The University of the State of New York

The State Education Department

State Review Officer

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No. 23-102

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 Zachary Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the portion of the IHO's determination which found that equitable considerations weighed in favor of the parents and awarded an independent educational evaluation (IEE). The appeal must be sustained in part. The cross-appeal must be sustained in part.

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]). Similarly, when a preschool student in New York is eligible for special education services, the IDEA calls for the creation of an IEP, which is delegated to a local Committee on Preschool Special Education (CPSE) that includes, but

is not limited to, parents, teachers, an individual who can interpret the instructional implications of evaluation results, and a chairperson that falls within statutory criteria (Educ. Law § 4410; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.1[mm], 200.3, 200.4[d][2], 200.16; see also 34 CFR 300.804). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here.[1] The Committee on Preschool Special Education (CPSE) convened on January 15, 2020 and reconvened on August 25, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Parent Ex. B). Next, the CPSE convened on August 17, 2021, to develop the student's IEP for the 2021-22 school year (see generally Parent Ex. C). The parents disagreed with the recommendations contained in the August 2021 IEP, and, as a result, in March 2022 notified the district of their intent to unilaterally place the student at iBrain for the remainder of the 2021-22 school year (see Parent Ex. F).[2] Next, the CSE convened on May 27, 2022, to develop the student's IEP for the 2022-23 school year (see Parent Ex. H; Dist. Ex. 34).[3] Again, the parents disagreed with the recommendations contained in the May 2022 IEP, and, as a result, in June 2022 notified the district of their intent to unilaterally place the student at iBrain for the 2022-23 12-month school year (see Parent Ex. N). In a due process complaint notice dated October 18, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years and sought tuition reimbursement for iBrain (see Parent Ex. A).[4]

The parties participated in two prehearing conferences before the Office of Administrative Trials and Hearings (OATH) on January 13, 2023 and February 1, 2023 (Jan. 13, 2023 Tr. pp. 1-13; Feb. 1, 2023 Tr. pp. 1-13). On March 1, 2023, the parties proceeded to an impartial hearing which concluded on March 15, 2023, after two days of proceedings (Tr. pp. 1-127). In a decision dated April 27, 2023, the IHO found that the district offered the student a FAPE for the 2020-21, 2021-22, 2022-23 school years, and denied the parents tuition reimbursement/direct funding to iBrain for the 2021-22 and 2022-23 school years (IHO Decision at pp. 9-13). If the district had not prevailed, the IHO made alternative findings that iBrain was an appropriate unilateral placement for the student, but that the parents would not have been entitled to direct funding and that equitable

[1] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only parent exhibits were cited in instances where both a parent and district exhibit were identical. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[2] 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).

[3] The May 2022 CSE determined that the student was eligible for special education services as a student with a traumatic brain injury (TBI) (Parent Ex. H at pp. 1, 53).

[4] On February 23, 2023, the parents made an application to file an amended due process complaint notice regarding the accessibility of the district's assigned school for the 2022-23 school year (see IHO Exs. VI-VII). The district objected the parents' amended due process complaint notice (IHO Ex. VIII at p. 1). The IHO found that the factual information sought to be added was already noted in the original due process complaint notice and therefore, the IHO did not accept the parents' amended due process complaint notice (see Parent Ex. A; see IHO Ex. VIII at p. 1).

would warrant a 25 percent reduction in tuition reimbursement. In addition, the IHO granted the parents' request for a neuropsychological IEE (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parents appeal the IHO's findings that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, and the IHO's denial of tuition reimbursement/direct funding at iBrain for part of the 2021-22 school year and the 2022-23 school year (see IHO Decision at pp. 9-13).

The parents contend that the district is obligated to provide a school location letter prior to the start of the school year, and although the parents stated that they did not want to send the student to a public school during the 2020-21 and 2021-22 school years, the district was not relieved of its responsibility to offer a school location (Req. for Rev. ¶ 23). In addition, the parents argue that the IHO failed to address why the May 2022 CSE recommended a 12:1+(3:1) special class instead of a 6:1+1 special class (id. ¶ 24). In connection with the 2020-21 and 2021-22 school years, the parents claim that the IHO "glossed over" the fact that the district failed to recommend a 1:1 paraprofessional for the 2020-21 and 2021-22 school years, which should have been found to be a denial of FAPE to the student (id. ¶ 27). They also argue that the IHO erred in finding that the CPSEs' failure to recommend a 1:1 nurse did not rise to the level of a denial of FAPE (id. ¶ 28). Additionally, the parents assert that it was "not speculative" to claim that the proposed assigned school could not implement the IEP because factual information indicated that the school only delivered 30-minute related service intervals, was not wheelchair accessible, and did not have a specific area for related service providers (id. ¶ 29).

Next, the parents contend that the IHO erred in finding that equitable considerations did not favor the parents (Req. for Rev. ¶ 31). The parents claim that the IHO's finding that the parents "predetermined" that they would reject the district's recommended program and place the student at iBrain was an improper standard to evaluate equities (id. ¶ 33). Then, the parents contend that the IHO erred in finding they were not entitled to direct funding because they failed to show an inability to pay the iBrain tuition (id. ¶ 37). In fact, the parents contend that the evidence in the hearing record did demonstrate that were unable to pay the cost of tuition at iBrain (id. ¶ 39).

On appeal the parents submit and request the admission of additional evidence that the IHO denied admission into evidence, and more specifically, the 2021-22 school transportation service agreement (Req. for Rev. ¶ 41). The parents contend that the transportation agreement was "inadvertently omitted" from the parents' disclosure of evidence (id.).

The parents seek to affirm the IHO's award of a neuropsychological IEE and finding that iBrain was an appropriate unilateral placement (Req. for Rev. ¶¶ 42-43). As relief, the parents request direct funding of the iBrain tuition for the 2021-22 and 2022-23 school years.

