The University of the State of New York

The State Education Department
State Review Officer
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No. 23-238

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 those portions of a decision of an impartial hearing officer (IHO) which denied in part his request for direct funding for 1:1 nursing services and special transportation for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determination that the parent's unilateral placement of his daughter at the International Academy for the Brain (iBrain) was appropriate and ordered it to fund the student's tuition costs at iBrain for the 2023-24 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. The student in this matter has significant global developmental delays and began attending iBrain in June 2022 (Parent Exs. B at pp. 1-40; C; I ¶ 12). The CSE convened on March 20, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Parent Ex. B). The parent disagreed with the recommendations contained in the March 2023 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2023-24 school year and, as a result,

notified the district of his intent to unilaterally place the student at iBrain (see Parent Exs. A; D). 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 (see Parent Ex. A).

An impartial hearing convened on August 28, 2023, and concluded that day (Tr. pp. 1-64).[1] In a decision dated September 16, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of district funding of the costs of the student's tuition (IHO Decision at pp. 16-28). However, the IHO determined that nothing in the hearing record supported a finding that "the family was required by the market or the exigencies" to contract for 1:1 nursing or transportation services for the entire school year "when services such as these are routinely available . . . on a per diem or per hour basis" (id. at p. 25). Further, the IHO concluded that "the equities do not support a finding that the family has shown that its nursing and/or transportation providers have been providing services at reasonable market rates or within the scope of reasonable market practices" (id.). As relief, the IHO ordered the district to fund the cost of the student's tuition and related services at iBrain for the 2023-24 school year (id. at pp. 24-28). Next, the IHO ordered the district to fund the costs incurred "to date" for 1:1 nursing services and special transportation "as contracted" (id. at p. 25). However, the IHO ordered that "going forward, at its discretion" the district may "fund nursing and transportation services actually provided to the student during the 2023-24 school year . . . at the costs identified by the contracts," or provide the services itself, among other relief (id. at pp. 25-26).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's reply and answer thereto are also presumed and, therefore, the allegations and arguments will not be recited in detail here. The gravamen of the parent's appeal is that the IHO erred in limiting the funding for nursing services and transportation relief. The crux of the district's cross-appeal is that the IHO erred in finding that the unilateral placement at iBrain was appropriate for the student during the 2023-24 school year.

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]).

[1] The IHO issued an interim order on pendency dated July 24, 2023 (see Interim IHO Decision).

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]).[2]

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

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

VI. Discussion

Neither party appeals from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 15-16, 24). As such, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the only issues left to be resolved are whether the IHO erred in finding that the unilateral placement at iBrain was appropriate or whether the IHO erred in the relief ordered.

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

A. Unilateral Placement

The district appeals from the IHO's finding that the parent sustained his burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges that the parent "presented scant evidence" with respect to the qualifications of the student's teachers and service providers, and progress the student made at iBrain.

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).

The hearing record shows that the student has attended iBrain since June 2022 and iBrain developed an individualized education plan for the student dated September 2022 (Parent Exs. C; I ¶ 12; J ¶ 10). The iBrain plan indicated that the student has received diagnoses including seizure disorder, visual impairment, and intellectual disability; she communicated through gestures, actions, and facial expressions; and she required assistance for self-care/hygiene tasks, transfers, mobility, dressing, and all other activities of daily living (Parent Ex. C at p. 1). To address those needs, iBrain provided a 12-month program in a 6:1+1 special class with both 1:1 nursing and paraprofessional services throughout the day, and assistive technology devices and services (id. at pp. 69, 70). The related services provided to the student at iBrain were four 60-minute individual sessions per week of both occupational therapy (OT) and physical therapy (PT), four 60-minute individual sessions and one 60-minute group session per week of speech-language therapy, and one 60-minute session per week each of individual and group music therapy (id.).[3]

Turning to the district's first argument on appeal regarding the providers' qualifications, as stated above, the private school need not employ certified special education teachers (Carter, 510 U.S. at 13-14). Review of the September 2022 iBrain plan shows that it was developed by two Masters-level speech-language pathologists who have also obtained their "CCC" credential, a Masters-level music therapist, a Masters-level occupational therapist who had obtained "OTR/L" designation, and a physical therapist (Parent Ex. C at p. 71). During the hearing, the director of special education at iBrain (director) testified that the student's paraprofessional had received training in seizure response, feeding techniques, "allergen-based training," and ongoing training in the use of the student's assistive technology devices (Tr. pp. 52-53; Parent Ex. J ¶ 1). When asked who provided the student's services during the 2022-23 school year, the director recalled some of the names of the staff and was not asked about their qualifications (see Tr. pp. 54-55). While the district is correct that the hearing record did not specify the qualifications of the student's then-current providers, that in and of itself does not provide a basis to overturn the IHO's finding about the appropriateness of the student's program at iBrain.

Next, the district argues that the parent failed to present evidence of the student's progress during the school year at issue; however, the impartial hearing took place on August 28, 2023, less than two months into the 12-month 2023-24 school year. Accordingly, it is not clear that a great deal of evidence would be available to the parent to present specific to the 2023-24 school year. In any event, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not

[3] I note that, with the exception of music therapy, the March 2023 CSE also recommended a 12-month program consisting of a 6:1+1 special class placement together with 1:1 paraprofessional, nursing, related, and assistive technology services, consistent with the September 2022 iBrain plan (compare Parent Ex. B at pp. 58-59, 65, with Parent Ex. C at pp. 69-70).

dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

While there is not a great deal of evidence of the student's progress during the 2023-24 school year, the evidence does demonstrate that the student made progress during the 2022-23 school year and was expected to continue to do so. Review of the iBrain plan shows that, although the "[r]eport" was dated September 2022, it included information obtained during the 2022-23 school year, including scores from assessments administered to the student in February and March 2023, and indications that the student had made progress and was "on track" to master some goals "by the end of the school year" (see Parent Ex. C at pp. 1, 2, 6, 9, 12-13, 16, 20-21). For example, in May 2022 the student achieved 11/65 on a measure of "the acquisition of functional skills or changes in functional abilities," and in February 2023 the student achieved 16/65 on that inventory (id. at pp. 2, 21). The iBrain plan indicated that the student demonstrated "slow, steady progress toward her" assistive technology goals, and included a graph with data spanning from August 2022 to March 2023 (id. at p. 12). Additionally, a comparison of augmentative alternative communication (AAC) assessment results from May 2022 and March 2023 show improvement from the student's designation of a "[l]evel 1" with scatter level 2 skills communicator to a "[l]evel 2" communicator, respectively (id. at pp. 10, 20). Regarding skills addressed by OT and PT, the plan included graphs documenting the student's "[p]rogress" from May 2022 to March 2023 (id. at pp. 6, 9).

In written testimony, the director stated that "over the past school year" the student had "made progress in skills across academic and related service domains in her educational program at iB[rain]," and that she anticipated that the student would "continue to build upon the progress she ha[d] made so long as she [wa]s provided with continuity in regard to her educational program" (Parent Ex. I ¶ 13). When asked by the district's counsel during cross-examination about that progress, the director testified that "one of the most significant areas of progress that we've seen [wa]s in [the student's] ability to use her AAC device for communication," including that the student made more intentional choices, confirmed her choices, and expanded her vocabulary, which made it easier for her to be understood with the devices (Tr. pp. 54-55). According to the director, the student had also improved her ability to attend to and participate in sessions, in that initially the student had a very limited attention span, needed a lot of sensory breaks, and preferred to be walking around (Tr. p. 55). The director indicated that the student developed the ability to attend to more types of tabletop tasks, engage with a wider range of materials, and respond with her device (Tr. pp. 55-56). Further, while the student once spent "some time working with switches to help establish her understanding of cause and effect," at the time of the hearing the student was "trialing" different devices and had "been moving" to using "a high-tech device" that allowed her to "choose between a few different options that [we]re on her screen" (Tr. p. 58).

The district has not identified any other grounds for reversing the IHO's decision regarding the appropriateness of iBrain. Based on the forgoing, there is insufficient basis to disturb IHO's determination that iBrain offered the student programming to meet her unique special education needs for the 2023-24 school year.

B. Equitable Considerations - Relief

As set forth above, the IHO effectively reduced the relief awarded for district funding of 1:1 nursing services and transportation for the student at iBrain for the 2023-24 school year on an equitable basis, which the parent challenges on appeal.

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; 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"]).

There is no allegation that the parent failed to provide timely notice of his intention to unilaterally place the student for the 2023-24 school year or that the parent failed to cooperate with the CSE (see Parent Ex. D). Accordingly, the only equitable ground at issue relates to the costs of the nursing and transportation services.[4]

Initially, it is undisputed that related services were part of the supplemental tuition calculated separately from the base tuition for iBrain and that iBrain did not deliver the transportation services or 1:1 nursing services to the student but that, instead, the services were delivered by separate agencies (see Parent Exs. E; F; G). The IHO found no requirement that would prevent the district from substituting its own providers for those transportation and nursing services unilaterally obtained by the parent, further noting a lack of evidence that the private providers were "unique," that they were contracted by iBrain, or that it was required that the

[4] The district contends that the parent has not appealed the portion of the IHO's decision that permits the district to make different arrangements with respect to providing transportation and nursing services for the remainder of the school year at issue. However, I disagree because the parent's request for an order for the "full transportation agreement" and the "full nursing agreement" challenges the wording and directive relating to delivery of services contained in the IHO's ordered relief (see IHO Decision at pp. 25-28; Req. for Rev. ¶¶ 12-24; p. 7). Thus, it is sufficiently clear from the reading of the request for review that the parent is appealing all aspects of the IHO order that limited funding for the privately-obtained transportation and nursing services.

services be privately obtained (IHO Decision at p. 25). However, the IHO's finding disregards authority that provides that a parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). The parent did not seek prospective relief in the form of district delivery of specified services but instead engaged in the self-help remedy of rejecting the public program and unilaterally placing the student and obtaining private services. The parent opted to take the financial risk and unilaterally arrange for the student's enrollment and receipt of services. The parent can obtain funding from the school district for the unilateral placement and services, "if the three-part test that has come to be known as the Burlington-Carter test" is satisfied (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Carter, 510 U.S. at 14 [finding that the "Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement."]). Under these circumstances, absent an agreement from the parties, the parent would not be required to accept district services a la carte in lieu of the chosen private unilaterally-obtained services.[5] Accordingly, to the extent the IHO relied on the premise that the district could substitute its own services to replace those unilaterally obtained by the parent, the IHO erred.

Further, the IHO found that the services were excessive in terms of their cost and that, therefore, equitable factors did not support the parent's request for relief. Among the factors that may warrant a reduction in tuition based on equitable considerations is whether the frequency of the services or the cost for the services was excessive (M.C., 226 F.3d at 68; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K., 674 Fed. App'x at 101; E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private school or agency was unreasonable or regarding any segregable costs charged by the private school or agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Initially, there was no argument presented and the IHO did not find that the amount of transportation or nursing services provided to the student exceeded the level that the student required in order to receive a FAPE such that a reduction of the amounts charged for each of the segregable costs would be warranted. Accordingly, the issue of excessiveness is specific to the cost of the services.

[5] For that matter, while iBrain seems to have agreed to the nurses from the private agency delivering services within the school, neither the district nor the IHO could compel the private school that is not a party to this matter to permit a nurse employed or contracted by the district to enter the private school property to deliver services.

The parent entered a contract with Sisters Travel and Transportation Services, LLC for the provision of transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. G). The contract set forth an annual rate for the services and noted that fees would be based on school days even if the services were not used (id. at p. 2). The parent also entered into a nursing services contract for the 2023-24 school year with B&H Health Care, Inc. for the provision of a 1:1 nurse during the school day and during transportation to and from iBrain (Parent Ex. F). The nursing services contract, like the transportation contract, set forth an annual rate and provided that the fees in the contract were based upon the number of school days in the school year whether the student used the services or not unless the provider was at fault for the student not utilizing the services (id. at pp. 2-3).

The district did not argue that the costs of iBrain or the transportation and nursing services were unreasonable during the impartial hearing or in its closing brief (Tr. pp. 1-64; see Dist. Post-Hr'g Br. at pp. 4-8). Relatedly, the district did not present any evidence that the costs of iBrain or the transportation or nursing services were excessive, i.e., by reference to evidence of lower-cost programs and/or services that were comparable to and available in the same geographic areas or correlated to the length of the school day. The district also did not attempt to show whether similar transportation or nursing services to those being provided to the student by the private agencies could have been provided at significantly lower cost by some district entity or in its public schools. Moreover, while it was within the IHO's authority to inquire of the parent witnesses about the cost of the private special transportation or nursing services (8 NYCRR 200.5[j][3][vii]), he did not do so.

In the absence of any documentary or testimonial evidence regarding the reasonableness of the costs of the transportation services, the IHO's finding that "services such as these are routinely available in their respective markets on a per diem or per hour basis" has no support in the hearing record (see IHO decision at p. 25). In so finding, the IHO seemed to improperly rely on his own knowledge of the markets for nursing and transportation services (i.e., judicial notice).[6]

Ultimately, the hearing record was not developed on the issue of the reasonableness of the costs of the transportation or 1:1 nursing services contracts and the responsibility for this lies with the district for not presenting any evidence on the issue and with the district and the IHO for the not raising the issue during the impartial hearing so that the parent was on notice and could present appropriate evidence.

[6] Generally, an adjudicative fact may be judicially noticed when that fact "is not subject to reasonable dispute because it" is either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned" (Fed. R. Evid. 201[a], [b][1]-[b][2]). While a court is empowered with the discretion to "take judicial notice on its own," a court "must take judicial notice if a party requests it and the court is supplied with the necessary information" (Fed. R. Evid. 201[c][1]-[2]). In addition, while a court "may take judicial notice at any stage of the proceeding," a party—upon request—must be provided with the opportunity to be heard "on the propriety of taking judicial notice and the nature of the fact to be noticed" (Fed. R. Evid. 201[d]-[e]). However, if a court "takes judicial notice before notifying a party, the party, on request, is still entitled to be heard" (Fed. R. Evid. 201[e]). The IHO's use of judicial notice in this case also offends State regulation, which requires, in part, that an IHO's decision "shall be based solely upon the record of the proceeding before the [IHO]" (8 NYCRR 200.5[j][5][v]).

Finally, the IHO also reduced the transportation award by directing the district to fund nursing and transportation services actually provided to the student during the 2023-24 school year (IHO Decision at p. 27), whereas the contracts for services require payment of an annual fee based on school days regardless of whether the student used the services (Parent Exs. F; G). The district does not dispute that this student required special transportation services and 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 parent could have contracted that would not have charged for the days when the student did not utilize the services.[7] Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only transportation and nursing services actually delivered notwithstanding the parent's financial obligation to fund the entire amount due under the contract.

If the IHO was concerned with excessive costs, it would have been permissible for him to instruct the parties to develop the evidentiary record. However, in the present matter, the IHO's determination that the costs of the student's private transportation and 1:1 nursing services were excessive and thereby warranted a reduction or denial of relief is without support in the hearing record.[8]

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the 2023-24 school year and that no equitable considerations warrant a reduction or denial of the relief sought by the parent.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

[7] As the parent notes, in a recent case involving enforcement of pendency orders requiring the district to fund private transportations costs, a district court reviewed similar contracts with the same transportation company and noted 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]).

[8] The district argues that this result would render IHO's discretion to craft equitable relief "meaningless in that IHOs would seemingly be required to award one hundred percent of the requested relief, even when the record only supports awarding less relief." Yet, the district cites to no record evidence in support of its position that the IHO correctly reduced the funding award, and for that matter did not offer any documentary or testimonial evidence during the impartial hearing to develop the record. This outcome reached does not impede an IHO's discretion to fashion appropriate equitable relief based on the hearing record; it was the record evidence that was lacking in this instance.

IT IS ORDERED that the IHO's decision, dated September 16, 2023, is modified by reversing those portions which reduced or denied the amount of funding to be paid by the district for the private transportation and 1:1 nursing services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district is directed to fully fund the student's special transportation and 1:1 nursing services for the 2023-24 school year as set forth in the relevant contracts in the hearing record.

Dated: **Albany, New York**
December 1, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER