist. Exs. 3-7).[8] The psychoeducational, PT, OT, and speech-language evaluations completed in August and September 2019 generally described the student as cooperative and engaged, and that he attempted tasks requested of him during testing (see Dist. Exs. 3 at p. 2; 4 at p. 3; 5 at p. 3; 6 at p. 2). The student was unable to complete formal intellectual and academic testing, and measures of his adaptive skills revealed scores in the extremely low range (Dist. Ex. 3 at pp. 2, 3). He was non-ambulatory, used a wheelchair, and had global developmental delays (see Dist. Exs. 3 at p. 2; 4 at pp. 1-3; 5 at pp. 2-4; 6 at p. 2). The occupational therapist reported that the student had poor self-regulation skills and that he was "not easily distracted by auditory or visual stimuli in a one-to-one setting" (Dist. Ex. 5 at p. 3).

According to the August 2019 psychoeducational evaluation report, the parent indicated that the student "often under[stood] what [wa]s said to him," and was able to speak a few words and use some gestures to communicate needs, such as putting his hand over his abdomen to indicate hunger (Dist. Ex. 3 at p. 1). The evaluator who conducted the September 2019 speech-language evaluation reported that the student exhibited "severe to profound delays in the receptive and expressive language domains" (Dist. Ex. 6 at p. 2). He was able to identify some action words in pictures as well as some body parts, complete some simple one-step commands, and look towards a named person or object (id. at p. 3). He was unable to imitate sounds or words on command or produce verbal responses (id. at p. 4).

The October 2019 PT evaluation report indicated that the student required complete assistance to transfer in and out of his wheelchair (Dist. Ex. 4 at p. 2). He had poor head control and limited range of motion in both upper and lower extremities; postural weakness; as well as balance, coordination, and motor planning deficits (id. at pp. 2, 4). The November 2019 OT evaluation report reflected that the student was able to minimally reach for items and briefly hold a pencil (Dist. Ex. 5 at p. 3). He was able to respond to sounds and light and deep touch (id.). The evaluator noted that the student "display[ed] diminished righting, equilibrium, and protective responses" (id.). He had a "G-tube for feeding" and required "maximum assistance with toileting, dressing[,] and bathing" (id. at p. 4).

The district conducted an assistive technology evaluation of the student from January 2021 through May 2021 (Dist. Ex. 8). After a series of sessions, the evaluators recommended that the student use a standard mobile tablet dynamic display voice output device with an application that offered "a language system in Spanish and English organized with access to core vocabulary through motor planning to build sentences, as well as categorically organized vocabulary" (id. at pp. 12-13).

The iBrain IEP reflected that the student benefitted from a bilingual approach as he appeared to have a strong understanding of English but demonstrated more accuracy when asked questions in Spanish (Parent Ex. H at p. 3). Regarding communication skills, the student was reported to use "gestures, facial expressions, and sustained eye gaze to communicate during daily routines," which was similar to information included in the April 2022 district IEP that noted the

[8] The 2019 district evaluations were conducted in both English and Spanish (see Dist. Exs. 3-7). At the time of the district evaluations, the student's "exposure to English ha[d] been minimal" and his dominant language was Spanish (Dist. Ex. 6 at p. 2).

student had limited verbal language, simple word approximations in Spanish, and that he used non-verbal language to communicate (compare Parent Ex. H at p. 4, with Dist. Ex. 2 at p. 4). At the time of his initial enrollment at iBrain the student was "trialing an eye gaze device" (Parent Ex. H at p. 4). The iBrain IEP noted that "[s]ince his initial evaluation at iBrain and engagement in speech and language sessions, [the student] ha[d] demonstrated adequate joint attention skills throughout activities that [were] presented. [The student] answer[ed] yes/no questions, gesture[d] towards desired objects (guitar), sustain[ed] his eye gaze on desired objects, and trial[ed] Snap Core on a high-tech AAC device provided by the school to request" (id.).[9] The student's receptive skills were noted to be a relative strength (id. at p. 5).

Socially, the student was able to show awareness and interest in others, react to familiar people and motivating activities, respond to physical interactions, and "vocalize emotions (i.e., happy) using smiles and laughter" (Parent Ex. H at p. 7). He was reported to enjoy "when others played with him interactively," and engaged in activities he liked with familiar and unfamiliar partners (id.). As reported in both the district's April 2022 IEP and the iBrain IEP, the student required assistance initiating interactions with peers, although he demonstrated interest in them (Parent Ex. H at p. 3; Dist. Ex. 2 at p. 4). The district's April 2022 IEP indicated that the student required significant adult prompting to "use curriculum vocabulary to ask and answer his peers' questions" and the iBrain IEP indicated that the student would "point to his [h]ello picture card when asked but otherwise stay[ed] quiet and wait[ed] until he [wa]s prompted" to interact with peers (Parent Ex. H at p. 3; Dist. Ex. 2 at p. 5).

Regarding physical development, according to the iBrain IEP, the student presented with "a low tone base with flexible tone in his extremities" and reduced strength and motor control in both arms (Parent Ex. H at p. 11). While the student was able to lift his head from a flexed to neutral position, the iBrain IEP levels of performance reflected that he was unable to "maintain a neutral position for more than [five] seconds" and "require[d] frequent verbal and tactile cues to bring [his] head to midline" (id.). The April 2022 district IEP similarly indicated the student had "poor head/trunk control and require[d] multiple corrections and adjustments throughout the day to facilitate his engagement in classroom activities" (Dist. Ex. 2 at p. 5). Consistent with the iBrain IEP, the April 2022 IEP noted the student's needs included improving head and trunk control, standing balance, and weight bearing skills (compare Parent Ex. H at p. 13, with Dist. Ex. 2 at p. 6). At iBrain, the student had also worked on range of motion, stretching, and strengthening (Parent Ex. H at p. 13). The iBrain IEP indicated the student required frequent rest breaks and redirection during sessions (id.). According to the iBrain IEP, the student was sometimes in pain, the pain could result in fear of movement, and reportedly inhibited the student's progress (id. at pp. 13, 14).

The iBrain IEP included information that the student was highly distractible and required rest breaks throughout the day because of decreased endurance (Parent Ex. H at pp. 2, 3, 10, 11, 12, 13, 15, 16). Similarly, the April 2022 district IEP noted the student had a short attention span and was frequently distracted (Dist. Ex. 2 at p. 5). The iBrain IEP included the student's management needs, such as that he required supports including aided language stimulation, one-to-one direct instruction, repetition, modeling, verbal and physical cues, and additional processing

[9] The acronym AAC represents augmentative and alternative communication.

time (Parent Ex. H at pp. 27-28). The student benefitted from a structured classroom environment with limited visual and auditory distractions and equipment such as bolsters and seating systems to meet his physical needs, as well as assistive technology to improve communication (id.). Breaks were provided to the student as needed to maintain his attention and energy (id. at p. 29). The district's April 2022 IEP noted the student's management needs included adult support for all activities of daily living and adult supervision throughout the day, as well as use of manipulatives and visuals, directions simplified and repeated, modeling, verbal cues and prompts, and assistance to navigate social interactions (Dist. Ex. 2 at pp. 6-7).

2. iBrain

While the IHO found that the parent met her burden to prove that iBrain was an appropriate unilateral placement, his analysis of equitable considerations called into question his determination regarding iBrain. The specific findings the IHO made, which related to the evidentiary value of the iBrain IEP, adverse inferences related iBrain's failure to respond to subpoenas, and the credibility of the testimony of iBrain's special education director, should have been discussed in the IHO's analysis of the appropriateness of iBrain as a unilateral placement. By making these adverse findings relevant to the appropriateness of iBrain in a discussion of equitable considerations, the IHO's decision could be viewed as contradictory as each additional finding seemed to erode, based on his assessment of the actual evidence adduced during the hearing as opposed to the parties' conduct during the CSE process and a weighing of the equities on that basis, his initial determination that iBrain was an appropriate unilateral placement and met the student's needs. With respect to the subpoenas, the IHO found that, taking into account testimony of the iBrain director and the iBrain occupational therapist that contradicted the school's subpoena responses, iBrain "was not truthful" in its responses to the district's subpoenas, and that he made "negative inference[s]" that documents and witnesses were not produced because they would have been detrimental to the parent's case (IHO Decision at pp. 11-14).[10] In particular, the IHO cited iBrain's response that a list of providers, the number of hours of services delivered to the student, and teacher notes or reports did not exist (id. at pp. 10-11). With respect to the witnesses, the individual subpoenaed who may have testified about the substantive program at iBrain was the student's PT provider (see Feb. 28, 2023 Tr. pp. 28-30).[11]

The IHO also found that the iBrain director lacked credibility given her inability to name the student's providers despite testifying that she regularly observed the student with his providers (IHO Decision at pp. 13-14).[12] The IHO's credibility determinations are accorded deference as

[10] 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 nevertheless assert appropriate discretionary controls over the due process and review proceedings; however, in New York they 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).

[11] The other subpoenaed witnesses who did not appear included signatories to the enrollment contract and tuition affidavit and the registered agent from Sisters (see Feb. 28, 2023 Tr. pp. 28-30).

[12] As the IHO relied on the director's testimony about the iBrain program, it appears his credibility finding was

neither the non-testimonial evidence in the hearing record hearing record nor the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v. City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]; Application of a Student with a Disability, Appeal No. 12-076).

Despite the IHO's credibility findings and adverse inferences, he still weighed the evidence (and the lack thereof) and found sufficient basis for a finding that iBrain was an appropriate unilateral placement (see IHO Decision at pp. 8-9).[13] Review of the hearing record supports that finding. That is, putting aside the testimony of the director about the delivery of services and even considering that the testimony of the PT provider or evidence withheld by iBrain in the form of service delivery records or teacher or provider notes may have revealed some issues with the delivery of the program and services or the student's progress, the iBrain IEP offers another source of information about the program at iBrain.[14] And the district did not elicit testimony from the iBrain witnesses who did testify to imply that the student was not receiving the services identified in the iBrain IEP.

The director of special education testified that iBrain's program was designed "exclusively for students with significant brain injuries or brain-based disorders" and served a "population [that] [wa]s primarily non-verbal and non-ambulatory" (Feb. 28, 2023 Tr. pp. 102-03). Each of the students at iBrain were assigned a one-to-one paraprofessional "to access the educational and therapeutic programming" (Feb. 28, 2023 Tr. p. 103). iBrain provided a range of related services including speech-language therapy, music therapy, OT, PT, vision education services, services for the deaf and hard of hearing, and assistive technology services (id.). There were two class sizes at iBrain, 6:1+1 and 8:1+1, and the director of special education stated that the difference between the students in these two class sizes was primarily related to the students' ability to communicate with greater independence; students within the 8:1+1 classroom were able to communicate more independently than those within the 6:1+1 classroom (Feb. 28, 2023 Tr. pp. 103-05). According to the director of special education, the 8:1+1 classroom allowed for more reciprocal peer interaction (Feb. 28, 2023 Tr. pp. 105-106).

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narrow in scope and related only to the director's testimony about the delivery of services (compare IHO Decision at p. 10, with IHO Decision at pp. 13-14).

[13] The IHO's finding that iBrain's failure to comply with subpoenas impeded his ability to make a determination regarding the appropriateness of iBrain is belied by the IHO's conclusion that the parent met her burden of proof on this point (compare IHO Decision at pp. 8-9, with IHO Decision at pp. 11-14).