The district generally denies the material allegations contained in the parents' request for review. Initially, the district contends that the request for review should be dismissed as untimely because the parents failed to file the request for review with the Office of State Review (OSR)

within the required time frame (Answer ¶ 7).[5] In addition, the district argues that the additional evidence proposed by the parents should be excluded as it was available at the time of the hearing and the IHO properly excluded the evidence during the hearing (id. ¶¶ 8-9). The district argues that the IHO did not err in finding that the May 2022 CSE's recommendation for a 12:1+(3:1) special class was appropriate for the student's medical, ambulatory, and cognitive needs (id. ¶ 16). In connection with a 1:1 nurse for the 2022-23 school year, the district contends that it was waiting for the parents to submit medical forms and the May 2022 IEP addressed school nursing services in the management needs and annual goals (id. ¶ 17). Furthermore, the district asserts that the IHO correctly found that the parents were not entitled to direct payment of the tuition at iBrain if tuition was awarded.

In its cross-appeal, the district argues that tuition reimbursement should be denied for both the 2021-22 and 2022-23 school years for equitable reasons as the parents failed to cooperate with the "CSE process" (Answer ¶ 20). The district additionally argues that if tuition is awarded it should be reduced to reflect only those days the student actually attended school and received related services (id. ¶¶ 21-22). Furthermore, the district argues that the IHO erred in granting an IEE (id. ¶ 23).

In an answer to the cross-appeal, the parents argue that the late filing of the request for review with the OSR was an oversight and did not prejudice the district (Reply ¶ 2). The parents argue that the additional evidence should be accepted as it is necessary to determine the parents' appeal regarding the IHO's denial of transportation costs (id. ¶¶ 3-4). Lastly, the parents reiterate those arguments contained in their request for review.

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]).

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[5] State regulation provides that the "petitioner shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). The parents timely served the request for review upon the district on June 6, 2023 but did not file their appeal with the OSR until June 12, 2023. It also appears that the parents served an amended request for review upon the district on June 7, 2023. The amended request for review was not filed with the OSR, but the request for review dated June 6, 2013 was filed on June 12, 2023. The district was granted an extension of time to respond. In this case, the timeline for rendering a decision did not commence until the parents' counsel filed the request for review. Based upon the foregoing, I decline to exercise my discretion to dismiss the parents' appeal as the district suffered no prejudice and the parents' attorney was attentive and acted quickly to self-correct the error once he became aware of the filing issue. There was minimal disruption of the State Review procedures in this case and the staff of the OSR were not required to expend scarce resources locating the problems with the parents' filing.

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. 2020-21, 2021-22, and 2022-23 School Years – 1:1 Nurse

The parents argue that the IHO erred in finding the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years. The parents' main contention on appeal with respect to the IHO's FAPE findings is that he incorrectly determined that the district's failure to recommend a 1:1 nurse for the student did not rise to the level of a denial of FAPE (Req. for Rev. ¶ 28).

In connection with the 2020-21 and 2021-22 school years, the district contends that the parents signed a partial services agreement and decided not to place the student in a school

[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).

placement and therefore, the lack of a 1:1 nurse in both the August 2020 and 2021 IEPs did not rise to the level of a denial of FAPE (Answer ¶ 15; see Parent Exs. B-C). With respect to the 2022-23 school year, the district argues that at the time of the May 2022 CSE meeting the CSE was waiting for the parents to submit medical forms in order to consider a 1:1 nurse (Answer ¶ 17). The district relies on the fact that nursing services are included in the May 2022 IEP management needs and the "goals contemplate that the paraprofessional will consult with the 1:1 and/or school nurse with respect to the [s]tudent's medical needs" (id.). The district also argues that the May 2022 IEP "read as a whole" was appropriate with respect to the information available at the time of the CSE meeting and there was no evidence in the hearing record that the assigned school "could not have implemented the IEP with a school nurse and 1:1 paraprofessional" (id.).

With respect to the August 2020 IEP, the IHO found that because the parents did not want to place the student in a preschool, the August 2020 CPSE had no obligation to recommend a 1:1 nurse which required a "doctor's medical recommendation" (IHO Decision at p. 10). Although the IHO did not make the same finding for the 2021-22 school year, the IHO found that the 12:1+3 special class was recommended because that placement was offered at school locations that provided "medical assistance" (id.). For the 2022-23 school year, the IHO found that a 1:1 nurse was discussed at the May 2022 CSE meeting but medical forms authorizing a 1:1 nurse had not yet been received from the parents (id. at p. 11). The IHO's reliance on the parents obtaining medical forms before a decision could be made by the CPSE/CSE regarding the provision of 1:1 nursing services was in error as further discussed below.

With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a student-with-a-disability-need-for-a-1-1-nurse.pdf). Instead, the guidance document provides that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by an RN [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4).[7] For administration of medication in school, provider orders must be obtained, and, according to State guidance, "[i]f a school has concerns or questions regarding a provider's order, the school's medical director or school nurse school call the provider to resolve concerns and/or clarify the order" ("Guidelines for Medication Management in Schools," at p. 20, Office of Student Support Servs. [Oct. 2022], available at https://www.p12.nysed.gov/sss/documents/medication-management.pdf).[8]

[7] In another State guidance document, it is acknowledged that an IHP is not required by law but "is strongly recommended for all students with special health needs-particularly those with nurse services as a related service on their individualized education plan (IEP)" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf).

[8] The same language was contained in the 2017 version of the State's guidance document.

