The University of the State of New York

The State Education Department
State Review Officer
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No. 23-312

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 Michael Gindi, 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 reduced the amount of reimbursement awarded for his daughter's tuition and transportation costs at the International Academy for the Brain (iBrain) for the 2023-24 school. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student was the subject of a prior State-level appeal involving a unilateral placement at iBrain for the 2021-22 and 2022-23 school years; accordingly, the parties' familiarity with the student's educational history is presumed (Application of a Student with a Disability, Appeal No. 22-150).[1] Regarding the parties' current dispute, the CSE convened on May 11, 2023, to formulate the student's IEP for the 2023-24 extended school year (see generally Dist. Ex. 1). Finding the student eligible for special education services as a student with a traumatic brain injury, the May

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

2023 CSE recommended 12-month programming consisting of an 8:1+1 special class placement at a district specialized school, together with three periods per week of adapted physical education, five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, three 60-minute sessions per week of individual vision education services, full-time paraprofessional services, one 60-minute session per week of individual assistive technology services, use of a Braille embosser, and that the parent receive one 60-minute session per month of group parent counseling and training (id. at pp. 1, 59-60).[2] Regarding transportation, the May 2023 CSE recommended that the student receive special transportation services "from the closest safe curb location to school," 1:1 paraprofessional services, a lift bus, a vehicle that could accommodate a regular sized wheelchair, limited travel time, and climate control (id. at p. 65).

By letter dated June 20, 2023, the parent informed the district that he disagreed with the recommendations contained in the student's May 2023 IEP, and that he had not received prior written notice or a school location letter for the 2023-24 school year and, as a result, notified the district of his intent to unilaterally place the student at iBrain for the 2023-24 school year and seek district funding for that placement (see Parent Ex. D). On June 26, 2023, the parent executed a contract with iBrain for the 2023-24 extended school year (Parent Ex. E at pp. 1, 6). 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). The student attended iBrain during the 2023-24 school year (see Parent Ex. H ¶¶ 11, 14).[3]

An impartial hearing convened on October 4, 2023 and concluded the same day (Tr. pp. 25-92).[4] In a final decision dated November 16, 2023, the IHO determined that the IEP developed by the CSE was appropriate to address the student's needs; however the IHO found that the district failed to inform the parent of the "bricks and mortar" or public school site, where the student could access the special education services (IHO Decision at pp. 5-6). Thus, the IHO concluded that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, that iBrain was an appropriate unilateral placement, and that equitable considerations did "not fully favor" the parent's request for an award of direct tuition funding (IHO Decision at pp. 5-8, 10). Specifically, the IHO determined that the base tuition cost at iBrain was "highly unreasonable" given what she calculated to be "2.5 hours of academic classroom instruction per week," and that the parent failed to explain the student's attendance record regarding when the student was present at school versus when she received instruction remotely (id. at pp. 8-10). As such, the IHO reduced the amount awarded for the base tuition cost by 50 percent (id. at pp. 10, 14). Regarding transportation, the IHO determined that the district attempted to "provide the required transportation services and they were rejected" by iBrain, the parent's contract with Sisters Travel and Transportation Services, LLC (Sisters Transportation) was not "reliable or credible,"

[2] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[3] The student has attended iBrain since April 2022 (Parent Ex. H ¶11).

[4] A different IHO was initially assigned to this matter, but recused herself (August 2, 2023 Tr. pp. 1-6, August 9, 2023 Tr. pp. 7-10). Prehearing conferences were held August 15, 2023 and September 7, 2023 (Tr. pp. 1-24).

and it was not clear that the student needed transportation services because it was "unclear if or when the Student received services in person" at iBrain; therefore, the IHO denied the parent's request for direct funding for transportation services (id. at pp. 10-12). The IHO denied the parent's request for an award of an independent educational evaluation (IEE) consisting of a neuropsychological evaluation on the basis that the parent failed to prove that he disagreed with the district's evaluation or requested an IEE from the district prior to the filing of the due process complaint notice (id. at pp. 12-13). As relief, the IHO ordered the district to directly fund the cost of the student's tuition at iBrain for the 2023-24 school year at "an amount not to exceed $95,000.00"; directed the district to directly fund the student's supplemental tuition at iBrain "in an amount not to exceed $125,700.00"; and ordered the district to provide the student with transportation to and from iBrain for the remainder of the 2023-24 school year (id. at p. 14).

IV. Appeal for State-Level Review

The parent appeals. The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail.

The following issues presented on appeal will be addressed in order to resolve the parties' disputes in this case:

1. Whether the IHO erred in reducing the award of the iBrain base tuition;[5]

2. Whether the IHO erred by not awarding the parent, the full cost associated with the terms of the parent's contract with Sisters Transportation; and

3. Whether the IHO erred by finding that equitable considerations only weighed partially in favor of the parent's request for an award of direct tuition funding.

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]).

[5] The IHO distinguished between the "two categories" of the student's iBrain costs: (1) base tuition of $190,000 and (2) supplemental tuition, which "includes the cost of the [s]tudent's related services programming such as physical therapy, occupational therapy, speech-language therapy, vision education services, assistive technology services, music therapy, hearing educational services and parent counseling and training" in the amount of $125,700 (IHO Decision at p. 9). The IHO determined that the hearing record reflected that the student was receiving her related services and therefore declined to reduce the cost of iBrain's $125,700 supplemental tuition (id. at p. 10). For the reasons discussed in further detail in the following discussion, the IHO reduced the award for the student's base tuition by 50 percent (id. at 10).

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]).[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 from the IHO's findings that 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 supplemental tuition at iBrain for the 2023-24 school year, and the parent was not entitled to an IEE at public expense (see generally Req. for Rev.; Answer). As a result, these determinations have become final and binding on the parties and will not be further 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]). As noted above,

[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).

the parties' remaining disputes focus on the IHO's determination to reduce the relief due to equitable considerations.

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"]).

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).

In this case, the evidence in the hearing record fails to show the extent to which the student attended in-person instruction at iBrain during the 2023-24 school year. The student's 2023-24 attendance record for July, August, and a portion of September 2023 marked the student as "Y" which leaves the strong impression that "Yes" the student was in attendance at iBrain on a particular day so marked; however, upon further testimonial evidence it became clear that the iBrain recordkeeping in actuality had a number of disparate meanings and the "Y' mark could represent "present or excused absence or home services" (Tr. pp. 66-67; Dist. Ex. 5). The district questioned the deputy director of special education at iBrain (deputy director) about how iBrain

designated the student as present for attendance purposes using the "Y" coding (Tr. pp. 66-67; Parent Ex. H ¶ 1). The deputy director testified that iBrain marked the student as present if they were "physically in the school building" or receiving telehealth services, which he described as situations where the student was at home with a paraprofessional and the students' "providers or their teachers would . . . conduct their specific services via telehealth" (Tr. p. 67). The deputy director also testified that iBrain utilized a home exercise program (HEP) that "double[d] as a home exercise or home educational program" (Tr. p. 70). He testified that "the teacher and the provider sen[t] home different . . . exercises or activities that the parent c[ould] conduct with the student at home," and that iBrain considered use of a student's HEP to be "an excused absence in the sense that [students were] also receiving services via . . . an HEP" (Tr. p. 70). Therefore, the evidence shows that iBrain's attendance records for the student failed to distinguish between at-home HEP activities conducted by the parent only, telehealth services with a paraprofessional at the student's home, or in-person instruction at iBrain(Tr. pp. 66-67, 70; Dist. Ex. 5). The district questioned the deputy director if he was "aware of how [Sisters Transportation] bill[ed] days where the student . . . either attend[ed] remotely or as an excused absence" to which the deputy director replied, "[t]hat is beyond my scope" (Tr. p. 67). It is noteworthy that neither the parent nor a representative from Sisters Transportation testified at the impartial hearing, which might have indicated how often the student attended school (see Tr. pp. 1-92).

After the district's questioning, with regard to the student's attendance form, the IHO attempted to clarify the hearing record by asking the deputy director if there was "any way to differentiate what was present as in physically present in the school and what [wa]s maybe an excused or home exercise program or home services," to which the deputy director stated "on this document, no" and that there was "no differentiation on this document" (Tr. pp. 69-71).[7] The IHO indicated that she wanted to "clarify what the actual days were in-person versus home services" to which the deputy director stated that he "would be able to find that out" (Tr. pp. 71-72). The IHO then stated that she would "discuss with Counsel how and when we can get that information (Tr. p. 72).

The evidence in the hearing record established that on the last day of hearing on October, 4, 2023, the IHO specifically requested that the parent provide the IHO with the promised clarification about the student's attendance record at iBrain (the attendance record was admitted into evidence as District Exhibit 5), in particular "what dates were in person versus home services" (Tr. p. 89). On October 26, 2023, the IHO emailed the parties and reminded the parent that she had "requested the days the Student attended [iBrain] in person, via home services/telehealth, and had excused absences" by October 13, 2023, and stated that because she had not received the requested information from the parent, the IHO "order[ed] the Parent to provide a detailed document outlining the Student's attendance at iBrain, which state[d] the days the Student was physically present in school, received home services/telehealth, and dates the Student had an excused absence during the period of July 2023 and September 2023" (IHO Ex. I at p. 2). The parent's attorney responded on November 7, 2023, affirming that no documentation clarifying the student's attendance at iBrain existed (id. at pp. 1-2). In her decision, the IHO stated that she was concerned with the hearing record's lack of clarity as to "how many of the days where the Student

[7] The IHO's efforts were part of her discretionary authority "to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record" (8 NYCRR 200.5[j][3][vii]).

was marked as 'present' were attributable to the HEP program or Telehealth and that HEP/excused absences count[ed] towards the Student's attendance" (IHO Decision at p. 10). The IHO found "the HEP services akin to homework, which while valuable to students, c[ould] not be substituted for qualified teacher/provider instruction" (id.). The IHO stated that "given the Parent's lack of candor and failure to provide this information after repeated requests and orders, [she took] a negative inference" which contributed to her determination to reduce the amount of the base tuition awarded as relief (id.).

Turning to the parties' expressed disagreements over equitable considerations in this matter, the parent disputes the IHO's reduction of the student's base tuition for the 2023-24 school year from $190,000 to $95,000 based on the IHO's determination to "take a negative inference against the Parent for first ignoring IHO orders and then submitting an incredulous and late response" regarding her request for clarification of the student's in-person attendance, and because the IHO found "that it [wa]s unreasonable and inappropriate to charge $190,000.00 for 2.5 hours of academic classroom instruction per week, a paraprofessional, and access to a 'school nurse' and [that] the related services which represent[ed] the majority of the Student's program [we]re included under separate charges" (see IHO Decision at pp. 9-10). The parent contends that the IHO erred in reducing the base tuition award to $95,000 because "[t]he IHO incorrectly assume[d] that the 30 minutes of individual academic instruction [wa]s the only time that [the student] receive[d] academic instruction," that the student "receive[d] academic instruction throughout the day," including "[t]here [wa]s clear record evidence that [the student] participate[d] in group academics throughout the school day at iBRAIN," and "attendance records [we]re not necessary for parents to substantiate their claims under the IDEA" (Req. for Rev. ¶¶ 14, 16, 17).

However, the hearing record does not support the parent's allegations of error, because there is no evidence of the degree to which the student attended iBrain in-person, was being provided services by the parent through the HEP program, received remote instruction, or was given an excused absence. In particular, the IHO found that delivery of the student's instruction through HEP, which the IHO noted was akin to homework, was unreasonable and reduced funding for base tuition due to the parent's failure to provide requested information as to the number of days the student received instruction through HEP (IHO Decision at p. 10). Although the parent was given the opportunity by the IHO to supplement his case with further evidence, the IHO was correct to hold that it was incredulous that iBrain failed to keep records tracking this kind of information. Under the circumstances, I decline to disturb the IHO's decision to draw a negative inference from the parent's decision not to clarify the hearing record regarding the student's in-person attendance, or the amount of instruction the student received through HEP, at iBrain after having been asked and then directed to do so by the IHO. Accordingly, I will not disturb the IHO's determination to award funding for iBrain at a reduced cost.

Next, the parent argues that the IHO erred in denying direct funding for the student's transportation services provided by Sisters Transportation.[8] The IHO based her denial on an

[8] The parent seems to be confused as to the IHO's awarded relief related to transportation, to be clear, the IHO directed the district to provide the student with transportation for the remainder of the 2023-24 school year, the IHO did not direct the district to pay for any service provided by Sisters Transportation although the parent indicates at multiple points in his request for review that the IHO ordered partial funding of the parent's transportation contract (IHO Decision at p. 14; Req. for Rev. ¶¶ 12, 19, 24, 27, 29, 35, 36).

equitable basis, having negatively inferred from the parent's failure to submit clarification of the student's in-person attendance at iBrain that the parent did not meet his burden to prove that that the student utilized Sisters Transportation services for the 2023-24 school year (IHO Decision at p. 12). The parties do not dispute that this student required special transportation services to attend school in person and, pursuant to the recommendations in the May 2023 IEP, she would have received such services through the district had it offered a FAPE (IHO Decision at p. 11; Dist. Ex. 1 at p. 65).

In addition, it is undisputed that neither the district nor iBrain delivered the transportation services to the student. Instead, the parent submitted a separate contract with Sisters Transportation into evidence in order to prove expenses for the transportation of the student to and from iBrain for the 12-month 2023-24 school year—although as noted above it is not clear from the hearing record how when or if the student was actually transported to and from iBrain during the 2023-24 school year (Parent Ex. F). Review of the contract shows it set forth an annual rate for the services and noted that fees would be based on school days regardless of whether the services were used (id. at p. 2). However, the IHO found that the contract with Sisters Transportation was not credible due to the lack of a date, questions regarding the parent's signature on the document, and the lack of testimony by the parent to authenticate the document (IHO Decision at p. 12). Tellingly, the parent does not appeal from this credibility finding nor does the parent even address it in his request for review or memorandum of law, instead asserting only that the IHO "erred by not awarding the full terms of the transportation contract" (Req. for Rev. ¶¶19-35).[9] Accordingly, the IHO's determination that the contract with Sisters Transportation is not credible and that it should not be afforded any weight is final and binding on the parties.

