The University of the State of New York

The State Education Department
State Review Officer
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No. 24-187

Application of a STUDENT WITH A DISABILITY, by her parents, 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 petitioners, by Peter Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Jared Arader, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their daughter's tuition costs at the International Academy for the Brain (iBrain) for the period of April 17, 2023 through June 23, 2023. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student in this case has been the subject of three prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 21-156; Application of a Student with a Disability, Appeal No. 22-062; and Application of the Dep't of Educ., Appeal No. 24-065). Accordingly, the parties' familiarity with this matter is presumed and the detailed facts and procedural history of the case and the IHO's decision will not be fully recited here. Briefly, the parent describes the student as suffering from a brain injury and the student has received a number of secondary diagnoses that have resulted in global developmental delays (see Parent Exs. C at p. 1; I ¶¶ 2, 3). The student is non-ambulatory, nonverbal, and g-tube dependent for her hydration, nutrition, and medication administration (Parent Ex. I ¶¶ 3-4).

The student attended the International Academy of Hope (iHope) for the 2016-17 and 2017-18 school years and attended iBrain for the 2018-19, 2019-20, 2020-21, and 2021-22 school years (Dist. Ex. 4 at p. 1; see Parent Ex. A at pp. 3-4).[1] Beginning on July 11, 2022 and continuing through March 31, 2023 the student attended iHope (see Parent Ex. A at p. 4; Dist. Exs. 15-16). Thereafter, the student attended iBrain from April 17, 2023 through June 23, 2023 (Parent Ex. E at p. 1; Dist. Ex. 23).

On March 21, 2022, the CSE convened and found the student eligible for special education services as a student with a traumatic brain injury (TBI) and recommended an educational program with an implementation date of March 28, 2022 (Dist. Ex. 11 at pp. 1, 57-58, 63-64). The March 2022 CSE recommended that the student attend a 12-month program in a 12:1+(3:1) special class in a district specialized school and receive related services of four 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, and three 60-minute sessions per week of individual vision education services (id. at pp. 57-59, 64). The March 2022 CSE also recommended that the parent be provided with one 60-minute session per month of group parent counseling and training (id. at p. 57). Additionally, the March 2022 CSE recommended that the student be provided with the assistance of full-time, individual paraprofessional services for health, ambulation, and safety (id. at p. 58). The CSE also recommended the student for assistive technology devices identified as switches and a mount and one 60-minute session per week of individual assistive technology services (id.).

On February 7, 2023, the CSE convened and found the student eligible for special education as a student with multiple disabilities and developed an IEP with an implementation date of February 27, 2023 (Dist. Ex. 18 at pp. 1, 36). The February 2023 CSE recommended a 12-month program for the student that included placement in a 12:1+(3:1) special class in a district specialized school and participation in adapted physical education three times per week (id. at pp. 29-30). Additionally, the February 2023 CSE recommended that the student receive the following related services: four 60-minute sessions per week of individual OT, four 60-minute sessions per week of individual PT, four 60-minute sessions per week of individual speech-language therapy, three 45-minute sessions per week of individual vision education services, along with individual school nurse services as needed (id. at p. 30). The February 2023 CSE also recommended that the parent receive one 60-minute session per month of group parent counseling and training (id.). The February 2023 CSE continued to recommend that the student receive the assistance of full-time individual paraprofessional services and that she be provided with assistive technology devices consisting of a switch and a mount (id. at pp. 30-31).

In a letter dated March 22, 2023, the parents advised the district that they disagreed with the recommendations contained in the February 2023 IEP and that they intended to place the student at iBrain from April 2023 through June 2023 (see Parent Ex. D).

Additionally, on March 22, 2023, the parents entered into an enrollment contract with iBrain for the student's attendance beginning on April 17, 2023 and ending on June 23, 2023 (see

[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).

Parent Ex. E).[2] Next, on April 1, 2023, the parents executed a school transportation service agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the period of April 17, 2023 through June 30, 2023 (see Parent Ex. F). Additionally, the parents entered into a nursing service agreement with B & H health Care, Inc. d/b/a Park Avenue Home Care (Park Avenue) for the provision of 1:1 private duty nursing services during the school day and a 1:1 transportation nurse for the period of April 17, 2023 and continuing through June 23, 2023 (see Parent Ex. G).

In a due process complaint notice, dated April 20, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years (see Parent Ex. A).[3] In connection with the 2022-23 school year, the parents specifically alleged that the February 2023 CSE failed to recommend an appropriate class size; recommended an assigned school that could not implement the IEP; failed to recommend a 1:1 nurse; failed to conduct timely and appropriate evaluations; failed to recommend a 1:1 transportation nurse, air conditioned bus and limited travel time; and predetermined the recommendations contained in the February 2023 IEP (Parent Ex. A at pp. 5-6). The parents claimed that iBrain was an appropriate unilateral placement and equitable considerations did not bar direct funding of the iBrain tuition (id. at p. 6). As relief, the parents sought direct funding of the iBrain tuition cost, a 1:1 nurse, and special education transportation, together with an independent neuropsychological evaluation (id. at p. 7).

An IHO appointed by the Office of Administrative Trials and Hearings (OATH) held a prehearing conference on June 5, 2023 (June 5, 2023 Tr. pp. 1-27); a pendency hearing on July 7, 2023 (Tr. pp. 1-27); and a status conference on September 7, 2023 (Tr. pp. 28-35).[4] On July 22, 2023, the IHO issued a pendency order for the student's continued placement at iBrain and for transportation of the student to and from iBrain (see IHO Ex. V). On August 17, 2023, the IHO denied consolidation of this proceeding with the due process complaint notice involving the student's placement at iHope for the 2022-23 school year and another due process complaint notice filed on July 5, 2023 pertaining to the student's placement at iBrain for the 2023-24 school year (see IHO Ex. VIII). Thereafter, an impartial hearing convened on October 3, 2023, and concluded on December 26, 2023 after four days of proceedings (Tr. pp. 36-238).

In a decision dated March 31, 2024, the IHO determined that the district failed to offer the student a FAPE for the period of April 17, 2023 through June 23, 2023, that iBrain was an

[2] According to the iBrain enrollment contract, the student's prorated tuition at iBrain was $38,400 and the cost of the supplemental tuition was $21,840 resulting in a total amount owed to iBrain of $60,240 for the 2022-23 school year (Parent Ex. E at pp. 1-2).

[3] The district made an application to dismiss the parent's claims for the 2023-24 school year as being "premature, speculative, and not ripe for adjudication" which was opposed by the parents (see IHO Exs. II-III). In a decision dated June 23, 2023, the IHO granted the district's motion to dismiss the parent's claims pertaining to the 2023-24 school year without prejudice (see IHO Ex. IV).

[4] The transcript of the June 5, 2023 prehearing conference was paginated separately from the rest of the hearing; accordingly, any references to the transcript of the prehearing conference will include the date (June 5, 2023 Tr. pp. 1-27). Following the prehearing conference, on June 7, 2023, the IHO issued a Prehearing Conference Summary and Order (see IHO Ex. I).

appropriate unilateral placement, but that equitable considerations did not weigh in favor of the parents' request for an award of direct funding of the iBrain tuition (IHO Decision at pp. 5-18). In connection with iBrain, the IHO found that the school provided the student with specially designed instruction sufficient to meet her needs (id. at p. 12). However, with respect to equitable considerations, the IHO found that the parents' actions of transferring the student back to iBrain from iHope during the time period in question was "unreasonable and unjustified" and denied the parents requested tuition relief (id. at pp. 13-17). Additionally, the IHO found that the student required the support of a 1:1 nurse and the district knew of the student's need for nursing services since at least the 2018-19 school year (id. at pp. 9, 17). Also, the IHO found that the student required special transportation services (id. at p. 17). Based on the same equitable considerations the IHO considered for the iBrain tuition, the IHO denied direct funding of the transportation and nursing services (id. at pp. 17-18). Lastly, the IHO ordered the district to conduct a triennial evaluation of the student (id. at p. 18).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be repeated in detail. The main issue presented on appeal is whether the IHO erred in finding that equitable considerations did not weigh in favor of granting the parents' requested relief for tuition, nursing services, and special transportation.

The district generally denies the material allegations contained in the request for review and asserts that the IHO properly denied the parents' requested relief on equitable grounds. The district also asserts that the IHO correctly considered other proceedings filed by the parents as they were a part of the hearing record. Lastly, the district asserts that the IHO's finding of a denial of FAPE does not warrant a finding of bad faith on the part of the district.[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

[5] The parents submitted a reply to the district's answer. State regulation limits the scope of a 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 parents' reply merely reasserts many of the same allegations as raised in the request for review and does not appear to address any of the issues permitted in a reply; accordingly, the parents' reply will be disregarded.

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

The district does not cross-appeal from the IHO's determinations that it failed to offer the student a FAPE for the period of April 17, 2023 through June 23, 2023, that iBrain was an appropriate unilateral placement, that the student was entitled to special transportation, or that the student was entitled to 1:1 nursing services. Additionally, the district did not cross-appeal the IHO's finding that although the district raised some arguments about the excessive costs of the iBrain tuition, special transportation, and nursing services, the district did not offer any evidence of a more reasonable cost or other transportation options, and therefore, "the evidence in the hearing record [did] not support any sort of reduction on this basis" (IHO Decision at p. 18). Accordingly, these findings have become final and binding on the parties and will not be further discussed (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]).

[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 only issue left on appeal is whether equitable considerations barred an award of the student's tuition at iBrain, or costs for special transportation and nursing services during the portion of the 2022-23 school year at issue. The parents assert that there was no evidence in the hearing record "of any actions taken by the [p]arents that precluded or inhibited the IEP or placement process which would warrant a reduction or denial of reimbursement or direct payment" (Req. for Rev. ¶ 14). The parents also assert that the IHO failed to explain how or why the parents' decision to place their daughter at iBrain for the remainder of the 2022-23 school year was "unreasonable and unjustified" (id. ¶ 16). They argue that the IHO's reliance on other due process proceedings involving the same student is irrelevant to the issues in this matter (id. ¶ 17). Moreover, the parents assert that they provided timely notice of their disagreement with the recommended program and intent to unilaterally place the student at iBrain (id. ¶ 18). Lastly, the parents contend that the CSE could have reconvened after receipt of the ten-day notice to discuss the concerns raised by them but failed to do so (id. ¶ 19). The district argues that the IHO, in her discretion, properly denied the parents any relief relying on the finding of unreasonableness of the parents' actions (Answer ¶¶ 8, 10).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2nd Cir. 2014][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. v. Bd. of Educ. Of Hyde Park, 459 F.3d 356, 376 [2nd Cir. 2006]; Voluntown, 226 F.3d at 68).

Here, in the parents' letter dated March 22, 2023, the parents stated that they rejected the district's recommended program as set forth in the February 2023 IEP (Parent Ex. D at p. 1). The parents stated that they "no longer" believed that the student's placement at iHope was appropriate, and they were removing the student and placing her at iBrain for the remainder of the 2022-23 school year (id. at pp. 1-2). As pointed out by the district, the March 22, 2023 letter does not mention that the parent disagreed with the specialized transportation and nursing services or that the parents were seeking unilateral special transportation and nursing services (id.). While I agree that the parents did not mention special transportation or nursing services in their ten-day notice letter, the IDEA does not, nor does the district present any authority, showing that a parent must describe all services the student would receive in connection with a unilateral placement (see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]).[7]

In denying the parents requested relief the IHO stated that even though the parents provided timely notice of their intent to unilaterally place the student at iBrain their actions "lacked candor" and "showed a total disregard" for the CSE process and "spirit" of the IDEA (see IHO Decision at pp. 13-18).[8] The basis for this conclusion was her familiarity as the appointed IHO with respect to two other cases involving this student and the totality of circumstances of all three cases (IHO Decision at pp. 14-16; see generally IHO Exs. VIII; XI; XIII). The IHO discussed a prior matter, over which she presided, involving the 2021-22 school year, and her decision dated April 4, 2022 finding that iBrain was an appropriate unilateral placement for the student (IHO Decision at p. 14; see generally IHO Ex. XIII). Thereafter, the IHO noted that, in June 2022, the parents notified the district of the student's removal from iBrain and unilateral placement of the student at iHope for the 2022-23 school year (IHO Decision at p. 14; see Dist. Ex. 15). Next, the IHO discussed the February 2023 CSE meeting, focusing on the parents indicating that iHope had "been very helpful and important to [the student's] progress," and that both the parents and iHope staff expressed concern with the district's recommended program (IHO Decision at p. 14; see Dist. Ex. 18 at p. 18). Notably, the IHO found no parental concerns expressed during the February 2023 CSE meeting regarding iHope, nursing services, or transportation services (IHO Decision at p. 14; see Dist. Ex. 18). Several weeks after the February CSE meeting, the parents sent a notice to the

[7] In another State level review, an SRO determined that there was no requirement under the IDEA that a parent correctly identify the specific unilateral placement in which the student would be placed (see Application of a Student with a Disability, Appeal No. 24-006). In that case, the SRO found no notification requirements in the ten-day notice other than that parents notify the district "they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (id.; see 20 U.S.C. § 1412[a][10][C][iii][I]).

[8] In this instance, even deferring to the IHO's findings as to the parents' lack of candor as to the switch in schools from iHope back to iBrain, it is unclear how the parents' candor regarding the unilateral placement might weigh as an equitable factor regarding the parents' cooperation with the district's efforts to offer the student a FAPE as there is no indication in the hearing record that the February 2023 CSE was considering placing the student at iHope.

district of their intent to unilaterally place the student at iBrain, indicating that iHope "could no longer meet [the student's] educational needs" (IHO Decision at pp. 14-15; see Parent Ex. D). The IHO noted that the March 2023 letter did not place the district "on notice" that they intended to seek reimbursement/direct funding for tuition at iBrain, or of the parents' intent to seek nursing services, and special transportation (IHO Decision at p. 15; Parent Ex. D at pp. 1-2).[9] The IHO relied on the testimony of the school psychologist, in which she stated that she learned about the student's transfer back to iBrain "several weeks after" the February 2023 CSE meeting and had no indication at the time of the meeting that the student was transferring back to iBrain (IHO Decision at p. 15; Dist. Ex. 25 ¶ 31). The IHO found that the testimony of the student's father was not credible with respect to the reason that the student was transferred back to iBrain, which he stated was due to issues related to the student's nursing services and transportation services, and her spinal surgery that occurred in November 2021; the IHO also found no evidence in the hearing record that the parents informed anyone at the district of the stated reasons for transferring the student mid-year (Tr. pp. 200-01, 203-05, 224-28; IHO Decision at pp. 15-16). The IHO went on to find that the testimony of the deputy director of iBrain lacked credibility, as he did not describe the reasons for the student's transfer back to iBrain (IHO Decision at p. 16). Based on the foregoing, the IHO held that the parents' placement of the student at iBrain for the 2022-23 school year was not reasonable and denied the parents direct funding of the iBrain tuition, nursing services, and special transportation services (id. at pp. 16-18).

While the IHO may have been skeptical with respect to the parents' stated reasons for moving the student from iHope to iBrain as their chosen unilateral placement and determined that, overall, the parents' decision to do so was unreasonable, the IHO failed to elucidate how either the parents' underlying reasons or suspected failure to fully divulge their reasons for choosing iBrain constituted a failure to cooperate with the district in the educational planning process or impeded the district's ability to offer a FAPE to the student. Moreover, the purported unreasonableness of the placement, which the IHO otherwise found appropriate for the student, does not relate, for example, to the excessiveness of the costs of iBrain or any possible fraud or collusion between iBrain and the parents but rather seems to rely on suspicions concerning the parents' motivations for placing the student at iBrain during the 2022-23 school year.

Accordingly, given the totality of evidence in the hearing record, I decline to find that the parents' failure to notify the district of their issues relating to iHope and their purported lack of "candor" regarding their decision to change the student's unilateral placement form iHope to iBrain after the February 2023 CSE meeting, but during the 2022-23 school year, demonstrates a level of unreasonableness sufficient to warrant a reduction in the amount of tuition reimbursement to be awarded. It is worth noting that moving a student from an appropriate program in the middle of the school year could be considered unreasonable if the district were required to continue funding that program for the full school year. However, in this instance, the parents are only seeking the prorated costs of the student's attendance at each of the schools the student attended during the 2022-23 school year and the district is not being asked to fund tuition for any days the student was not enrolled (see Parent Exs. E-G; IHO Ex. XI).

[9] Contrary to the IHO's finding, the parents' March 22, 2023 letter did specifically nota that the "[p]arents will seek public funding" for the student's placement at iBrain (Parent Ex. D at p. 1). However, the IHO was correct in finding that it did not mention transportation or nursing services (id. at pp. 1-2).

Accordingly, the parents are entitled to direct funding of the iBrain tuition and supplemental tuition costs as well as the nursing services as described in the contracts contained in the hearing record. While I shall also award special transportation costs, it shall be limited to the period of time from April 17, 2023 and continuing through to June 23, 2023 for the reasons that follow. The iBrain enrollment contract specifically states that the enrollment period began on April 17, 2023 and ended on June 23, 2023 (Parent Ex. E at pp. 1-2). Additionally, the nursing service agreement with Park Avenue stated that the student would receive 1:1 private duty nursing services at school during school days and 1:1 transportation nurse services to and from iBrain during iBrain's school days for the period of April 17, 2023 through June 23, 2023 (Parent Ex. G at pp. 1-2). However, the transportation contract with Sisters Travel for the provision of the student's transportation to and from iBrain was for the period of April 17, 2023 through June 30, 2023 (see Parent Ex. F). The contract set forth that the transportation was to and from iBrain during school days (approximately 48 days) and that the annual rate for the services was based on school days even if the services were not used by the student (Parent Ex. F at pp. 1-2). As the parent was aware, when entering into the contract with Sisters Travel, that the student would not be in school from June 24 through June 30, 2023, I will exercise my discretion and limit the award of funding for special transportation during the period of the enrollment contracts for iBrain and for nursing services to the time frame of April 17, 2023 through and including June 23, 2023 (see Parent Exs. E-G). Entering into a contract for services the parents knew the student would not receive is the type of unreasonable action that requires a reduction on an equitable basis.

VII. Conclusion

Having determined that the IHO erred by denying the parents requested relief based on equitable grounds, the district is directed to fund the tuition costs at iBrain, contracted for nursing services, and contracted for transportation services for the period of April 17, 2023 through June 23, 2023.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 31, 2024, is modified to reverse that portion that found equitable considerations weighed against granting relief;

IT IS FURTHER ORDERED that the district shall fully fund the costs of the student's tuition at iBrain for the period of April 17, 2023 through June 23, 2023 as set forth in the enrollment contract;

IT IS FURTHER ORDERED that the district shall fully fund the costs of the student's unilaterally obtained 1:1 nursing services for the period of April 17, 2023 through June 23, 2023 as set forth in the contract with Park Avenue; and

IT IS FURTHER ORDERED that the district shall fund the costs of the student's special transportation services for the period of April 17, 2023 through June 23, 2023 as set forth in the contract with Park Avenue, specifically excluding any charges for the period of June 24, 2023

through June 30, 2023.

Dated: **Albany, New York**
July 1, 2024

STEVEN KROLAK
STATE REVIEW OFFICER