The University of the State of New York

The State Education Department
State Review Officer
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No. 24-543

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 Peter G. Albert, 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 a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the full costs of her daughter's tuition at the International Academy for the Brain (iBrain) and other services for the 2024-25 school year. The district cross-appeals from that portion of the IHO's decision which denied the district's motion to dismiss the parent's due process complaint notice for failure to appear at a resolution meeting and requests a further reduction in the relief awarded. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

Initially, the student has been the subject of prior State-level appeals (Application of a Student with a Disability, Appeal No. 24-292; Application of a Student with a Disability, Appeal No. 24-087; Application of a Student with a Disability, Appeal No. 23-266; Application of a Student with a Disability, Appeal No. 18-114).

Given the limited issues to be resolved, a full recitation of the student's educational history is unwarranted. Briefly, a CSE conducted an annual review for the student—who is eligible for special education as a student with a traumatic brain injury—in March 2024 and developed an IEP for the student with an implementation date of March 18, 2024 (see Parent Ex. B).[1] In a letter dated June 14, 2024, the parent notified the district of her disagreements with the March 2024 IEP, as well as her intentions to unilaterally place the student at iBrain for the 2024-25 school year (12-month program) and to seek public funding from the district for the costs of the student's tuition (see generally Parent Ex. A-A).[2, 3]

The evidence in the hearing record indicates that, on June 20, 2024, the parent electronically signed an "Annual Enrollment Contract" with iBrain for the student's attendance during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-E at pp. 1, 6). On June 18, 2024, the parent also electronically signed a "Nursing Service Agreement" with "B&H Health Care Services, Inc. – DBA Park Avenue Home Care" (Park Avenue) to deliver nursing services to the student during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-G at pp. 1, 7-8).

The hearing record further reflects that, on June 21, 2024, the parent electronically signed a "School Transportation Annual Service Agreement" with "Sisters Travel and Transportation Services, LLC," (Sisters Travel) to provide round-trip transportation services for the student during the 2024-25 school year (July 2, 2024 through June 27, 2025) (Parent Ex. A-F at pp. 1, 6-7).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2024-25 school year and requested pendency and relief in the form of direct payment to iBrain for the student's tuition costs for the 2024-25 school year in addition to the costs of related services and a 1:1 paraprofessional; direct funding for the student's special education transportation; and an independent educational evaluation (IEE) at public expense (see Parent Ex. A).[4] In particular, the parent asserted that the district failed to conduct sufficient evaluations of the student, that the recommendation for a district specialized school was not appropriate, and that the March 2024 CSE failed to recommend 1:1 nursing services, music therapy services, or an assistive technology device, and recommended insufficient special transportation services and accommodations (id. at

[1] The student's eligibility for special education and related services 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]).

[2] The parent's due process complaint notice included several attached exhibits, which were separately entered into the hearing record as evidence (see Tr. pp. 34-35, 40). For the purpose of clarity, citations to the exhibits attached to the due process complaint notice will be referred to as they were identified in the transcript (Tr. pp. 34-35; Parent Exs. A-A; A-B; A-C; A-D; A-E; A-F; A-G).

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

[4] The hearing record includes a district "Pendency Implementation Form" prepared by parent's counsel on July 2, 2024 (Parent Ex. A-B).

pp. 4-5, 7-9). In addition, the parent set forth concerns about the assigned public school site (id. at pp. 7-8). As relief, the parent sought an order directing the district to directly pay iBrain for the costs of the student's tuition in addition to the costs of her related services and the services of a 1:1 paraprofessional; funding for the costs of the student's special education transportation services with "a 1:1 transportation nurse, air conditioning, a lift bus, and a regular-sized wheelchair"; funding of 1:1 nursing services; and funding for the costs of an IEE consisting of a neuropsychological evaluation (id. at p. 10).

The district submitted a response to the parent's due process complaint notice, dated July 16, 2024.

B. Impartial Hearing Officer Decision

Following her appointment on July 12, 2024, the IHO sent the parties a copy of her rules of practice (IHO Ex. I; see IHO Decision at p. 1).

On August 8, 2024, the district filed a motion to dismiss the parent's due process complaint notice with prejudice on the basis that the parent did not herself participate in the resolution process (Dist. Mot. To Dismiss). The parent filed opposition to the district's motion on August 9, 2024 and subsequently amended the opposition on the same day to include a number of exhibits (see Opp'n to Mot. to Dismiss; Amended Opp'n to Mot. to Dismiss).[5] A pre-hearing conference was held on August 16, 2024 at which time the parties briefly discussed the district's motion and the student's right to a placement during the pendency of the proceeding (Tr. pp. 1-19). Also on August 16, 2024, the district submitted its position as to the student's pendency placement indicating agreement that the decision in Application of a Student with a Disability, Appeal No. 23-266 established pendency but objecting to the increased costs of the student's educational program and further indicating that the district would provide the student's transportation services to iBrain (Dist. Pendency Position).

On August 20, 2024, the IHO denied the district's motion to dismiss on the basis that the parent was entitled to a hearing (IHO Interim Decision p. 1). The IHO also issued an August 20, 2024 decision on pendency, in which she found that the student's pendency program was based on the decision in Application of a Student with a Disability, Appeal No. 23-266 and found that the pendency program included tuition and related services at iBrain for the 12-month school year and special transportation to be provided by the district (IHO Decision on Pendency). On the same day, the IHO issued a prehearing conference summary and order identifying the issues and relief that was within the scope of the hearing and setting forth a date and time for the hearing (Pre-Hr'g Conf. Summ. & Order).

[5] According to the IHO Decision, the district filed a motion to dismiss on August 1, 2024, the parent responded eight days later, the district then amended its motion, and the parent filed an amended motion to dismiss (IHO Decision). However, the hearing record only includes the district's August 8, 2024 motion to dismiss and two separate sets of opposition papers from the parent, both dated August 9, 2024, one without exhibits and one with exhibits.

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 6, 2024 and concluded on September 26, 2024 after two days of hearings (Tr. pp. 20-245).

In a decision dated October 15, 2024, the IHO summarized the procedural history of the matter particularly as it pertained to the district's motion to dismiss (IHO Decision p. 1). Next, the IHO detailed her factual summary of the matter, stating in pertinent part, that the student was classified by the district as having a traumatic brain injury and was placed by the parent at iBrain (Tr. pp. 4-5). The IHO found that the March 2024 IEP recommended the student be placed in a specialized school in a 12:1+(3:1) special class with related services including adapted physical education, occupational therapy (OT), physical therapy (PT), speech-language therapy, vision education services, and the support of health paraprofessional services daily and a dynamic speech generating device with assistive technology services (id.). The IHO made specific findings with regard to several of the parent's allegations of a denial of FAPE for the 2024-25 school year, finding that they were not supported by the hearing record (id. at pp. 6-8). In particular, the IHO found that the parent's allegations that the district failed to recommend appropriate feeding protocols, that the district failed to recommend support for assistive technology, that the district failed to provide the parent with a school location letter, that the district predetermined the special class recommendation, and that music therapy was required for the student to receive a FAPE, were all unsupported by the hearing record (id. at pp. 7-8). The IHO further found that the parent's remaining claims related to the district's alleged failure to develop an appropriate IEP and alleged failure to evaluate the student in all areas of suspected disability were not sufficiently developed and the IHO indicated it was not possible to determine what the student needed or was administered (id. at p. 8).

The IHO then turned to the issue of nursing services and after acknowledging the district's position that the parent's failure to provide medical forms inhibited the CSE's ability to make an appropriate recommendation for nursing services found that the CSE was required to make the determination (IHO Decision at pp. 8-9). The IHO then held that the district's failure to recommend nursing services in the March 2024 IEP rendered the IEP flawed as the student could not attend class nor "ride a school bus without such support" and that due to the lack of recommendation for nursing services the district denied the student a FAPE for the 2024-25 school year (id. pp. 9-10). The IHO next reviewed the student's educational program as provided at iBrain and determined that iBrain was an appropriate placement for the student as the program was "reasonably calculated to enable the [s]tudent to receive educational benefits" (id. pp. 10-11). Finally, the IHO held that the evidence in the hearing record demonstrated that the equitable considerations did not favor awarding all of the relief requested by the parent because the parent did not cooperate with the district as she failed to provide medical information needed by the CSE to develop the student's IEP and the parent gave "less-than-credible testimony" (id. at p. 12). The IHO reduced the requested relief and awarded the parent 50% of the contracted for amounts for tuition, nursing services, and already used transportation services less any money "that represents counsel/legal fees, directly or indirectly paid by any party on behalf of [p]arent" (id. at p. 13). Furthermore, the IHO ordered that the district provide transportation for the student to and from iBrain for the remainder of the 2024-25 school year and that the district convene a CSE meeting to determine "what evaluations, if any, the [s]tudent requires" (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that equitable considerations weighed against the parent. In particular, the parents assert that the IHO erred in finding the parent was uncooperative in the CSE process as she participated in the May 2024 CSE meeting, iBrain provided the CSE with documentation of the student's program, and the parent expressed willingness to consider the district's recommendations. The parent contends that even if she does not submit medical authorization forms, the district still had an obligation to offer the student a FAPE, for which the parent asserts the district could have used forms from prior school years containing the same information. The parent further asserts that the district had ample opportunity to reconvene a CSE meeting apparently citing to the IEP being developed in March 2024. Finally, the parent argues that the IHO's decision was internally inconsistent asserting that the IHO should not have found that the district denied the student a FAPE because it did not recommended nursing services because it did not have the requested medical forms and then use the same lack of medical forms to deny relief on an equitable basis.

The parent also appeals from a number of the IHO's findings as to the district's offer of a FAPE, asserting that the IHO erred in finding that the parent received the prior written notice, that the lack of music therapy was inconsequential, and that the assigned public school could implement the IEP, and further erred by not faulting the district for failing to evaluate the student as required.

The district answers and cross-appeals arguing that due to the parent's failure to participate in the resolution process, the parent's due process complaint notice should have been dismissed and the IHO erred by not granting the district's motion to dismiss on invalid grounds. Moreover, the district argues that equitable considerations support a further reduction of funding. The district concedes that it denied the student a FAPE for the 2024-25 school year and posits that the parent's arguments related to the service of the school location letter, denial of music therapy, reasonableness of costs, and public school placement and implementation of the IEP are all related to the denial of FAPE which is not at issue on appeal. Finally, the district asserts that the parent has not raised any issues with the pendency order and the district requests clarification as to the order of pendency as it relates to the services the student was receiving.

The parent submits a reply and answer to the district's cross-appeal asserting that the IHO acted in accordance with the law in allowing the matter to proceed to a hearing after parent's counsel appeared for a resolution meeting on her behalf.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[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

A. Preliminary Matters

1. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulations governing practice before the Office of State Review provide that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, State regulation provides that a

[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).

request for review must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

In the present case, neither the parent nor the district appeals from the IHO's findings with regard to the denial of FAPE for the 2024-25 school year and the appropriateness of the parent's placement of the student at iBrain (see Req. for Rev. at pp. 1, 9; see also Answer ¶ 26). 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]).

Initially, I note that "[g]enerally, the party who has successfully obtained a judgment or order in his favor is not aggrieved by it, and, consequently, has no need and, in fact, no right to appeal" (Parochial Bus Sys., Inc. v. Bd. of Educ., 60 N.Y.2d 539, 544 [1983]; 34 C.F.R. § 300.514[b][1]; see Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 385 [N.D.N.Y. 2001] [holding that "(t)he administrative appeal process is available only to a party which is 'aggrieved' by an IHO's determination"]).

In her request for review, the parent alleges that the "IHO deferred action on pendency without basis" but the phrasing of the allegation failed to raise any challenges related to the IHO's interim order on pendency.[7] The practice regulations also require that the request for review contain "citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number" (8 NYCRR 279.8[c][3]), but in this case the request for review includes reference to the IHO's "deferred action" and "omission" without citation (Req. for Rev. ¶ 15). The use of broad and conclusory statements or allegations within a request for review does not act to revive any and all violations the parent believes the IHO erroneously addressed or failed to address without the parent specifically identifying which violations meet this criterion (M.C., 2018 WL 4997516, at *23 [finding that "the phrase 'procedural inadequacies,' without more, simply does not

[7] The parent submits an email chain with her request for review as additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; Landsman v. Banks, 2024 WL 3605970, at *3 [S.D.N.Y. July 31, 2024] [finding a plaintiff's "inexplicable failure to submit this evidence during the IHO hearing barred her from taking another bite at the apple"]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). As the additional evidence purportedly pertains to the student's pendency, an issue not properly before this tribunal, such evidence is not necessary to render a decision on appeal and will not be considered. Further to the extent that the parent is asserting that the IHO erred in not responding to the parent's request for corrections to the IHO's interim decision as raised in the emails attached as additional evidence, the parties were provided with the IHO's rules of practice which specifically note that all motions or requests for orders must be made in writing, in word or pdf format and there is no indication that the parent made any such request (see IHO Ex. I at pp. 1-2).

meet the state's pleading requirement"]). As there is an interim IHO decision addressing pendency included in the hearing record, the findings of which are not specifically appealed from, the parent's vague allegations do not properly challenge the IHO's decision. The district also requests review of the pendency decision, seeking clarification "so it properly reflects that [the s]tudent has pendency in the level of programming and/or services provided by the source identified in the [pendency decision]"; however, the district does not specify what specific change to the IHO's decision on pendency that the district is seeking (Answer with Cross-Appeal at ¶25). Thus, there is no basis to disturb or further address the IHO's August 20, 2024 interim order on pendency.

Likewise, the district cross-appeals the IHO's denial of its motion to dismiss the due process complaint notice on the basis that the parent did not participate in the resolution process. Unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parent and the district (Letter to Anonymous, 23 IDELR 1073).

According to the district's motion to dismiss, a resolution meeting was scheduled for July 25, 2024 and the parent did not personally appear, but instead a representative from the parent's attorney's office appeared on her behalf (Dist. Mot. to Dismiss at pp. 3-4). In parent's opposition, counsel for the parent indicated that a different representative from parent's attorney's office appeared without the participation of the parent for a resolution meeting on a different date, July 12, 2024 (Parent Opp. to Mot. to Dismiss at pp. 3-4).[8] The only consistent facts across the motion papers is that both parties agree a resolution meeting was held but the parent did not appear for the meeting herself.

In this instance, the district is correct in noting that the parent is required to attend a resolution meeting as the district may request that an IHO dismiss a proceeding if the district "is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made" and "[t]he purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the [district] has the opportunity to resolve the dispute that is the basis for the due process complaint" (34 CFR 500.10[a][3], [b][4]). However, it is also worth noting that federal regulation specifically provides that "the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held" (34 CFR 500.10[pb][3]), and, at this point, the hearing has been held.

As the matter did proceed to hearing on the merits whereby both sides were afforded a meaningful opportunity to participate, the parent's failure to appear for the resolution meeting has

[8] In her reply and answer to the district's cross-appeal, the parent concedes that the parent appeared by counsel at a resolution meeting on July 24, 2024 (Reply and Answer to Cross-Appeal at pp. 2-3). Accordingly, it is assumed that the resolution meeting occurred on July 24, 2024.

already resulted in a delay in the hearing process. Although it may have been permissible for the IHO to have dismissed the parent's due process complaint notice after the conclusion of the resolution period, which would have required the parent to refile her due process complaint notice and begin the timelines again, at this juncture, such an action would be counterproductive to the efficiency of the administrative process and there is no need to disturb the IHO's decision as she properly exercised her discretion in denying the district's motion.

The only remaining issue presented on appeal is whether the IHO's decision to reduce the award of funding for tuition, nursing services, and transportation by 50% was supported by the hearing record.

B. Equitable Considerations

The parent asserts on appeal that the IHO erred in finding that equitable considerations weighed against awarding the full cost of the contracted for tuition at iBrain, related services, nursing services, and transportation services for the 2024-25 school year, while the district asserts that an across the board 75% reduction is warranted due to the parent's actions, including the failure to appear for a resolution The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st

Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Initially, with respect to the district's cross-appeal, a party's conduct during a due process proceeding may be weighed as a factor when fashioning equitable relief. If a party has engaged in a pattern or practice that results in unfair manipulation of the due process procedures, there is nothing that precludes the IHO from considering such facts when weighing equitable factors at the conclusion of the impartial hearing, so long as they are based on an adequate record and after providing the parties a reasonable opportunity to be heard (see Application of a Student with a Disability, Appeal No. 24-333). Here, as noted above, the parent's actions in failing to appear for a resolution meeting could have resulted in a dismissal of the due process complaint notice. However, as the hearing was already delayed by the parent's failure to participate and the hearing has been completed without any issues, I do not find that the parent unfairly manipulated the due process procedures to the extent that a reduction under equitable considerations in warranted.

Turning next to the parent's appeal of the IHO's reduction, in addressing equitable considerations, the IHO determined that the testimony and documentary evidence demonstrated that the parent did not cooperate with the district (IHO Decision p. 11). The IHO held that "the [p]arent failed to provide medical information needed by the IEP team" which was "repeatedly sent to her at her email address" (id.). Moreover, the IHO held that the parent "hampered the [district's] ability to craft a medically safe program for her child" (id.). The IHO clarified her findings holding that, while she found the district denied the student a FAPE, it was because of the district's "fail[ure] to act on the [s]tudent's behalf despite the [p]arent's stonewalling" (id.). The parent asserts that the IHO ignored the fact that the parent participated in the March 2024 CSE meeting (Req. for Rev. at p. 4). In further support, the parent argues that the district had ample opportunity to reconvene for a subsequent CSE meeting or in the alternative the district "had sufficient information from prior [medical accommodation forms] to make proper recommendations" (id. at p. 5).[9]

The hearing record does support the parent's contention that she submitted in the March 2024 CSE meeting, iBrain did provide the district with resent evaluative information regarding the student's present levels of performance, and the parent did provide the district with adequate notice of her intention to place the student at iBrain for the 2024-25 school year at district expense (Parent Exs. A-A; B; Dist. Exs. 4-6). However, as noted by the IHO, the district made multiple requests for medical information from the parent (see Dist. Exs. 11; 12; 17). In those requests, the district informed the parent that the medical accommodation forms were required to be completed every year (Dist. Ex. 17). The district school psychologist who had sent the request for the medical accommodation forms testified that she never received the complete forms back (Tr. pp. 179-80, 185-86). Additionally, the school psychologist provided testimony as to the purpose of the medical

[9] To the extent that the parent asserts that the district had sufficient information from prior medical accommodation forms, the only other medical accommodation forms in the hearing record were signed by the student's physician in November 2022 and they do not indicate a request for 1:1 nursing services (Dist. Ex. 13).

forms and how the CSE would have used them in making its recommendations, particularly how those forms could have supported a recommendation for 1:1 nursing services (see Tr. pp. 180-84). As the lack of a recommendation for 1:1 nursing services was the basis for the IHO finding a denial of FAPE, the IHO appears to have attributed the district's failure, in part, to the parent "stonewalling" the CSE by not providing the requested medical information (IHO Decision at p. 12).

Notably, the parent testified that she had received the medical accommodation forms and had them completed by the student's pediatrician (Tr. p. 159). The parent's evidence shows that the student's physician completed a series of district medical forms on January 25, 2024 (Parent Ex. H). Furthermore, the parent testified that these documents were faxed to iBrain and that she submitted the forms to the CSE (Tr. pp. 159-60). However, the parent did not recall when she sent the forms to the CSE, or who she sent the forms to, and she acknowledged that the district sent her email requests for completed medical forms on multiple occasions, in March and April 2024, after the forms had already been completed (Tr. pp. 160-61, 163).

Despite the parent's testimony, the IHO specifically found that the parent did not provide the medical forms to the CSE and the parent has not challenged that finding on appeal (IHO Decision at p. 12). Rather, the parent asserts that the parent's failure to provide the district with the medical accommodation forms should be ignored as it was the district's obligation to offer the student a FAPE. Nevertheless, the IHO found that the weight of the evidence showed the parent did not cooperate with the district and found the parent's failure to cooperate determinative as an equitable factor (IHO Decision at p. 12). A parent's actions showing that they were uncooperative in the process of coordinating the student's educational placement may weigh against an award of relief as an equitable consideration (see Neske v. New York City Dept. of Educ., 2023 WL 8888586, at *2 [2d Cir. Dec. 26, 2023] [parents' absence from CSE meeting, involvement in an organized campaign to move students from one private school to another at district expense, and the inference that those actions were taken in bad faith supported a complete denial of relief on equitable grounds]). Accordingly, the IHO's measured 50% reduction is supportable in this instance and I decline to disturb the IHO's determination that equitable considerations supported such a reduction.

As a final matter, the parent requested funding for transportation costs which the IHO declined to award given that she found the transportation provided by the district to be "identical" without making any further analysis (IHO Decision p. 12). However, the district did not offer the student transportation services to and from iBrain until July 11, 2024—after the parent had already entered into a contract for transportation services with Sisters Transportation and after the school year had started (Parent Ex. A-F; Dist. Ex. 21). Accordingly, the district's later offer of transportation services cannot be weighed as an equitable factor in assessing the reasonableness of the parent's decision to enter into the transportation services agreement with Sisters Transportation. Therefore, I am modifying the IHO's decision to award funding for transportation consistent with the transportation contract the parent entered into and the relief requested in the due process complaint, albeit, at the 50% reduction consistent with my determination above.

VII. Conclusion

Having determined that the IHO was justified in finding that the parties' actions during the resolution meeting did not warrant dismissal of the parent's due process complaint notice and that the parent's actions in withholding information from the district warranted a reduction of the funding awarded under equitable considerations, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that, the IHO's decision, dated October 15, 2024, is modified to direct the district to fund the transportation costs at 50% of the contracted for rate for the entirety of the 2024-25 school year.

Dated: **Albany, New York**
February 25, 2025

STEVEN KROLAK
STATE REVIEW OFFICER