As noted above, the parent did not testify at the impartial hearing (see Tr. pp. 1-92). In balancing the equitable factors in this case, there is therefore no evidence in the hearing record as to why, or if, the parent entered into a contract obligating him to pay $192,930.00 in the event that the district was not held liable to fund the student's transportation, especially since the hearing record reflects that there was a free transportation option available to transport the student to iBrain (see Parent Ex. F at p. 2; Dist. Ex. 7). On this point, the IHO relied on email evidence proffered by the district (IHO Decision at pp. 11-12, citing Dist. Ex. 7). In the email, dated May 31, 2023, a district school psychologist inquired of a director of special education at iBrain whether the school would want the district "to create a code for [iBrain] to allow for initiation of special education transportation for [the] students," noting that "[t]ypically," private schools "reached out directly to request the routing process begin[]" (Dist. Ex. 7 at p. 3).[10] In a response dated June 27, 2023, the iBrain director of special education indicated that she was "not aware of any iBrain students who w[ould] be seeking transportation through the [district]" (id. at p. 1).[11] The IHO

[9] The parent does contend that the district "failed to offer any evidence that the transportation agreement was unreasonable, fraudulent, or excessive" (Req. for Rev. ¶ 31); however, this assertion does not address any of the concerns raised by the IHO as to the credibility of the contract with Sisters Transportation.

[10] The director of special education with whom the district corresponded in the above-described email is not the same individual who testified at the impartial hearing as iBrain's deputy director of special education (compare Dist. Ex. 7 at p. 1, with Parent Ex. H ¶ 1).

[11] In its answer, the district asserts that Sisters Transportation and iBrain are related entities insofar as the founder

found the document to be credible and determined that "[t]he record is clear that the [d]istrict tried to fulfill its [transportation] obligation but was told that the transportation services were not required" (IHO Decision at p. 12).

Additionally, the IHO held that "the record is also unclear as to the need for transportation as it is unclear if or when the [s]tudent received services in person at [iBrain], thus requiring transportation" (IHO Decision at p. 12). The IHO considered the above-referenced district May 2023 email offering free transportation services to iBrain students and iBrain's rejection of the offer of free transportation services (id.). Because the student's May 2023 IEP, which the IHO concluded was appropriately designed to address the student's needs and included a detailed section on the special transportation services recommended for the student based on her needs, the IHO determined that the district was prepared to offer the student appropriate transportation services (IHO Decision at pp. 5, 12; Dist. Ex. 1 at p. 65). Therefore, the IHO did not order the district to fund the costs as prescribed by the parent's contract with Sisters Transportation and instead ordered the district "to provide transportation to the [s]tudent to the extent needed as outlined in the IEP and Education Plan to the extent that the [s]tudent requires such transportation from home and school to receive the special education services outlined in the Education Plan in person at [iBrain]" (IHO Decision at p. 12).

It is atypical for an IHO to order the district to provide special transportation services midway through a school year in which a student has been unilaterally placed by a parent. However, on appeal the district has not asserted any error in the IHO's directive to provide the student with special transportation services to iBrain and has therefore waived any such challenge. At the same time, the IHO was presented with evidence that was sufficient to justify drawing a negative inference based on the parent's decision not to provide documentation clarifying the student's in-person attendance at iBrain, and I find, upon my independent review, that the remaining evidence in the hearing record was unreliable because iBrain's recordkeeping could not distinguish services that required transportation from those that did not, namely the HEP services provided by the parent rather than iBrain, excused absences, and remote services. Accordingly, I find it was permissible for the IHO to conclude it was unreasonable to provide the parent with relief in the form of directing the district to fund the parent's costs under the Sisters Transportation contract in the circumstances present in this case. Therefore, I decline to disturb the IHO's decision to deny direct district funding for Sisters Transportation or the IHO's order directing the district to provide district transportation to the student to iBrain.

VII. Conclusion

Based on the foregoing evidence, because the parent failed to establish that the student attended iBrain in person and the evidence shows that the parent was providing some services to the student through HEP rather than iBrain personnel, the IHO's determination to reduce the student's base tuition rate by 50 percent and to deny the student transportation costs through Sisters Transportation must be upheld.

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of both iBrain and the law firm representing the parent is married to the director of Sisters Transportation and that both companies are registered under the iBrain founder's home address. Such matters and their significance are better raised before the IHO in the first instance where there is an opportunity to develop the evidentiary record.

Having determined that the evidence in the hearing record supports the IHO's determination to reduce the amount of the student's iBrain base tuition by 50 percent and to deny the parent's request for direct funding of Sisters Transportation, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are without merit.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
February 14, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER