The University of the State of New York

The State Education Department
State Review Officer
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No. 23-224

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 Rights Injury Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 fully reimbursed for the costs of the student's transportation services during the 2023-24 school year. For reasons explained herein, the appeal must be sustained in part and the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). 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

Given the limited issues on appeal, a full recitation of the student's educational history is not warranted. Briefly, the student in this matter began attending the International Academy for the Brain (iBrain) for the 2018-19 school year (see Parent Ex. M ¶ 10).[1] During the 2022-23 school year, the student's classroom at iBrain consisted of six students, one teacher, and one teaching assistant, and the student attended a 6:1+1 special class with the support of a 1:1 paraprofessional and a 1:1 nurse (see Parent Ex. G at p. 1). The evidence also reflects, however, in an "iBrain

[1] 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).

Report and Education Plan" dated May 18, 2023, that for "medical reasons," the student had "remained remote and [wa]s [then-]currently receiving all services via telehealth, with a paraprofessional and 1:1 nurse assisting in the home" (id.). The same report indicated that when the student returned to in-person services, the student would "undergo re-evaluation to obtain the most accurate and up-to-date information regarding his functioning and ability to utilize equipment, positions, etc. as per doctor's clearances" (id.).[2]

On May 18, 2023, a CSE convened to conduct the student's annual review and developed an IEP for the student for the 2023-24 school year (see Parent Ex. F at pp. 1, 47). In a letter dated June 20, 2023, the parent rejected the district's recommended placement and program for the 2023-24 school year and notified the district of her intention to unilaterally place the student at iBrain for the 2023-24, 12-month school year and to seek funding of the costs of the student's tuition expenses from the district (see Parent Ex. H at p. 1).

In a due process complaint notice dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year based on various procedural and substantive violations (see Parent Ex. A at pp. 1-8). As relief, the parent sought an order directing the district to directly pay iBrain for the costs of the student's tuition in addition to the costs of his related services, 1:1 nursing services, and the services of a 1:1 paraprofessional; to directly or prospectively fund the costs of the student's special education transportation services with "limited travel time, a 1:1 transportation nurse, air conditioning, a lift bus, and a regular-sized wheelchair"; to fund the costs of an independent educational evaluation (IEE) consisting of a neuropsychological evaluation by a provider selected by the parent; to reconvene a CSE meeting to "address changes if necessary"; and to conduct all necessary evaluations of the student within 30 days (id. at pp. 8-9).

On July 7, 2023, the parent executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year from July 5, 2023 through June 21, 2024 (see Parent Ex. I at pp, 1, 6).

The evidence also reflects that the parent executed a "School Transportation Annual Service Agreement" (transportation agreement) with Sisters Travel and Transportation Services, LLC, (Sisters Travel) to provide the student with round-trip transportation between his home and iBrain during the 2023-24 school year beginning on July 1, 2023 and concluding on June 30, 2024 (Parent Ex. J at pp. 1, 6).[3] According to the transportation agreement, the parent was responsible to pay for approximately 218 school days during the 2023-24, 12-month school year, whether or not the student utilized the transportation service on a particular day unless the transportation provider was at fault for the student not utilizing the services (id. at p. 2). The transportation agreement allows for each party to terminate the agreement "for cause" and allows the parent (client) to terminate the agreement if the student "relocates outside of the local school district or

[2] The hearing record does not include any evaluations of the student that post-date the information in the May 2023 report (see generally Tr. pp. 1-63; Parent Exs. A-N; IHO Exs. I-VI).

[3] The transportation agreement does not include the date the parent executed the agreement (see generally Parent Ex. J). Without explanation, the parent identified the transportation agreement's date as July 7, 2023 (see Tr. p. 24).

due to health reasons [the student] is no longer requiring special school transportation services" (id. at p. 3). In addition, the terms of the transportation agreement allow the parent (client) to terminate the agreement if the parent has "exhausted all legal remedies available to them to secure third party funding," however, the parent would "remain responsible for any balance due to the [transportation provider] on the date of such termination" (id.). The total amount of the transportation services was listed as $166,770.00, with payments due in three installments on July 5, 2023; September 1, 2023; and January 1, 2024 (id. at p. 2). The transportation agreement noted that the provider would "not take any deductions, omissions, or refunds for unexcused absences, withdrawal, suspension or for any other reason except as outlined" therein (id.).

A. Impartial Hearing

On August 2, 2023, the parties proceeded to an impartial hearing, which concluded on August 22, 2023 after a total of four days of proceedings (see Tr. pp. 1-63). The district did not enter any documentary or testimonial evidence into the hearing record, nor did the district representative conduct any cross-examination of the parent's two witnesses, who delivered their respective direct testimony by affidavit (see Tr. pp. 27, 37-38, 44-45; see generally Parent Exs. M-N).

On the final day of the impartial hearing and prior to concluding the proceedings, the IHO asked if someone could "explain how the tuition and transportation" were billed and paid (Tr. p. 41). The parent's attorney pointed to the enrollment contract for the 2023-24 school year to explain the tuition charges and noted that the "full tuition" did not include transportation or nursing services (Tr. pp. 41-43, 45; see generally Parent Ex. I). Turning to the transportation agreement for the 2023-24 school year executed by the parent, the IHO noted that it did not include a "per-trip charge," but instead, included an "annual charge" (Tr. pp. 46-47; see generally Parent Ex. J). The IHO also reviewed language in a previous IHO decision in the hearing record for guidance on the language to be used with respect to any potential award of reimbursement or funding for the requested transportation costs in this matter (see Tr. pp. 47-48). The IHO opined that, if he found that the parent prevailed on this issue, he would insert the "amount per day," which, consistent with the transportation agreement, "would be the maximum that could be billed"—however, the IHO noted that it would be up to the district to "ensure that" (Tr. p. 48). In addition, the IHO hypothesized that if the district received a "bill today for that full amount [of the transportation agreement]," the district would not pay it and "someone's going to review that to make sure it's broken down for the services that actually occurred" (id.).

At that point, the district's attorney at the impartial hearing asked the IHO to specifically set forth in the decision that any award for transportation costs was "limited to occasions where the student was actually transported," as it would be "unconscionable to expect the [district] to pay, based on this blanket agreement" for any periods of time that the student did not attend school "due to doctor's appointment, illness, et cetera" (Tr. p. 49). The IHO agreed with this proposition, noting that any award would "be limited to going back and forth to the school" (id.). However, the parent's attorney then reminded the IHO that the "transportation, even on days where the student [wa]sn't transported, the school still ha[d] costs associated by having those services available for them" and that "when it c[ame] to days that they [we]ren't able to go to school, it's usually not planned out heavily in advance" (id.).

The IHO turned to the transportation agreement, itself, to review the terms of the agreement (see Tr. p. 50; Parent Ex. J at p. 2). The IHO read the following from the agreement: "'based on school days, whether the student used services [or] not, unless provider was at fault'" (Tr. p. 50; Parent Ex. J at p. 2). Relying on that language, the IHO noted that "[w]ith a contract like this, the parent signs it," and without knowing how the services were billed, the IHO again hypothesized that if, for instance, the student did not attend school after January, "they're not going to get paid, right" (Tr. p. 50). The IHO also noted that the transportation agreement could not address or cover "every permutation" of planned absences or the reasons why the student may become unable to attend school (id.).

After confirming each party's respective position regarding the language to formulate any award of transportation costs, the IHO then briefly questioned the parent on this issue (see Tr. pp. 50-53, 57). The parent testified that "back in the days when the—when he was in school, sometimes somebody [was] on the bus" with the student and, as a "wheelchair bus," it could "accommodate more than one student" (Tr. p. 53). The parent confirmed that the vehicle used to transport the student was an "ambulette," rather than a "school bus" (Tr. p. 57). Upon further discussion of the issue, the IHO indicated that based on the transportation agreement and "what sound[ed] reasonable" to him, it was "reasonable just to bill for the days the student was transported unless . . . this bus [was] only [for transporting the student]" and no one else (Tr. p. 56; see Tr. pp. 53-57). At that point, the parent's attorney provided a closing statement and the impartial hearing concluded (see Tr. pp. 57-62).

B. Impartial Hearing Officer Decision

In a decision dated September 8, 2023, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement for the student, that the parent was not entitled to an IEE at public expense, and that the district was not required to convene a CSE meeting to address any changes (see IHO Decision at pp. 1-28, 30-35). With respect to the parent's request for the district to fund the student's transportation costs, the IHO concluded that, based on the evidence in the hearing record, it was undisputed that the student required special education transportation (id. at pp. 28-29). The IHO noted that the district did not raise any objections to "continuing special education transportation" (id. at p. 29). The IHO also noted that the hearing record included the transportation agreement, which set forth the parent's "obligation to pay" for the student's transportation and which included a "yearly total of $166,770.00 for 218 days of transportation" (id., citing Parent Ex. J at p. 2). Additionally, the IHO found that the transportation agreement indicated that "services w[ould] be billed whether or not [the s]tudent [wa]s actually transported," and, moreover, the parent had "obligate[d] herself to payment under the terms of the contract, via signature" (IHO Decision at p. 29, citing Parent Ex. J at pp. 2, 6). The IHO indicated that the parent's attorney "note[d] that there [we]re costs associated with scheduling transportation, even if [the s]tudent [wa]s not transported," but the transportation agreement did not "include a per diem rate" (IHO Decision at p. 29, citing Tr. pp. 49, 52; Parent Ex. J). In light of the evidence, the IHO concluded that it was "appropriate that the transportation services [we]re only funded when they actually take place," which "logically w[ould] encourage the Parent and Transportation company to plan for any days when transportation [wa]s not necessary" (IHO Decision at p. 29).

Therefore, as relief, the IHO ordered the district: to evaluate the student in all areas of suspected disability within 90 days of the date of the decision, which included a neuropsychological evaluation; to directly fund the costs of the student's tuition at iBrain, for a 12-month school year during the 2023-24 school year, up to a specified amount (identifying the specific services); and to fund the student's transportation to iBrain for the 2023-24 school year "for days [the s]tudent [wa]s transported to and from iBrain," up to the total contracted amount of $166,770.00, for 218 school days of transportation (or $765.00 per day) (IHO Decision at pp. 36-37).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by limiting the amount of transportation funding awarded to the cost of transportation actually used by the student, as opposed to the full amount required by the terms of the transportation agreement.

In an answer, the district responds to the parent's allegations and argues to uphold the IHO's decision in its entirety.

The parent responds to the district's answer in a reply.[4, 5]

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

[4] Although the parent prepared, served, and filed a reply to the district's answer in this case, State regulation limits the scope of the parent's reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to compose a reply. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

[5] In addition to the reply, the parent's attorney forwarded a copy of an IHO decision issued in another administrative proceeding by letter dated November 14, 2023, purportedly in support of the instant issue on appeal. However, State regulation does not provide for the filing of any additional pleadings, other than a request for review, answer, answer with cross-appeal, an answer to a cross-appeal, or a reply for consideration on appeal (see 8 NYCRR 270.6[a]). As a result, the parent's additional filing will not be considered.

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]).[6]

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

At the outset, the parties have not appealed the following IHO findings: the district failed to offer the student a FAPE for the 2023-24 school year, iBrain was an appropriate unilateral placement for the student for the 2023-24 school year, the parent was entitled to an award of direct funding for the costs of the student's tuition at iBrain for the 2023-24 school year, the parent was not entitled to an IEE at public expense at this time, the district was required to evaluate the student in all areas of suspected disability (including a neuropsychological evaluation), and the district was not required to convene a CSE meeting to address any changes if necessary (see generally Req. for Rev.; Answer). As a result, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

In support of the parent's contention that the IHO erred by limiting the award of transportation costs to the dates the student was actually transported to iBrain, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company

[6] 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).

and determined that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't of Educ., 2022 WL 523455 at p. *5 [S.D.N.Y. Feb. 22, 2022]).

In opposition, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO properly limited the award of transportation costs to those actually used by the student, as opposed to the amount the parent contracted to pay in the transportation agreement. In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023).

Ultimately, the parties do not dispute that this student required special transportation services and, pursuant to the recommendations in the May 2023 IEP, he would have received such services through the district had it offered a FAPE. Further, during the impartial hearing, the district did not offer any evidence that other transportation options were available, which would have resulted in a more reasonable cost or identify any other company with whom the parents could have contracted that would not have charged for the days when the student did not utilize the services. Moreover, during the impartial hearing, the district did not assert that the transportation costs sought by the parent were unreasonable or excessive. Indeed, as discussed in prior appeals regarding the same issue, if the district had provided special transportation to the student, it is unlikely that the district would incur no transportation expenses on the school days that the student was unable to attend school. For instance, when a school district purchases a bus or other vehicle with which it transports students, it is not necessarily relieved of the obligation to maintain the vehicle at the ready, pay drivers, purchase insurance, or have available fuel in place, and public taxpayers bear those expenses even if a student does not attend school on a particular day. Similarly, it is logical that the transportation company is required to have a vehicle and staff to transport the student each school day per the terms of the contract, even if the student did not utilize the service on a particular day and that the parents are liable to the transportation company for those costs. Accordingly, the district's argument is without merit.

However, if the IHO was concerned with excessive costs, it would have been permissible for him to instruct the parties to develop the evidentiary record. In the present matter, the IHO addressed his limited concerns at the impartial hearing about the interpretation of the transportation agreement, but sought no additional evidence on the issue of costs, other than asking the parent whether the student would have been transported alone or with another student and the type of vehicle used to transport the student (an ambulette). As noted by the district court in Araujo, in assessing the reasonableness of the costs attendant to the transportation contract, an IHO may consider that "there are many services one might be required to pay for regardless of whether or how much they are used," but that contracted for costs are not "automatically reasonable because they are specified by the [c]ontract" (Araujo, 2023 WL 5097982 at *5). Considering the above, the IHO's determination that the district must fund the student's transportation services only when actually provided was without support in the hearing record and directly contradicted the terms of the transportation agreement.

Still, it is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred in reducing the award of transportation funding, as all three of the matters cited by the parties involved implementation of either pendency

orders or a final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a review of the administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

As a final point, and prior to ordering the district to fund the student's transportation costs consistent with the terms of the transportation agreement, the hearing record lacks any evidence to determine whether the student resumed in-person instruction at iBrain during the 2023-24 school year. The final criterion for a reimbursement award is that the parent's 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"]).

Here, the evidence reflects that, during the 2022-23 school year, the student remained on remote instruction due to medical issues, but neither the parent nor the director of special education at iBrain testified about how the student received instruction for the 2023-24 school year (see generally Parent Exs. M-N). If the student were not attending school in person, entering into a contract for the delivery of special transportation services could be considered excessive. In this instance, as the parent contracted for the student's enrollment at iBrain on a 12-month basis, there should have been evidence available to the parent's witnesses on this issue and whether the student was being transported to and from iBrain; however, the hearing record is deficient on this point. Rather than deny relief that may be warranted, to address this question, the matter is being remanded to the IHO for further proceedings.

VII. Conclusion

Having found that the IHO erred in his reasoning behind the limit of the award of transportation costs to only those services actually provided, but also having found that the hearing

record lacks sufficient evidence about the student's attendance at iBrain during the 2023-24 school year to determine the reasonableness of the transportation agreement on appeal, the matter must be remanded to the IHO.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 8, 2023, is modified by reversing that portion which ordered the district to fund the student's transportation for days the student was transported to and from iBrain; and,

IT IS FURTHER ORDERED that the matter shall be remanded to the IHO for further proceedings consistent with this decision.

Dated: **Albany, New York**
December 7, 2023

STEVEN KROLAK
STATE REVIEW OFFICER