The University of the State of New York

The State Education Department
State Review Officer
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No. 23-297

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

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

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

II. Overview—Administrative Procedures

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

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

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student began attending iBrain in 2019 (Parent Ex. A at p. 3). A CSE convened on March 31, 2023 and, finding the student eligible for special education as a student with a traumatic brain injury, developed an IEP for the student with an implementation date of April 25, 2023 (see generally

Dist. Ex. 1).[1] In a letter dated June 20, 2023, the parent disagreed with the recommendations contained in the March 2023 IEP and indicated that the district failed to provide the parent with a school location letter for the 2023-24 school year; as a result, the parent notified the district of her intent to unilaterally place the student at iBrain (Parent Ex. G).

In a due process complaint notice, dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parent's specific claims alleging a denial of a FAPE to the student included but were not limited to the district's failure to recommend music therapy, vision education services, hearing education services, assistive technology devices and services, parent counseling and training, 1:1 nursing services, and appropriate special transportation (id. at pp. 4, 5-6). The parent further argued that the recommended placement in a specialized district public school was not appropriate (id. at pp. 4, 5). In addition, the parent asserted that the district failed to provide a prior written notice and school location letter for the 2023-24 school year (id. at p. 5). The parent sought findings that the district denied the student a FAPE for the 2023-24 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations favored an award of direct payment for the cost of the student's attendance at iBrain (id. at pp. 8-9). As relief, the parent requested direct payment to iBrain for the costs of the student's base tuition of $190,000 that included a paraprofessional and a school nurse and supplemental tuition of $124,392 for related services,[2] as well as direct funding of privately obtained special transportation and 1:1 nursing services (id. at p. 9; see Parent Ex. D).

The impartial hearing convened on August 25, 2023 to address the student's pendency placement and reconvened on September 29, 2023 to address the merits (Tr. pp. 10-118).[3] During the impartial hearing, the district conceded that it failed to timely provide a prior written notice or notify the parent of the particular public school location to which it had assigned the student to attend for the 2023-24 school year (Tr. p. 28). The district further stated that it would challenge the parent's request for tuition, "transportation, as well as nursing reimbursement or payment" (Tr. pp. 28-29). In a decision dated November 4, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 8, 14). The IHO also found that iBrain provided the student "with a special education program that addressed his various and complex needs," and that the hearing record established that the student had made progress in "various areas" (id. at p. 11). The IHO further found that the parent cooperated with the district and provided timely written notice to the district of her intention to unilaterally place the student at iBrain and seek public funding (id.). In addition, the IHO determined that the parent was entitled to direct funding (id. at pp. 11, 14).

With regard to the issue of 1:1 nursing services, the IHO found that the student required a nurse on the bus and in school (IHO Decision at p. 12). However, the IHO determined that the

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

[2] The base and supplemental tuition provisions in the iBrain contract did not include 1;1 nursing (Parent Ex. D) but were silent on the topic of the related service of special transportation.

[3] A prehearing conference was held on August 22, 2023 (Tr. pp. 1-9).

need for 1:1 nursing services provided by the parent's contract with B&H Health Care, Inc. d/b/a Park Avenue Home Care (Park Avenue Home Care) at an annual rate of $292,556.00 did not support the entire cost stated contract between the parent and the agency. (id.; see Parent Ex. F). The IHO determined that the parent "signed an agreement for the nursing services which obligated her to pay even if services were not provided" and that, although the parent "was not aware at the time of the hearing of the provisions of the agreement," but there was no evidence of "fraud or duress" (IHO Decision at p. 12). As a result, the IHO concluded "that even if [the p]arent [wa]s obligated for services that were not provided, it d[id] not follow that [the district] [wa]s responsible to pay for said services" (id. at pp. 12-13). The IHO also noted that the parent had "no knowledge of attendance and there [wa]s no attendance record in evidence" (id. at p. 13). The IHO further determined that the contract for 1:1 nursing services did not apply to any home-based services (id. at p. 13). The IHO then imputed a rate of $1,342 per day for the services extrapolated from the terms of the private nursing contract and found that the district was "only responsible for days when nursing services were provided on the bus and at school" (id.).

The IHO next addressed the student's special transportation and similarly found that the parent had entered into a contract with a private company, Sisters Travel and Transportation Services, LLC (Sisters Travel) which included an annual rate of $166.770.00, and was obligated to pay for transportation services even on days when no transportation was provided (IHO Decision at p. 13; see Parent Ex. E). The IHO again found that there was no evidence of fraud or duress, that the parent was unaware of the terms of the agreement at the time of the impartial hearing, and that there was no evidence in the hearing record of the student's attendance (id.). The IHO also imputed a daily rate for transportation services of $765 extrapolated from the terms of the contract and directed the district to fund that amount "for each day that services were provided" (id.).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in determining that the district was responsible to fund the cost of the student's 1:1 nursing services and the cost of the student's special transportation on only those days when services were actually provided to the student rather than the entire contractual amounts. As relief, the parent requests that the district be required to provide direct funding of the student's nursing services and transportation in accordance with the terms of the respective contracts.

In an answer with cross-appeal, the district alleges that the IHO erred in finding that iBrain was an appropriate unilateral placement and that the student required 1:1 nursing services and should have denied all of the parent's requested relief. The district further argues that equitable considerations warranted a complete denial of funding for the student's transportation and 1:1 nursing services. In the alternative, the district asserts that the IHO's reduction in the amount awarded should be upheld.

In a reply and answer to the cross-appeal, the parent denies the district's allegations and reiterates the claims asserted in her 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]).

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]).[4]

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).

[4] 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).

VI. Discussion

Neither party appeals from the IHO's determination that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at pp. 8, 14). As such, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). Therefore, the only issues left to be resolved are whether the IHO erred in finding that the parent's unilateral placement of the student at iBrain for the 2023-24 school year was appropriate and whether the IHO erred in the relief ordered.

A. Unilateral Placement

The district appeals from the IHO's finding that the parent sustained her burden to show that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district alleges that the record was "devoid of any evidence" that the program provided to the student was individualized to meet the student's unique needs or that the student made progress at iBrain (Answer ¶¶ 18-20).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

.[5] As noted above, a private school need not develop its own IEP for a student (Carter, 510 U.S. at 13-14). However, iBrain developed an education plan for the student dated March 2023 which was entered into evidence as the student's iBrain education plan for the 2023-24 school year (Parent Ex. C; Tr. pp. 27-28). The iBrain deputy director of special education (deputy director) testified that iBrain is a specialized school for children with acquired brain injuries or brain-based disorders (Tr. pp. 34-35). He further explained that iBrain runs on an extended 12-month school year calendar and offers an extended school day (8:30 a.m. – 5:00 p.m.) (Tr. p. 35). According to the deputy director, all of the students at iBrain are nonverbal and non-ambulatory and because of the intensive natures of their disabilities require a 1:1 paraprofessional to assist them with activities of daily living and in their one-to-one sessions with their providers and teachers (Tr. pp. 35, 36-37). The deputy director testified that at the time of the hearing the student was attending an 8:1+1 special class and receiving five sessions per week, each, of occupational therapy (OT), physical therapy (PT), and speech-language therapy; three sessions per week of vision education services; one session per week of assistive technology services; three sessions per week of hearing education services; and four sessions per week of music therapy, all with all sessions being 60-minute in duration (Tr. pp. 40, 44; Parent Ex. C at pp. 71, 75).[6]

The March 2023 iBrain plan described the student as nonverbal and non-ambulatory and as having received diagnoses of cerebral palsy, and epilepsy (Parent Ex. C at p. 17, 22, 49; see Tr.

[5] Review of the March 2023 iBrain education plan reflects that it had been updated on February 2023, March 2023, and April 2023; however, there was no indication within the report which of the information was the most recently updated (see Parent Ex. C). Furthermore, the March 2023 iBrain plan indicated that communication and language assessments (Dynamic AAC Goals Grid II, Communication Function Classification System, and Pediatric Evaluation of Disability Inventory) and the Gross Motor Function Measure were administered in January 2021 and updated in December 2021 and February 2023 (Parent Ex. C at pp. 3, 4, 18, 19, 26).

[6] The related service frequencies were the same as those outlined on the student's 2023-24 iBrain education plan, with the exception of hearing education services, which the plan recommended be reduced to two times per week (Parent Ex. C at p. 59).

p. 89).[7] The plan stated that the student had a moderate understanding of cause and effect, understood object permanence, expressed his wants and needs using his AAC device and vocalizations and further indicated his choices by pushing away or grabbing objects to indicate his preferences, and showed persistence by reaching out for his iPad when he wanted to use it (Parent Ex. C at p. 2). In terms of classroom participation, the education plan indicated that the student benefitted from engaging in a multisensory environment but that he often required a movement break following 20-30 minutes of seated activity as evidenced by restlessness, lack of attending, and resistance to activities (id. at p. 15). According to the education plan, when distracted the student could require up to five minutes of prompting to reengage in a task (id.). With respect to academics, the education plan indicated that the student was working on building his knowledge of numbers and letters, "answering 'wh' questions and 'yes' and 'no' questions," and sequencing three objects by size (id. at p. 19). The plan described how the student's paraprofessional support him during one-to-one instruction by prompting him and assisting him in task completion (id.). According to the education plan, the student was able to maintain attention to tasks for 60 minutes given sensory breaks, and he benefited from 1:1 support during all activities to assist with positioning, transfers, donning/doffing of splints, attention, cognitive processing, motor control, access to assistive technology and devices, navigating environments, activities of daily living, and safety and a 1:1 nurse for medical management (id. at p. 16).

With regard to speech-language development, the March 2023 iBrain plan indicated that the student exhibited significant delays in his receptive and expressive language skills, and communicated his preferences and dislikes clearly through verbalization attempts, gestures including reaching and pointing, sign language, and the use of a speech generating device (Parent Ex. C at pp. 3-4, 16).[8] For example, the plan noted that the student was able to point, wave, shake his head "yes" and "no," and use facial expressions to interact with familiar peers and adults, and he typically demonstrated eye contact (id. at pp. 1, 3-4, 37). The student presented with the ability to turn his head towards a speaker and to say "hello" using his AAC device (id. at p. 2).The education plan reflected that the student consistently used sign language to communicate and could indicate "'yes', 'no', 'thank you', 'hello', 'rest/break'" (Parent Ex. C at p. 21).

Next, the March 2023 iBrain education plan indicated the student exhibited delays in his oral motor and feeding skills, and, although he was able to independently bring a fork to his mouth with "infrequent spillage," he presented with difficulty motor planning to use a spoon or fork and required "constant supervision and maximal assistance" to take breaks when drinking from an open cup to prevent chugging (id. at pp. 9-10). The education plan further stated that the student demonstrated low tone in his mouth and lips, limited oral motor control such as difficulty with lip closure, and decreased oral awareness (id. at p. 10).[9]

[7] The March 2023 iBrain plan also described the student as having an acquired brain injury; global developmental delays; and a vision impairment (Parent Ex. C at p. 49).

[8] According to the plan, the student's speech was "highly unintelligible" (less than 25 percent), and he struggled to produce specific phonemes in isolation (Parent Ex. C at p. 35).

[9] The student reportedly consumed a diet of soft or dissolvable solids by mouth, required assistance with self-feeding, and demonstrated a slightly immature chew pattern and poor bolus formation and manipulation (Parent

Physically, the education plan described the student as having "moderate low tone in his trunk and neck with moderate spasticity in all extremities" (Parent Ex. C at p. 14). The plan further described the student's movement as typical of a student with triplegic cerebral palsy and noted that the student had difficulty performing functional activity due to velocity-dependent increased muscle tone, hyper-deep tendon reflexes, muscle weaknesses, and low endurance (id. at p. 17). The education plan explained that the student was able to walk 150 feet using a walker "[o]n his good days," used a wheelchair for as his main form of functional mobility but demonstrated resistance to self-propulsion, and utilized ankle foot orthotics (AFOs) for lower extremity weight bearing activities (id. at pp. 14, 46). The education plan indicated that the student generally required moderate to maximal levels of physical assist to complete ADLs (id. at p. 4-10). The student was able to independently reach for objectives with his right hand laterally, towards midline, and across midline with accuracy but when using his left hand required some assistance to improve accuracy (id. at p. 11). According to the education plan the student used a gross palmer grasp with both hands and demonstrated an emerging lateral pinch, 3-jaw chuck, and pincer grasp with his right hand (id.). The student was able to employ his left hand as a functional assist when provided with assistance, however, most often required cueing to incorporate the use of his left hand into daily activities (id. at p. 13).

The March 2023 iBrain educational plan indicated that the student's preferred visual fields were his center and upper visual field and that his lower visual field was impaired (Parent Ex. C at p. 20). The student was able to successfully track materials horizontally and vertically but required wait time when tracking vertically due to visual latency (id.). The iBrain plan stated that the student wore glasses "for esotropia and strabismus," although inconsistently (id.). The education plan indicated that the student benefitted from , the use of a slant board, extended time for visual processing when scanning and tracking visual materials, visual breaks, fewer auditory distractions, a light-controlled environment, and materials with reduced visual complexity (id. at pp. 20-22). The plan also indicated that the student was able to use his near vision and intermediate viewing range to access materials when given presentation of materials at 10 to 15 inches away from his face (id. at p. 20). With regard to hearing education, the iBrain education plan indicated that the student required multimodal instruction and that learning and using sign language helped to improve the student's fine motor skills as well as his brain development (id. at p. 21). The plan identified the signs consistently used by the student and noted that they were modified based on the range of motion in his digits and limbs (id.).

With regard to assistive technology, the March 2023 iBrain education plan indicated the student used a Tobii-Dynavox I-110 tablet, described as "a dynamic display, high-tech speech generating device (SGD), with TD Snap communication software" (Parent Ex. C at p. 24). According to the education plan, the student was able to access "icons within a field of [12] through direct selection with right index finger isolation" (id. at pp. 24, 28). In addition, the student consistently combined two or more symbols to create a longer, more complex variety of messages for different communicative purposes such as requesting activities (id. at pp. 26-27).

Ex. C at pp. 8; 38). He presented with an open-mouthed posture, poor secretion management, slightly reduced mandibular, lingual, and labial strength, range of motion, and speed (id. at p. 38).

Turning to music therapy, the March 2023 iBrain plan indicated that the student benefited from music therapy, which appeared to "help him express himself greatly" (Parent Ex. C at p. 47). The plan indicated that during music therapy sessions the student would sing along, match pitches, and play instruments (id.). The plan noted that the student had the potential to use his voice more to communicate and that the continued use of music therapy techniques would be helpful to encourage and prompt the student to speak (id.).

Lastly, the plan stated that although the student was highly motivated to engage with others, he needed to work on initiating and maintaining social interaction with unfamiliar peers and adults (id. at p. 2). Regarding behavior, the plan explained that the student "demonstrate[ed] poor frustration tolerance [for] non-preferred, difficult activit[i]es and may throw toys, put his head down, throw himself to the floor, or resist participation" (id. at p. 16). Additionally, the plan noted that the student required encouragement to request a break when frustrated (id.). The plan indicated that due to the student's significant impairments he required a high level of individualization of his curriculum (id. at p. 48).

To address the student's identified needs, the iBrain plan recommended that the student receive 12-month services consisting of an 8:1+1 special class with both 1:1 nursing services and 1:1 paraprofessional services throughout the day(Parent Ex. C at pp. 75-77; see Tr. p. 40). The related services recommended by iBrain included four 60-minute sessions per week of individual OT and one 60-minute session per week of OT in a group; five 60-minute sessions per week of individual PT; four 60-minute sessions per week of individual speech-language therapy and one 60-minute session per week of speech-language therapy in a group; three 60-minute sessions of individual vision education services per week ; two 60-minute sessions of individual hearing education services per week; three 60-minute sessions per week of individual music therapy and one 60-minute session per week of group music therapy; one 60-minute session per month of parent counseling and training; and one 60-minute session per week of individual assistive technology services (Parent Ex. C at pp. 71, 75-76). To further support the student's identified needs, the March 2023 iBrain plan recommended transportation accommodations including adult supervision by a nurse, a vehicle with a wheelchair lift and air conditioning, a regular size wheelchair, and limited travel time of 90 minutes (id. at p. 75).

Turning to the district's argument that the parent failed to present evidence of the student's progress during the 2023-24 school year. It is noted that the final date of the impartial hearing occurred on September 29, 2023, about three months into the 12-month 2023-24 school year. Accordingly, it is not clear that a great deal of evidence regarding progress would be available to the parent to present specific to the 2023-24 school year. In any event, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is,

nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

While there is limited evidence available regarding the student's progress during the 2023-24 school year, the deputy director at iBrain testified that the student had made progress in his 1:1 academics (Tr. p. 46). For example, the student was able to identify numerals that came next in a sequence of numbers with moderate support, whereas before he required maximal support; receptively identify the function of an object from an image; identify objects and pictures which he previously had difficulty doing (Tr. pp. 46-47, 70). In terms of social skills, the deputy director reported that the student had improved significantly and could identify "good" or "bad" behavior using his AAC device (Tr. pp. 47, 70-71). The deputy director also reported that the student's ambulation and tolerance for standing had increased, and the student's dressing skills had improved (Tr. pp. 47-48). In addition, the deputy director testified that as a result of the administration of the Brigance Diagnostic Tool (Brigance) to the student, new individualized goals aligned with the student's performance on the Brigance were "recently" added to the student's program at iBrain; however, the deputy director noted that this may not be reflected on the iBrain education plan in evidence (Tr. p. 74). Finally, the deputy director at iBrain opined that the student demonstrated extensive progress during the 2022-23 school year and was expected to continue to make further progress during the 2023-24 school year (Tr. pp. 48, 52).

The parent also testified that the student made progress at iBrain over the last school year (Tr. p. 96). For example, the parent testified that the student was able to identify more objects across different settings, attempted to feed himself and drink on his own, and tried to inform adults of his need to use the bathroom (Tr. pp. 96-97).

Aside from progress, the district has not identified any other grounds for challenging the IHO's decision regarding the appropriateness of iBrain. Based on the foregoing, there is an insufficient basis to disturb the IHO's determination that iBrain offered the student programming to meet his unique needs for the 2023-24 school year.

B. Equitable Considerations

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

equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

The IHO found that the parent attended the March 2023 CSE meeting and timely provided ten-day written notice to the district of her intention to unilaterally enroll the student at iBrain and seek direct public funding (IHO Decision at p. 11). The IHO further determined that there was "no evidence that [the p]arent did not cooperate with the [district]" and she found "nothing that would prevent [the p]arent from obtaining relief for tuition reimbursement" (id.). Neither party challenges these discrete findings by the IHO. Accordingly, the only equitable ground at issue relates to the costs of the privately obtained transportation and 1:1 nursing services, as well as the amount of services the student required.

The IHO effectively reduced the relief awarded for district funding of privately obtained 1:1 nursing services and transportation for the student to and from iBrain for the 2023-24 school year on an equitable basis by directing the district to fund only those services actually provided to the student during the 2023-24 school year, which the parent challenges on appeal. The district additionally argues that the evidence in the hearing record raised questions about the authenticity of the nursing and transportation contracts and argues that the 1:1 nursing services exceeded the level of support the student needed to receive a FAPE.

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

More specific to segregable services, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral

private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

With respect to the student's need for a 1:1 nurse, for the 2022-23 school year, the student's physician completed a medical accommodations request form that indicated that the student suffered from "continuous tonic clonic epilepsy" with no known trigger and recommended that the student receive special transportation and nursing services (Parent Ex. N at p. 4, 8). According to the physician's entries on the form, the student did not require daily administration of medication during school hours or in-school medications more than three times per day but did list the need to potentially administer emergency medications in school (id. at pp. 4-6, 8). The form further reflected that the student required blood pressure and pulse oximetry monitoring during school and transport (id. at p. 4).

The March 2023 iBrain plan indicated that the student "require[d] a 1:1 nurse to administer his seizure medications, aid in safety during feeding, and monitor for seizure activity" (Parent Ex. C at pp. 13). Additionally, the iBrain plan indicated that a 1:1 paraprofessional and a 1:1 nurse were necessary to support the student's "medical, physical, cognitive, and sensory needs throughout the day" (id. at p. 13). The student needed support "ranging from minimal to total assistance during all transitions and transfers throughout the day, maximal support for functional mobility and navigation of all environments, maximal assistance for completion of all activities of daily living (ADLs), and support throughout the day to aid in attention to tasks, use adapted devices and assistive technology, don/doff orthotics, position changes, behavior and impulsivity management, and overall safety" (id. at pp. 13-14). iBrain staff recommended that the student receive both full time 1:1 nursing and 1:1 paraprofessional services throughout the school day in all environments (id. at p. 76).

The student's iBrain individualized health plan (IHP) identified the following nursing interventions: develop and implement an emergency evacuation plan; observe fall and seizure precautions; administer anti-epileptic medications; monitor and document seizure episodes; maintain the student in a safe environment when not attended; refer for and coordinate PT, OT, speech-language therapy, and vision therapy services; assess need for assistance with assistive technology; observe aspiration and incontinence precautions; conduct frequent skin checks and repositioning; monitor food and fluid intake and bowel movements; determine use of coping skills that effect ability to be involved in social interactions; allow time for task completion; ensure that the "IEP" and IHP include appropriate transition planning activities; and assist the family with interventions in the home setting (Parent Ex. C at pp. 48-51).

According to the deputy director, the student required a 1:1 nurse to address his "medical problems that ha[d] resulted from his brain injury" and cerebral palsy (Tr. pp. 45-46). In particular, the deputy director noted the students' deficits in language, speech, memory, attention, reasoning, judgement, sensory, perceptual, and motor abilities, and physical functioning (Tr. pp. 45-56, 54). Upon cross-examination by the district, the deputy director did have difficulty identifying precise

"medical reasons" for a 1:1 nurse instead of a 1:1 paraprofessional or a school nurse but ultimately testified that the student "had frequent seizure triggers and activities" that required a 1:1 nurse (Tr. pp. 54-59). The deputy director did not know if the student had experienced a seizure that year (Tr. pp. 59-60).

The parent testified that the student needed to be monitored by a nurse due to his seizures (Tr. p. 90). The parent indicated that a 1:1 nurse was "vital" given that the triggers for the student's seizures were unknown and "somebody need[ed] to be ready to administer his PRN, his emergency medication, at any point throughout the day" (Tr. p. 92).

Based on the foregoing, there is sufficient evidence under the totality of the circumstances to support the reimbursement of the services of a 1:1 nurse to meet the student's medical needs in addition to the 1:1 paraprofessional, and the evidence in the hearing record does not reveal that the nursing services provided to the student as part of the unilateral placement were so excessive that they should be excluded from the relief provided to the parent for the costs of iBrain for the 2023-24 school year. While I decline to find that the services from a 1:1 nurse and a 1:1 paraprofessional were excessive under the circumstances in terms of the parent's decision to unilaterally place the student, the parties should also carefully note that I do not find that the contrary is necessarily true either, that is, that the district was required to replicate the precise approach taken by the parent's preferred providers in order for the student to receive a FAPE. The evidence shows that the district's own IEP called for a full-time individual paraprofessional for health related concerns without listing 1:1 nursing services, but the district's due process hearing strategy of electing to forego its opportunity to present its own evidence with regard to one of the central disputed issues in this proceeding was not in its own interests and inflicted significant damage to the position it took thereafter (see Tr. pp. 28-29).[10] The simultaneous need for both a full time 1:1 paraprofessional and a full time 1:1 nurse may be more than what is minimally required, especially when the evidence suggests that the student's seizures may be well controlled and the student's regular medication to control them, if any, is administered outside of school (Parent Ex. N at pp. 4-6, 8). But the district has not overcome the parent's evidence that at least some individualized attention from a nurse may be required (albeit perhaps considerably less than full time), which leads to the conclusion that the parent should not be denied reimbursement on the ground of excessiveness of the private services based on the available evidence in the hearing record. But it also does not lead to the conclusion that the district was required to duplicate the 1:1 nursing and 1:1 paraprofessional services offered by iBrain.

Turning to the reasonableness of the contract terms and amounts, the evidence in the hearing record shows that iBrain did not deliver the transportation services or 1:1 nursing services to the student but that, instead, the services were delivered by other private companies (see Parent Exs. D-F). The parent entered a contract with Sisters Travel for the provision of the student's transportation to and from iBrain for the 12-month 2023-24 school year (Parent Ex. E). The contract set forth an annual rate for the services and noted that fees were based on school days even if the services were not used (id. at p. 2). The parent also entered into a nursing services contract for the 2023-24 school year with Park Avenue Home Care for the provision of a 1:1 nurse

[10] The district noted the parent's concern for the need for a 1:1 nurse for medication management (Dist. Ex. 1 at p. 9), but neither the IEP nor the written notice explain why the district personnel believed a full time 1:1 nurse was not necessary (see Dist. Ex. 3).

during the school day and during transportation to and from iBrain (Parent Ex. F). The nursing services contract, like the transportation contract, set forth an annual rate and provided that the fees in the contract were based upon the number of school days in the school year whether the student used the services or not unless the provider was at fault for the student not utilizing the services (id. at pp. 2-3).

The parent testified that the student had, in the past, received nursing services from an agency called BAYADA, with a private nurse in the home paid by insurance and the student's former school district of residency contracting with the agency for the nursing services during travel to school (Tr. pp. 98-99). When the parent "first receive[d] a contract from Park Avenue Home Care, [she] did question it because [she] was aware of BAYADA" but she was informed that Park Avenue Home Care utilized nurses from BAYADA to provide services (Tr. pp. 100-01). She further testified that she believed the nursing services were "part of the school contract" (Tr. p. 101). The parent testified to her understanding that, as long as the student was "taking remote Telehealth services or [was] physically present in school and the nurse [wa]s in attendance, he [wa]s under the contract" but that the contract did not apply if the student was absent and/or the nurse was not present (Tr. pp. 102, 106). Regarding the transportation services, the parent testified to her understanding that iBrain contracted for the services and that a vendor would call to arrange "pick up" (Tr. p. 107). She was not aware that she would be responsible to pay for the costs of services even when the student did not use the transportation (Tr. p. 108).[11] Notwithstanding the foregoing, the parent did confirm during the impartial hearing that she signed the contracts with the transportation and nursing agencies (Tr. pp. 112-13; see Parent Exs. E-F).

While the evidence showed that the parent did not appear to understand with whom she had contracted to provide the student's 1:1 nursing and transportation services and it appears that iBrain staff arranged the services and induced the parent sign the contracts (see Tr. pp. 98-108), the IHO weighed the parent's testimony in concluding that there was no actual fraud demonstrated (IHO Decision at pp. 12-13), and the evidence in the hearing record is not sufficient to support the district's allegations that the contracts were "sham transactions," that there was "collusion" between the parent and iBrain,[12] or even that the costs of the transportation and nursing services were "artificially inflated. The IHO was in the best position to assess the credibility of the parent, and I will not reject the IHOs findings when, in short, there is little to no evidence that the student would not benefit from these unilaterally obtained services or that the parent was unaware of them or did not want them.

The IHO's reduction of the parent's award of direct funding for only those 1:1 nursing and transportation services that were actually provided to the student during the 2023-24 school year

[11] When she testified on September 29, 2023, the parent indicated that the student was not absent often (Tr. p. 105) and that thus far during the 2023-24 school year, the student had attended school remotely "maybe . . . five to ten days at the most" (Tr. p. 110).

[12] For example, although the district alleges inconsistencies in the parent's signatures on various documents in the hearing record (compare Parent Ex. E at p. 6, with Parent Ex. F at p. 8, and Parent Aff. of Verif.), the parent confirmed in her testimony that she signed the contracts (Tr. pp. 112-13) and the district did not rebut this testimony; instead, the district objected to the parent's attorney's redirect examination regarding the contracts, arguing that it had "already been stated that she would have agreed and signed these agreements" (Tr. p. 114).

presupposes without evidence that the parent acted unreasonably in entering into the contracts. Thus far, courts assessing unilateral placements arranged by parents have not required a parent to establish that they obtained the private placement and services as the lowest possible cost when assessing whether the unilateral placement is appropriate or that equitable considerations favor the parent. During the impartial hearing, the district did not offer any evidence that other 1:1 nursing or transportation options were available to meet the student's needs, which would have resulted in a more reasonable cost, nor did it identify any other company with whom the parent could have contracted that would not have charged for the days when the student did not utilize the services.[13] Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only those 1:1 nursing services and transportation services actually delivered notwithstanding the parent's financial obligation to fund the entire amount due under the contracts.

If the IHO was concerned with excessive costs, it would have been permissible for her to instruct the parties to further develop the evidentiary record with respect to that issue. However, in the present matter, the IHO's determination that the district should not be required to fund the costs of the student's private 1:1 nursing services and transportation services that were not delivered to the student despite the parent's contracts with the providers is without support in the evidentiary record.

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the 2023-24 school year and that the district did not present adequate evidence to refute the parent's evidence that no equitable considerations warrant a reduction or denial of the costs of the unilateral placement sought by the parent.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 4, 2023, is modified by reversing those portions which reduced or denied the amount of funding to be paid by the district for the private 1:1 nursing services and transportation services for the 2023-24 school year; and

[13] As the parent notes, in a recent case involving enforcement of pendency orders requiring the district to fund private transportations costs, a district court reviewed similar contracts with the same transportation company and noted that the terms of the contracts required parents "to pay fees irrespective of whether the students use[d] the services" (Abrams v. New York City Dep't. of Educ., 2022 WL 523455 at *5 [S.D.N.Y. Feb. 22, 2022]). However, another district court has recently noted that in assessing the reasonableness of the costs attendant to a transportation contract, an IHO may consider that "there are many services one might be required to pay for regardless of whether or how much they are used," but that contracted for costs are not "automatically reasonable because they are specified by the [c]ontract" (Araujo v. New York City Dep't. of Educ., 2023 WL 5097982 at *5).

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

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

JUSTYN P. BATES
STATE REVIEW OFFICER