State guidance further indicates that in determining whether a student needs a 1:1 nurse, a CSE must obtain evaluative information in all areas of the student's disability or suspected disability; it is expected that "[t]his information may include information from a physician, such as a written order to the school nurse from a student's health care provider" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2, Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). Additionally, in providing school nurse services "the school remains responsible for the health and safety of the student and ensuring the care provided to the student is appropriate and done in accordance with healthcare provider orders" (id. at p. 5). However, there is also State guidance indicating that "[i]f the CSE/CPSE determine that a student's health needs in accordance with provider orders for treatment can be appropriately met by the school's building nurse, a shared nurse, a 1:1 aide to monitor and alert the school nurse, then a 1:1 nurse is not necessary" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at pp. 11-12, Office of Student Support Servs., [Jan. 2019], available at https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). In determining whether a student requires the support of a full-day continuous 1:1 nurse, State guidance indicates the CSE "must weigh the factors of both the student's individual health needs and what specific school health and/or school nurse services are required to meet those needs" providing a set of factors to consider:

> - The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;
> - The qualifications required to meet the student's health needs;
> - The student's proximity to a nurse;
> - The building nurse's student case load; and
> - The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3, Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf).

At the outset, a brief review of the student's medical needs is necessary for determining whether the CPSEs and CSE properly determined whether the student required a 1:1 nurse on the student's IEP. The student has received diagnoses of spastic quadriplegic cerebral palsy, hypotonic infantile spasm, microcephaly, Lennox Gastaut Syndrome, and cortical visual impairment (CVI) (Parent Ex. I at p. 1; Dist. Ex. 6 at p. 1).[9] She presented with "absent and myoclonic seizures" approximately three to four times per day (Parent Ex. I at p. 1).

[9] A January 2020 assessment report described Lennox Gastaut Syndrome as a rare and severe form of epilepsy (Dist. Ex. 9 at p. 1).

Beginning in the 2019-20 school year, the student received Early Intervention (EI) services that consisted of special education, speech-language therapy, feeding therapy, vision therapy, occupational therapy (OT), and physical therapy (PT) (Dist. Exs. 5 at p. 1; 6 at p. 2; 38 ¶¶ 6-7). On January 15, 2020, a CPSE meeting was held to determine the student's eligibility for preschool special education services for the 2020-21 school year (Parent Ex. B; Dist. Ex. 38 ¶¶ 6, 9, 11).[10]

In order to evaluate the student's eligibility for preschool special education services, the student underwent the following evaluations: October 2019 home based observation; October 2019 psychological evaluation; October 2019 social history evaluation; November 2019 PT evaluation; November 2019 OT evaluation; December 2019 educational evaluation; December 2019 speech-language and feeding evaluation; January 2020 vision evaluation report (see Dist. Exs. 1-6, 8-9; 38 ¶ 6). Specific to the student's medical needs, the October 2019 social history and the October 2019 psychological evaluation both indicated that the student was eating a variety of pureed foods due to frequent gagging and choking and received medication for seizures (Dist. Exs. 2 at p. 2; 3 at p. 2). According to the December 2019 speech-language and feeding evaluation the student's medical history was remarkable for frequent seizures which started at birth (Dist. Ex. 6 at p. 1). The speech-language pathologist indicated that the student's feeding skills were significantly delayed, and suggested the parents pursue medical clearance to rule out possible aspiration during meals (id. at p. 5). The evaluator who conducted the student's January 2020 CVI evaluation reported that the student had physical limitations and was non-verbal, and that she was currently aspirating; however, she was working on improving feeding and swallowing skills with her then-current speech pathologist (Dist. Ex. 9 at p. 2).

The CPSE administrator testified that she met with the parents on January 15, 2020 and "discussed in lengthy detail" the student's medical conditions including hypoxic-ischemic encephalopathy (HIE), infantile spasms, microcephaly, cerebral palsy, seizures, and legal blindness (Tr. pp. 40-42, 45; Dist. Ex. 38 ¶¶ 1, 8-9, 11). After discussion of the student's evaluative material, the January 2020 CPSE recommended an 8:1+2 special class based on the student's needs identified in the evaluations "as well as due to her medical concerns" (Dist. Ex. 38 ¶¶ 8-9).

However, at the January 2020 CPSE meeting, the parents stated that they did not want the student in a school until kindergarten because of her medical conditions as well as concerns regarding the COVID-19 pandemic (Tr. pp. 42-43, 45, 79, 86; Dist. Ex. 38 ¶ 10). The parents agreed to accept partial services for the student for the 2020-21 school year that included five 60-minute sessions per week of individual special education itinerate teacher (SEIT) services together with three individual sessions per week each of vision education services, PT, speech-language therapy, and OT (Parent Ex. B at p. 22; Dist. Ex. 38 ¶¶ 10-11).[11] The CPSE administrator testified

[10] The CPSE administrator testified that the student's EI services would extend until August 31, 2020 and CPSE services would begin in September 2020 (Dist. Ex. 38 ¶ 11).

[11] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at http://www.p12.nysed.gov/specialed/publications/2015-memos/documents/SpecialEducationItinerantServicesforPreschoolChildrenwithDisabilities.pdf; "Approved Preschool Special Education Programs Providing [SEIT]

that after the January 2020 CPSE meeting she continued to communicate with the student's mother by email regarding various preschool placements and how those schools "specialized in children with medical concerns" (Dist. Ex. 38 ¶ 10). During those email communications, the CPSE administrator testified that she discussed a nurse for the student and that "[t]o obtain a school nurse [the] [p]arent must "fill out an OSH where [the student's] doctor would document her medical needs, a [district] doctor and her pediatrician would discuss the possible accommodations and approve the services at which time a nurse and/or transportation nurse would have been added to the IEP" (Tr. pp. 44-45; Dist. Ex. 38 ¶ 10).[12] She further testified that since the parents did not want to place the student in a school at that time, a nurse was not added to the IEP (Dist. Ex. 38 ¶ 10).

On August 25, 2020, the CPSE reconvened, and based upon the evaluative information reviewed during the January 2020 CPSE meeting, the recommendation continued to be for a 12-month program commencing in September 2020 consisting of an 8:1+2 special class in an approved center-based program with four 30-minute sessions per week each of PT, OT, speech-language therapy, and vision education services, along with special transportation due to her global deficits as well as her medical needs (Parent Ex. B at pp. 1, 4-7, 18-19; see Dist. Exs. 1-9; Dist. Ex. 38 ¶¶ 6, 12). The August 2020 IEP indicated under the effect of student needs on involvement and progress in the general education curriculum section, that the student ate a variety of pureed foods due to frequent gagging and choking (Parent Ex. B at p. 9). The August 2020 IEP also indicated that the student had "Lenox G[estaut] Syndrome" and that she took several medications twice daily (id.).

Next, the CPSE administrator testified that around June 2021, she contacted the parents regarding a school-based program and told them that because of the student's medical conditions she was recommending a 12:1+3 medical special class as there was an additional adult in the classroom (Tr. pp. 50-51; see Dist. Ex. 38 ¶ 13). In her direct affidavit testimony, the CPSE administrator described that the August 2021 CSE changed the recommendation from an 8:1+2 to a 12:1+3 special class in a school with medical assistance along with the related services of OT, PT, vision education services, and SEIT services each for four sessions per week, and five sessions per week of speech-language therapy (Dist. Ex. 38 ¶ 13). The August 2021 IEP noted from the June 2021 annual report for SEIT services that the student required medical and/or healthcare treatments or procedures during the school day and at home (compare Dist. Ex. 16 at p. 1, with Parent Ex. C at p. 3). Additionally, the August 2021 IEP reported from the SEIT report that the student required full physical support by an adult to move and/or do any self-help activities and that she was unable to move, eat or communicate independently (id.). It is noted that the August 2021 IEP does not contain any reference to the student's medical needs related to her aspiration concerns or seizure disorder, nor does it contain the diagnosis of Lenox Gastaut Syndrome, yet the

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Services," Office of Special Educ. [June 2011], available at http://www.p12.nysed.gov/specialed/publications /SEITjointmemo.pdf). In addition, SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii] [emphasis added]; see Educ. Law § 4410[1][k]).

[12] The hearing record does not indicate what "OSH" stands for; the context of the CPSE administrator's testimony suggested that this was a form required by the district in order for a CPSE to consider whether or not a student required the services of a 1:1 nurse (see Dist. Ex. 38 ¶ 10).

CPSE administrator frequently referred to the student's medical needs in her affidavit and testified that the 12:1+3 special class recommendation—which included that the school have medical support—was based on her medical needs (Tr. pp. 48-53; see Parent Ex. C; Dist. Ex. 38 ¶¶ 8-13). The August 2021 CPSE also recommended five 30-minute sessions per week of individual speech-language therapy; four 30-minute sessions per week of individual OT; four 30-minute sessions per week of individual PT; and four 30-minute sessions per week of individual vision education services (Parent Ex. C at p. 17).

During the August 2021 CSE meeting, the parents continued to express that they did not want the student in a school until kindergarten, and the CPSE administrator explained that should the parents wish to pursue a school setting, the recommendations would be for schools that could provide medical assistance to the student (Tr. pp. 49-50; Dist. Ex. 38 ¶ 13). The parents also expressed to the CPSE administrator that the student would be having surgery on September 2, 2021 and this was another reason why they did not want to send the student to a school at that time (Dist. Ex. 38 ¶ 13). Again, for the 2021-22 school year the parents agreed to accept partial services for the student to include individual SEIT services, speech-language therapy, OT, PT, and vision education services (Parent Ex. C at p. 21).

Based upon the information detailed above, the January 2020, August 2020, and August 2021 CPSEs had sufficient information available by which to consider whether the student required a 1:1 nurse; however, such consideration was not memorialized in the August 2020 or August 2021 IEPs (see Parent Exs. B at pp. 2-21; C at pp. 2-20). Moreover, the CPSE administrator testified that the CPSE could not make this determination, instead deferring the decision to another department upon the parents completing the required medical forms (Dist. Ex. 38 ¶ 10).

The May 27, 2022 CSE relied on the following evaluative information to develop the IEP: a psychological update dated March 4, 2022; a social history update dated March 15, 2022; a program and related service report dated April 18, 2022; and an iBrain report and education plan dated May 27, 2022 (Parent Exs. D-E; G; H at pp. 1-26; I; Dist. Ex. 39 ¶ 7).[13] Due to the student's global developmental delays, the May 2022 CSE recommend a 12-month program in a 12:1+(3:1) special class in a district specialized school (Parent Ex. H at pp. 28, 47-48, 52).[14] Additionally, the May 2022 CSE recommend related services of five 60-minute sessions per week of individual OT; one 60-minute session per month of group parent counseling and training; five 60-minute sessions per week of individual PT; five 60-minute sessions per week of individual speech-language therapy; three 60-minute session per week of individual vision education services; and two 60-minute sessions per week of individual assistive technology services (id. at pp. 47-48). The May 2022 CSE also recommended full-time individual health, safety, ambulation, and feeding paraprofessional services (id. at p. 47).

[13] The student began attending iBrain on May 23, 2022 (see Dist. Exs. 31-32; 38 ¶ 9).

[14] The May 2022 IEP specified the student's special class as 12:1+(3:1) in accordance with the State regulation that "[i]n addition to the teacher, the staff/student ratio shall be one staff person to three students" (see Parent Ex. H at p. 47; see also 8 NYCRR 200.6[h][4][iii]).

With regard to the information before the May 2022 CSE, the March 2022 social history update indicated that the student had surgery in the fall of 2021 and was hospitalized for four months (see Dist. Ex. 27 at p. 1). Additionally, the update indicated that the student was taking medications for seizures and would need to take those medications while in school during the 2022-23 school year (id.). The May 2022 IEP meeting minutes indicated that the CSE discussed the student's diagnoses: spastic quadriplegic cerebral palsy, microcephaly, Lennox Gastaut Syndrome, cortical visual impairment, as well as several surgeries she had undergone and that she had a gastrostomy tube (G-tube) inserted in May 2022 (Dist. Ex. 34 at pp. 1, 4). Additionally, the meeting minutes indicated that the student presented with absent and myoclonic seizures and described what the seizures looked like, that they lasted five to seven seconds and were occurring three to four times per day (id.).

Comparison of the May 2022 IEP with the May 2022 iBrain educational report indicated that the May 2022 CSE copied much of the iBrain report verbatim in the present levels of performance, management needs, and annual goals (compare Parent Ex. H at pp. 1-46, with Parent Ex. I at pp. 1-45, 47-49). Review of the May 2022 IEP present levels of performance indicated that the student "require[d] a 1:1 nurse at all times to tend to her physical needs and ensure her medical safety, seizure management, and G-tube feed" (Parent Ex. H at p. 23). The IEP further reflected that at iBrain the student was accompanied by a 1:1 nurse daily to assist with managing her seizure and other medical needs and noted that the student was experiencing absent and myclonic seizures three to four times per day, each lasting approximately five to seven seconds (id. at pp. 1, 23). The May 2022 IEP present levels of performance for assistive technology reiterated the student's ongoing diagnoses and indicated that the student had received a diagnosis of laryngomalacia (id. at p. 3). According to the May 2022 IEP present levels of performance in speech, the student had a G-tube placed in April 2022 and had a nasogastric tube (NG tube) which was placed post-surgery in September 2021 (id. at pp. 6, 10). The speech-language pathologist indicated that prior to the placement of the NG tube the student ate soft and pureed textures as well as thickened liquids; however, it was noted that she would occasionally cough when feeding (id. at pp. 6-7, 10). Additionally, it was reported that a formal feeding evaluation was not conducted during the speech-language evaluation because the student was currently NPO, or nothing by mouth (id. at p. 10). The May 2022 present levels of performance in PT indicated that the 1:1 nurse attended to the student's safety during positioning and handling and intervened when she coughed (id. at pp. 17, 21).

Furthermore, the May 2022 IEP indicated, in part, the following health management needs: observe aspiration precaution, monitor food and fluid intake, observe seizure precautions, obtain seizure action plan and necessary medications, monitor seizure activity, and monitor for signs and symptoms of low oxygen levels or low heart rate (Parent Ex. H at pp. 27-28). The "use of 1:1 nurse and paraprofessional" appears in the May 2022 IEP management needs twice, and reference to her need generally for a nurse occurs three other times in that section (id. at pp. 27-29). Additionally, the May 2022 IEP contained an annual goal designed for the paraprofessional to consult with the 1:1 nurse and/or school nurse, teacher, and therapists regarding close monitoring of the student's medical needs and to ensure her toileting, feeding, and ambulation needs were addressed (id. at p. 45). The short-term objectives related to that annual goal included in part: the student "will be free from aspiration" with the paraprofessional and private nurse observing aspiration precaution at all times; maintenance of an upright position; free from injury; "monitor administration of anticonvulsive medications (by the nurse) including side effects;" her "skin will

remain intact" with the paraprofessional and private nurse observing "incontinence precautions, partake in frequent skin check and repositioning and schedule potty time" (id. at pp. 45-46).

When asked if the May 2022 CSE discussed the student's need for a 1:1 nurse, the school psychologist who chaired the May 2022 CSE meeting, testified that a discussion was held; however, "for the provision of nursing on a [district] IEP, there are medical forms that I'm required to submit to the nursing office" and the CSE did not have the forms (Tr. pp. 21-22; see Parent Ex. H at p. 54). She further clarified that because she was not a licensed medical professional, the district required medical forms be submitted to a licensed medical professional who then reviews the forms and makes a determination (Tr. p. 23). She further testified that the CSE felt "based on the needs and description provided that the student required individualized attention through a paraprofessional" (Tr. p. 22). The school psychologist explained that the purpose of the 1:1 paraprofessional would be to support the student's individualized needs related to ambulation, safety, feeding, and other ability to participate (Tr. p. 35).

The June 2022 prior written notice indicated that the district was unable to recommend a 1:1 nurse at that meeting because the required paperwork "to seek approval" was not provided to the CSE (Dist. Ex. 35 at p. 2). According to the May 2022 CSE meeting minutes and June 2022 prior written notice, the parents were going to get the "MAF forms so that 1:1 nursing could be considered" and added to the student's IEP (Dist. Ex. 34 at p. 6).[15] The May 2022 CSE meeting minutes explained that the student needed special transportations because her "medical conditions and/or physical limitations" "affect[ed] her learning, behavior and/or participation in school activities" (Dist. Ex. 34 at p. 6). It is noted that the student was recommended for special transportation with accommodations in part because she required medical and/or healthcare treatments or procedures during the school day and at home (Dist. Exs. 34 at p. 6; 35 at p. 2).

As with the prior school years, again here, the May 2022 CSE had sufficient information regarding the student's medical needs to warrant consideration of a 1:1 nurse. For each of the school years at issue, neither the CPSEs nor the CSE engaged in any meaningful discussions regarding the student's needs for a 1:1 nurse and improperly placed the burden to obtain medical forms on the parents (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). Instead, the evidence shows that the district has another team, individual or office that is not part of the CSE that actually decides whether this student's IEPs in 2020, 2021 and 2022 would include a 1:1 nurse. The case bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings. . . . Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without

[15] The hearing record does not indicate what "MAF" stands for, it only explains that this was a form required by the district in order for a CSE to consider whether or not a student required the services of a 1:1 nurse.

coordinating—much less knowing—the services each was required to provide" (J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464–65 [S.D.N.Y. 2018]).

During the policy litigation, the district represented to the court that the policy had been changed, but the court was unwilling to accept that the matter was moot due to evidence of continuing problems (J.P. 324 F. Supp. 3d at 465). The evidence in this case similarly showed that the district followed the same practice of requiring the parents to file paperwork that another office within the district would examine at another time and then would, perhaps, decide if the student's IEP would be amended to include 1:1 nursing services. This is not the process called for under IDEA because is the CPSE of CSE that is required to make the determination of which services should be placed on a student's IEP and it is the district's responsibility to ensure that the individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parents, rather than the district to pursue the further consultation with the district doctor and obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]; see Dist. Exs. 34 at p. 6; 35 at p. 2). The district members of the CPSEs and CSE in this case failed to appreciate that they were the entities responsible to determine whether the student needed a 1:1 nurse in order to receive a FAPE and recommend a 1:1 nurse if the student required one (see "Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," Office of Special Educ. Mem. [Jan. 2019], available at http://www.p12.nysed.gov/specialed/publications/documents/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf).

It is routine for most parents across the State to routinely obtain and provide physical and medical documentation from their children's personal physicians at the request of evaluating district personnel in a cooperative fashion rather than subject their child to duplicative physical assessment procedures by the district. Similarly, the district personnel across the State routinely conduct appropriate consultations with district medical directors, school nurses and student's private health care providers so that upon meeting the CPSEs or CSEs are prepared to complete an appropriate IEP for each student with a disability. Under certain conditions not relevant here, a school district physician may be called upon to participate in a CSE meeting, albeit the practice is not common even among students with medical needs that are undisputed an can be addressed though consultations (8 NYCRR 200.3[a][vii]; 34 CFR 300.321; see Melendez v. Porter, 2023 WL 4362557, at *9 [E.D.N.Y. July 6, 2023]). IHO erred in accepting the district's explanation that a 1:1 nurse could not be placed on the IEP by the CPSE or CSE and that the parents were required to send documentation to another office for a later determination of whether the student required a 1:1 nurse, especially where there was no evidence in this case that the CPSE or CSEs were merely waiting to complete the student's IEPs over the course of multiple meetings and that the IEPs in the record were merely draft documents awaiting further action (see e.g., Application of the Bd of Educ., Appeal No. 22-092 [noting the development of the IEP over meeting multiple sessions]). Therefore, the CPSEs' and CSE's development of IEPs in this case that failed to consider 1:1 nurse services in light of the student's documented medical needs was a denial of a FAPE. Accordingly, the IHO's finding that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years must be reversed.

B. Relief

The IHO wisely made alternative findings regarding the unilateral placement and determined that the parents established that iBrain was an appropriate unilateral placement (id. at p. 12). The parties do not challenge the IHO's determination and therefore it has 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]).

The IHO also made alternative findings regarding equitable considerations and the next question to be addressed is the extent to which parents are entitled to relief. The parents have not sought any specific relief for the denial of FAPE for the 2020-21 school year, and therefore, the following discussion will only focus on the relief they seek related to the 2021-22 and 2022-23 school years (see generally Req. for Rev.; see Parent Ex. A).

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 [2d 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., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

In connection with equitable considerations for the 2022-23 school year, the IHO found that the parents failed to "engage in a good faith consideration of the [district's] public school program and placement prior to enrolling the [s]tudent" at iBrain (IHO Decision at p. 12). The IHO referenced a March 15, 2022 social history update which noted that the parents intended to enroll the student at iBrain for kindergarten (IHO Decision at p. 12; see Parent Ex. E at p. 1). The IHO found that the parents engaged in predetermination when they enrolled the student at iBrain at least two months before the May 2022 CSE meeting and also when they failed to contact or visit the assigned school for the 2022-23 school year (IHO Decision at p. 12).[16] Based upon the foregoing, the IHO found that the parents' conduct would warrant a 25 percent reduction of tuition reimbursement if there had been a finding of a denial of a FAPE (id.).

The parents argue that the IHO erred in finding that they engaged in predetermination when they unilaterally placed the student at iBrain (Req. for Rev. ¶ 33). The parents assert that the IHO failed to use the proper standard to evaluate equitable factors in reducing the tuition award (id. ¶¶ 34-35). Here, the parents contend that they actively engaged in the CSE process and the evidence in the hearing record does not suggest "unreasonableness or misconduct" in which tuition should be denied or reduced on equitable grounds (id. ¶ 35).

The IHO's ruling was contrary to the holdings of the Second Circuit Court of Appeals, which explain that so long as the parents cooperate with the district, and do not impede the district's efforts to offer a FAPE, even if the parents had no intention of placing the student in the district's recommended program, it is well-settled that their plan to unilaterally place a student, by itself, is not a basis to deny their request for tuition reimbursement (see E.M., 758 F.3d at 461; C.L., 744 F.3d at 840 [holding that the parents' "pursuit of a private placement was not a basis for denying their [request for] tuition reimbursement, even assuming . . . that the parents never intended to keep [the student] in public school"]). For the same reason that a complete denial is not permissible, the parents' intentions are not a basis to reduce tuition reimbursement either. Here, the hearing record reflects that the parents did cooperate with the district's efforts to evaluate the

[16] Regarding the parents' ability to tour an assigned public school site, the United States Department of Education's Office of Special Education Programs (OSEP) has opined that the IDEA does not provide a general entitlement to parents of students with disabilities or their professional representatives to observe proposed school placement options for their children (Letter to Mamas, 42 IDELR 10 [OSEP 2004]; see G.J. v. Muscogee County Sch. Dist., 668 F.3d 1258, 1267 [11th Cir. 2012] [noting that rather than forbidding or mandating access for parents, "the process contemplates cooperation between parents and school administrators"]; J.B. v. New York City Dep't of Educ., 242 F. Supp. 3d 186, 195 [E.D.N.Y. 2017] [noting that the IDEA does not afford parents a right to visit an assigned school placement before the recommendation is finalized]; J.C. v New York City Dep't of Educ., 2015 WL 1499389, at *24 n.14 [S.D.N.Y. Mar. 31, 2015] [acknowledging that courts have rejected the argument that parents have a right under the IDEA to visit assigned schools and listing authority], aff'd, 643 Fed. App'x 31 [2d Cir. Mar. 16, 2016]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *11 [S.D.N.Y. Sept. 29, 2012] [finding that a district has no obligation to allow a parent to visit an assigned school or proposed classroom before the recommendation is finalized or prior to the school year]; S.F. v. New York City Dep't of Educ., 2011 WL 5419847, at *12 [S.D.N.Y. Nov. 9, 2011] [same]).

student, they provided privately obtained evaluative information to the CSE, and fully participated with and meaningfully contributed to the CPSE and CSE discussions (Parent Exs. C at p. 2; H at pp. 4, 7, 10-12, 15, 18, 20, 22, 54-55; R ¶ 7; Dist. Exs. 37 ¶ 7; 38 ¶¶ 8-11, 13). Accordingly, equitable considerations do not weigh against the parents' request for tuition reimbursement and the IHO's findings of parental predetermination and 25 percent reduction of the tuition reimbursement for iBrain for the 2021-22 and 2022-23 school years must be reversed.

Turning next to the parents' request for transportation expenses for the 2021-22 and 2022-23 school years, and the IHO did not address the unilaterally obtained transportation in the alternative findings in the final written decision. In their request for review, the parents argued that the IHO erred by not permitting them to complete the hearing record with the 2021-22 transportation agreement (Req. for Rev. ¶ 41). The parents further allege that the transportation agreement was "inadvertently" not disclosed and seek to have the agreement admitted as additional evidence (id.).

Generally, documentary evidence not presented at an impartial hearing is 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]; 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]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

In this case, the parents did not disclose a transportation contract for the 2021-22 school year prior to the start of the impartial hearing (see Parent Exs. A-R; Tr. p. 87). On the last day of the impartial hearing, the father testified that he was could not recall whether or not there was a separate transportation agreement for the 2021-22 school year (Tr. p. 86). Next, the parents' attorney stated that he had no additional questions for the father, and the IHO noted the completion of his testimony and that he could remain in the hearing (id.). Then, the parents' attorney attempted to refresh the father's recollection with a copy of the transportation agreement for the 2021-22 school year, but the district objected (Tr. p. 87). The IHO sustained the objection because the father had completed his testimony and, the transportation agreement was not contained in the

parents' prehearing disclosures to the district (Tr. pp. 87, 125-26).[17] The rules for prehearing disclosure are clear, and in this case the district went even further and obtained a signed subpoena from the IHO that was solely dedicated to transportation issues including the transportation agreement(s) with Sisters Travel and Transportation Services, LLC, (Sisters Travel) for both school years (IHO Ex. V) and there is no evidence that the parent complied with the subpoena. Where as here, the parent could not recall if there was a transportation agreement for the 2021-22 school year and appeared confused about when the student had surgery and began being transported to iBrain by Sisters Travel (Tr. pp 81-83, 86), and there is a notable lack evidence of compliance with a subpoena or the disclosure rules. I find the parent's excuse that the document should be now admitted as additional evidence on appeal because it was "inadvertently" omitted lacks any merit at all. The IHO was correct to exclude the agreement and it was not an abuse of discretion for the IHO to exclude the transportation agreement for the 2021-22 school year or disallow refreshing the witness's recollection after the testimony had concluded.[18]

In connection with the transportation services for the student from Sister's Travel for the 2022-23 school year, I reach a different result (see Parent Ex. M). The student was mandated to receive special transportation pursuant to the May 2022 IEP (Parent Ex. H at p. 52). There is no dispute on appeal that the student required special transportation or as discussed above, that iBrain was an appropriate unilateral placement. As there is evidence of the parents' obligation to pay for the student's transportation services for the 2022-23 school year, I find that the parents are entitled to reimbursement for the transportation expenses incurred for the 2022-23 school year (see Parent Ex. M).

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[17] State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). However, federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). If a party fails to disclose all completed evaluations, the prohibition against introduction of evaluations is discretionary insofar as an IHO "may" bar a party from introducing an evaluation (34 CFR 300.512[b][2]; 8 NYCRR 200.5[j][3][xii][a]).

Courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. Apr. 9, 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]).

[18] Generally, 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]).

1. Parent's Financial Obligation and Ability to Pay

The parents request that the district fund the student's attendance at iBrain by directly paying iBrain, rather than by reimbursing the parents for the out-of-pocket costs of the student's tuition. This same request was made by the parents for the transportation expenses. The district argues that direct payment is not warranted because the parents failed to demonstrate the financial hardship that an award for direct payment requires (Answer ¶ 19).

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]; see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

With respect to the parents' financial obligation, the hearing record includes an enrollment contract signed by the parents on March 29, 2022 for the student's attendance at iBrain for part of the 2021-22 school year, and a contract signed by the parents on June 11, 2022 for the student's attendance at iBrain for the 2022-23 school year (Parent Exs. K; P). Both contracts with iBrain set out a base tuition that included the cost of academic programming, related services, a school nurse, and an individual paraprofessional for the student (Parent Exs. K at pp. 1-2; P at pp. 1-2). In addition, both contracts provide that the parents would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (Parent Exs. K at pp. 2-3; P at pp. 2-3). Further, as noted above, the hearing record includes a transportation service agreement with Sisters Travel for the transportation of the student to and from iBrain for the 2022-23 12-month school year that the parent executed on June 16, 2022 (see Parent Ex. M). Here, the iBrain contract is sufficient to demonstrate that the parents incurred a financial obligation to pay the costs of the unilateral placement inclusive of related services and transportation. Moreover, the Sisters Travel

agreement demonstrates that the parents incurred a financial obligation to pay the transportations costs.

With regard to the parents' ability to pay, since the parents selected iBrain as the unilateral placement and their financial status is at issue, it was the parents' burden of production and persuasion with respect to whether they had the financial resources to "front" the costs of the services (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). As discussed above, the parents have established a financial obligation for the costs of the student's tuition at iBrain; however, as correctly argued by the district, the parents have not demonstrated an inability to pay. For example, there is no evidence in the hearing record regarding the parents' financial resources, such as showing eligibility for government benefit programs for low income families that cover food, housing, medical, or other basic living expenses, or a copy of a recent tax return, or other evidence regarding the parents' assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parents' financial resources, direct payment is not an appropriate form of relief; however, tuition reimbursement, as well as reimbursement shall be awarded for the student's attendance at iBrain during the 2021- 22 and 2022-23 school year upon proof of attendance and payment for services delivered. The district is also responsible for reimbursement of the costs of the student's transportation from Sister's Travel for the 2022-23 school year upon proof of payment.

2. Independent Educational Evaluation

Turning to the district's cross-appeal of the IHO's award of an IEE at public expense, the IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).[19]

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a

[19] Guidance from OSEP indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In this case, the parents' made their request for an IEE in the due process complaint notice in the first instance (Parent Ex. A at p. 10). In their due process complaint notice, the parents asserted that the March 4, 2022 psychological update evaluation "failed to thoroughly assess [the student] in all areas of her suspected disability" (Parent Ex. A at p. 10; see Parent Ex. D). They further explained that the March 2022 "evaluation was not sufficiently comprehensive, did not use a variety of assessment tools and measures, were not tailored to assess specific areas of need, failed to accurately reflect [the student's] aptitude (when also taking into account her disability)" (id.). The parents contended that due to their disagreement with the March 2022 evaluation the student required a neuropsychological IEE (id.).In past decisions SROs, including the undersigned, have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g. Application of the Dep't of Educ., Appeal No. 21-135); however, I have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and my observation is that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]).

The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021][discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense];[20] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014];

[20] The Parkland case also discussed caselaw with different factual circumstances in which the district's failure to

Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 168-69 [2d Cir. 2020]).[21] My continued study of the judicial and administrative guidance on the topic has led me to change my previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first). Moreover, I am convinced in this case that the parents may have delayed sufficiently clear communication of the IEE request for a number of years while planning for the student's educational programming continued or more likely included the request for an IEE as an afterthought. This is an improper use of the due process procedures.

Accordingly, I find that the IHO erred in his decision to grant the parents' request for an IEE at public expense that was raised for the first time in the due process complaint notice. While the parents' request for an independent neuropsychological evaluation at district expense is denied, if the parents still desire that the student undergo a neuropsychological evaluation, they may request that the district conduct such evaluation. Upon receipt of such request, the district must consider whether it would be appropriate to conduct the evaluations to assess the student's special education needs and, after due consideration, provide the parents with prior written notice describing, if applicable, its reasons for concluding that additional evaluative data of the student was unnecessary (8 NYCRR 200.5[a]; see 34 CFR 300.503, 300.305[d]). If the parents are dissatisfied with the district's response or evaluation, the parents may then submit a request to the district that it fund an IEE in the manner contemplated by the IDEA, as discussed above.

VII. Conclusion

As described above, IHO's finding that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years due to the CPSE and CSE to adhere to the IDEA's process for determining if it was appropriate to place 1:1 nursing on the student's IEPs, despite evidence supporting that the service may be necessary. I shall award reimbursement of the iBrain tuition costs for the 2021-22 and 2022-23 school years and reimbursement of transportation costs to and from iBrain for the 2022-23 school year in accordance with this decision. Further, I find a sufficient reason to reverse the IHO's award of an independent neuropsychological evaluation.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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file for due process had been excused such as incomplete district evaluations or agreements between the district and parent that the district would conduct further evaluations.

[21] The Second Circuit, in Trumbull, speculated that a "hypothetical scenario in which a parent might need to file a due process complaint for a hearing to seek an IEE at public expense is if the school unnecessarily withheld a requested IEE or failed to file its own due process complaint to defend its challenged evaluation as appropriate" (Trumbull, 975 F.3d at 169).

IT IS ORDERED that the IHO decision, dated April 27, 2023, is modified by reversing that portion that found that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years; and

IT IS FURTHER ORDERED that the IHO decision, dated April 27, 2023, is hereby modified by reversing the IHO's that reimbursement should be reduced under equitable considerations by 25 percent; and

IT IS FURTHER ORDERED that the IHO decision, dated April 27, 2023, is hereby modified to require that, unless the parties shall otherwise agree, the district shall reimburse the parents for the costs iBrain tuition for the 2021-22 and 2022-23 school years upon the parents' submission to the district of proof of attendance and payment; and

IT IS FURTHER ORDERED that, unless the parties shall otherwise agree, the district shall reimburse the parents for the costs of the student's transportation to and from iBrain for the 2022-23 school year pursuant to the contract that the parent entered into with Sisters Travel upon the parents submission of proof of payment to the district; and

IT IS FURTHER ORDERED that the IHO decision, dated April 27, 2023, is hereby modified by reversing that portion which granted the parents' request for an IEE at public expense.

Dated: **Albany, New York**
July 31, 2023

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JUSTYN P. BATES
STATE REVIEW OFFICER