[14] According to the district's attorney, the testimony of the PT provider (as well as the OT provider who did ultimately testimony) was sought to probe the representations in iBrain's response to the document subpoena that service delivery records did not exist and to inquire about what language was used in delivering the services to the student (i.e., Spanish or English), as well as to question the extent to which they delivered services (see SRO Ex. A at p. 17). As summarized below, much of this line of questioning was accomplished with the occupational therapist.

In her testimony, the director of special education offered that prior to accepting a student at iBrain, the family and student were brought in for a day of evaluations to determine whether they qualified for the iBrain program (Feb. 28, 2023 Tr. p. 106). If the student was admitted to iBrain, the evaluators inputted the results into a document that became the iBrain IEP (Feb. 28, 2023 Tr. p. 107). Within a few weeks of beginning at iBrain, a new student's providers added to the original information as they learned more about the student (Feb. 28, 2023 Tr. p. 108). The director of special education stated that at this point the iBrain IEP was "completed," and that the document was updated "if something significant change[d]" or when there was an upcoming IEP meeting for the student (Feb. 28, 2023 Tr. p. 109).

Contrary to the IHO's finding that the hearing record lacked evidence of the student's programming at iBrain from the time of the student's initial enrollment in May 2022 through the IEP "update" in February 2023 (see IHO Decision at p. 10), review of the iBrain IEP shows that it contains information from the student's initial enrollment in May 2022 as well as more recently updated information (see Parent Ex. H). For example, the iBrain IEP contained statements such as "he is new to his classroom" and "he has currently only been there for [six] days," as well as references to evaluation dates that occurred in April and May 2022 (id. at pp. 1, 2, 4, 10, 15, 23). In addition, the iBrain IEP included a projected beginning service date of May 2, 2022 (id. at p. 56-58). As for more recently updated information likely related to the February 2023 date, the iBrain IEP included statements that referenced the kind of progress the student had made since beginning at iBrain, and the occupational therapist testified to updates she had made to the document (Feb. 28, 2023 Tr. pp. 88-90, 94-95; Parent Ex. H at pp. 14, 16, 17). While it may be that iBrain withheld separate versions of the document in its response to the subpoena, the timeline of information added is sufficiently discernable from the document.

Review of the iBrain IEP shows that it provided extensive information about the student's present levels of performance and needs in the areas of academics, social skills, speech-language/communication, adaptive equipment, fine and gross motor skills, assistive technology, functional/daily living skills, and management needs (see Parent Ex. H at pp. 1-34).

According to the iBrain IEP, the student began attending iBrain in May 2022 in an 8:1+1 special class setting with a full-time 1:1 paraprofessional throughout the day (Parent Ex. H at pp. 1, 4, 57). Staff at iBrain recommended that the student receive five 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, four 60-minute sessions of individual and one 60-minute session of group speech-language therapy per week, and two 60-minute sessions of assistive technology per week on an individual, indirect basis (id.). The student also used a "variety of low, mid, and high tech" assistive technology devices daily (id.). Training for the staff was conducted as needed for the use of the student's AAC devices, braces and orthotics, seizure safety, and the use of direct instruction (id. at p. 58).

The iBrain class schedule included in the hearing record indicated that the student participated in daily literacy, academics, and math classes (Dist. Ex. 12 at p. 1). In addition to these classes, the student had daily speech-language therapy, PT, and OT, music therapy on Monday, Tuesday, and Friday, and assistive technology on Wednesday and Thursday (id.). The beginning and end of each day was spent on activities of daily living (id.). At iBrain, the student participated in daily academic instruction that used a direct instruction approach and targeted the student's goals (Parent Ex. H at p. 3). The student also participated in small group activities

focused on math, science, literacy, art, and music with the assistance of his paraprofessional (id.). The iBrain IEP noted that the student had "demonstrated increased attention and arousal since moving into a classroom with similar level peers," in that he was able to consistently attend to the teacher and lessons for two minutes or longer (id.). He benefitted from "verbal cues to focus on the teacher" (id.).

Regarding the student's physical needs, the occupational therapist testified that initially the student required time to adjust to the amount of therapy he was receiving at iBrain (Feb. 28, 2023 Tr. p. 85). He needed to build up his endurance, work on "maintaining different positions, work[] on his alignment and his positioning to make sure that he [wa]s able to go through the school day in an aligned, proper position, and also safely" (id.). She stated that within OT sessions the methods she used with the student—neurodevelopmental techniques or NDT—focused on prolonged stretching, maintaining range of motion, including passive range of motion, donning and doffing orthotics, and weight bearing, to "reach[] and develop[] the developmental milestones that [the student] had never reached" (Feb. 28, 2023 Tr. pp. 86-87).

With respect to the student's language needs, the student benefitted from a bilingual approach at iBrain as he appeared to have a strong understanding of English but demonstrated more accuracy when asked questions in Spanish (Parent Ex. H at p. 3). The iBrain occupational therapist testified that the student's English comprehension was "very strong," and "that he [wa]s able to receive [instruction] in English and Spanish" (Feb. 28, 2023 Tr. pp. 63, 84). She went on to say that "[h]e might require a bit longer processing time for English than Spanish, but . . . his comprehension receptively [wa]s very strong" (id.). When asked if the student was more comfortable with Spanish or English, the occupational therapist testified that, when she asked if he needed what she said translated, he indicated that he did not and told her that he understood (Feb. 28, 2023 Tr. p. 93).

Turning to the student's performance at iBrain, while a student's progress is not dispositive of the appropriateness of a unilateral placement, a finding of some progress is, nevertheless, a relevant factor to be considered (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty, 315 F.3d at 26-27; Lexington County Sch. Dist. One v. Frazier, 2011 WL 4435690, at *11 [D.S.C. Sept. 22, 2011] [holding that "evidence of actual progress is also a relevant factor to a determination of whether a parental placement was reasonably calculated to confer some educational benefit"]). Review of the evidence in the hearing record, not including the testimony of the iBrain director that the IHO found not credible, shows that the student made progress at iBrain.

According to the iBrain IEP, the student had demonstrated "fast progress" toward his goals in literacy, mathematics, and social skills (Parent Ex. H at p. 16). He had answered various "wh" questions and "yes/no" questions using pictures, gestures, and his AAC device (id.). He demonstrated the ability recognize more and less when given two numbers, put three numbers in order from smallest to largest, and identify the number of objects within a picture (id. at p. 17). Socially, the student "ha[d] done a great job interacting with his classmates, consistently asked to sit near or say hi to peers and his providers, and used his AAC device to greet peers and therapists (id.). Progress in physical therapy was noted to be slow due to the student's pain (id. at p. 14).

In her testimony, the occupational therapist stated that the student "ha[d] made a lot of very strong progress" throughout the year in OT (Feb. 28, 2023 Tr. p. 82). She testified that his sustained, joint, and divided attention skills had improved, and he had increased his skills with matching, visually discriminating, advocating for himself, and communicating wants and needs (id.). She also reported improvement in the student's quality of movement, ability to reach and grasp, and his ability to cross midline (id.). The occupational therapist testified that the student had increased his mobility and transitions, as he was now able to roll on the mat and beginning to crawl, and he had increased his "static sitting for longer periods of time with less assistance" (Feb. 28, 2023 Tr. pp. 82-83). Given the equipment used at iBrain, the student had increased his independence in completing activities of daily living, and both grasping skills and weight-bearing had progressed (Feb. 28, 2023 Tr. p. 83). She also stated that his sensory processing had improved at iBrain (id.).

Additionally, the parent testified that iBrain staff have been helpful and understanding while providing "a very good service" (Mar. 1, 2023, Tr. p. 9). She indicated that "all [of] his needs are met and he is progressing with each one of them" (Mar. 1, 2023, Tr. p. 10).

Based on the foregoing, the IHO correctly determined that iBrain was an appropriate unilateral placement from May 2022 through the end of the 2021-22 school year and for the 2022-23 school year. The documentary evidence including the iBrain IEP and class schedule, coupled with the testimony of the director of special education, the occupational therapist, and the parent supports a finding that iBrain provided instruction and services specially designed to meet the unique needs of the student (see Gagliardo, 489 F.3d at 112; Frank G., 459 F.3d at 364-65).

C. Equitable Considerations

As indicated above, the parent asserts that the IHO erred in denying all relief for the portion of the 2021-22 school year that the student attended iBrain. The parent also alleges the IHO erred in reducing the amount of reimbursement for the base tuition and related services for the 2022-23 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"]).

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).

With regard to the portion of the 2021-22 school year in which the student attended iBrain, there is insufficient basis in the hearing record to modify the IHO's discretionary denial of all relief for these two months on equitable grounds. The parent failed to demonstrate that she provided ten-day notice to the district.

Turning to the 2022-23 school year, as indicated above, a number of the IHO's findings that he categorized as equitable considerations were related to the appropriateness of iBrain in direct contradiction to his initial determination that iBrain was an appropriate unilateral placement for the student, a finding that I affirm based on my independent review of the record detailed above. However, the IHO also seemingly reduced the parent's award based on what he construed as a failure by the parent to act in good faith and cooperate with the district during the due process proceeding with respect to the insufficient subpoena responses by iBrain. The IHO reduced the parent's request for base tuition by 65 percent and the parent's request for the cost of related services was limited to OT. The hearing record does not support the IHO's reductions. The IHO declined to award direct funding for related services other than OT because the services outlined in the iBrain IEP were not further supported by witness testimony. Here, the evidence in the hearing record reflected that the student received in-person instruction at iBrain and had very good attendance (see Dist. Ex. 16). With regard to the IHO's reduction of base tuition, it appeared to be punitive based on iBrain's failure to fully comply with the district's document and witness subpoenas (IHO Decision at pp. 11-12). As discussed above, the IHO's equitable considerations with regard to base tuition were evidentiary in nature and should have been included in the IHO's analysis of the appropriateness of iBrain to the extent he felt that they were relevant to that discussion or warranted a finding that iBrain was inappropriate for the student and tuition should not be awarded as relief. And certainly, notwithstanding the result herein, iBrain's refusal to fully comply with the district's subpoenas and Sisters refusal to respond at all to the district's subpoena have not gone unnoticed and are reason for concern given the importance of a fully developed

hearing record in due process proceedings.[15] However, as the hearing record demonstrates that the parent met her burden of proving the appropriateness of iBrain, a conclusion with which the IHO agreed in his initial finding of iBrain's appropriateness as the student's unilateral placement for the relevant time period, the IHO's subsequent reductions of the relief awarded for the 2022-23 school year pursuant to a misplaced equitable considerations analysis were not appropriate under these specific circumstances. Accordingly, the evidence in the hearing record supports the parent's request for district funding of the full cost of the student's attendance at iBrain for the 2022-23 school year.

VII. Conclusion

The hearing record demonstrates that the IHO correctly denied all of the parent's requested relief for the portion of the 2021-22 school year in which the student attended iBrain. The hearing record further demonstrates that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year and that equitable considerations weigh in favor of awarding the parent's requested relief. As such, the district is ordered to directly pay the full cost of the student's tuition at iBrain as well as the transportation services for the 2022-23 school year.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated March 2, 2023, is modified by reversing those portions which found that equitable considerations would warrant a reduction or denial of an award of tuition funding for the 2022-23 school year; and

IT IS FURTHER ORDERED that the district is directed to fund the costs of the student's tuition at iBrain, including the supplemental tuition, for the 2022-23 school year, as well as the costs of special transportation.

Dated: **Albany, New York**
June 29, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[15] There is no evidence that the district took any action outside of the impartial hearing to enforce the subpoenas.