The University of the State of New York

The State Education Department
State Review Officer
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No. 23-299

Application of a STUDENT WITH A DISABILITY, by his 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 Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 in part their request for direct funding for special transportation services for the 2023-24 school year. Respondent (the district) cross-appeals from the IHO's determinations that the parents' unilateral placement of their son at the International Academy for the Brain (iBrain), 1:1 nursing services, and transportation services were appropriate for the student for the 2023-24 school year, and from an order that the district fund an independent educational evaluation (IEE) for the student. The appeal must be sustained. 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]). 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 in detail. Briefly, the student in this matter has significant global delays and began attending the International Academy for the Brain (iBrain) during the 2019 school year (Parent Exs. A at pp. 2-3; C at p. 41; I ¶ 5; J ¶11). A CSE convened on March 13, 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 March 27, 2023 (see generally Parent Ex. D).[1] By email to the district dated June 20, 2023, the parents disagreed with the recommendations contained in the March 2023 IEP, asserting that the district did not send out a school location letter for the 2023-24 school year and that they had previously rejected the public school site to which they surmised the district would assign the student to attend, and, as a result, notified the district of their intent to unilaterally place the student at iBrain (see Parent Ex. B). In a due process complaint notice, dated July 5, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year, raising issues related to the district's failure to recommend an appropriate public school location, 1:1 nursing services, music therapy, appropriate transportation accommodations, and a hearing evaluation or updated evaluations in all areas of suspected disability (see Parent Ex. A).

An impartial hearing convened on August, 15, 2023 and concluded on September 20, 2023 after three days of proceedings (Tr. pp. 1-99). 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, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 4-11).[2] As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at iBrain for the 2023-24 school year, including the costs of related services, 1:1 nursing services, and a 1:1 paraprofessional; with respect to transportation, the IHO ordered reimbursement of transportation with special accommodations, for school days the student was in attendance at school; and with, respect to the parents' IEE request, the IHO ordered the district to fund an independent neuropsychological evaluation (id. at p. 11). With respect to equitable considerations, the IHO found that the district had raised arguments regarding 1:1 nursing services and transportation within their closing brief and found that although the parents submitted third party contracts for 1:1 nursing services and transportation, the parents did not offer testimony regarding the incurred costs if the student did not attend school, and found that equities supported a finding that the district was required to make payments when "nursing during transportation and/or transportation-related services are actually utilized by the student" (id. at p. 10). As relief, the IHO ordered the district to "make direct payment to iBrain for the cost of full tuition for the 2023-24 [extended school year] in addition to the costs of related services, 1:1 nursing services, and a 1:1 paraprofessional" (id. at p. 11). The IHO further ordered the district to "direct pay and/or reimburse" for costs related to private special transportation and accommodations including a "1:1 transportation nurse and/or paraprofessional" to and from the private school and the student's home "on school days that the student attends school and is [in] need of transportation and transportation-related services" (id.).

[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 IHO also issued a September 12, 2023 interim decision concerning the student's placement during the pendency of this proceeding (IHO Interim Decision).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal, and the parents' reply and answer thereto are also presumed and, therefore, the allegations and arguments will not be recited in detail. The gravamen of the parents' appeal is that the IHO erred in limiting the funding for the parents' unilaterally-obtained special transportation services. The crux of the district's cross-appeal is that the IHO erred in finding that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year, including the parents' unilaterally-obtained 1:1 nursing services and special transportation, and that the IHO also erred in ordering the district to fund an IEE.

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]).[3]

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

[3] 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).

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. FAPE

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. 4-7). 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 parents' unilateral placement of the student at iBrain for the 2023-24 school year was appropriate and whether the IHO erred in the relief ordered.

B. Unilateral Placement

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).

The district argues in its cross-appeal that the hearing record does not support the IHO's finding that iBrain was an appropriate unilateral placement for the student during the 2023-24 school year. Specifically, the district contends that the iBrain education plan developed for the student—which was undated but had an implementation date of March 2023—did not address the student's needs for the 2023-24 school year.[4] The hearing record shows that the student began attending iBrain in 2019 (see Parent Ex. C at pp. 1, 75-76; Parent Ex. I ¶ 5; J ¶ 11). At the time of the March 2023 iBrain education plan , the student was described as a "passionate, self-directed and determined 18 year old who like[d] to vocalize his needs and wants" and currently lived in a primarily Spanish speaking household with his parents, grandparents, and younger brother (Parent Ex. C at p. 1).

In affidavit testimony, the deputy director of special education at iBrain (deputy director) described iBrain as a private, highly specialized school for children who suffered from acquired brain injuries or brain-based disorders that offered students a 12-month school year and provided special education services during an extended school day (Parent Ex. J ¶ 5). Further, the deputy director explained that every student who attended iBrain required a 1:1 paraprofessional to assist with activities of daily living (ADLs) and to access and benefit from the educational programming (id.). The deputy director testified that iBrain provided students with IEPs focused on improving functional skills appropriate to their cognitive, physical, and developmental levels and provided a "collaborative and multi-disciplinary approach" incorporating practices from the medical, clinical,

[4] The March 2023 iBrain education plan was undated; however, it provided a beginning date of service of March 20, 2023 within the summary of program and service recommendations (see Parent Ex. C at pp. 1, 75-76).

and educational fields with instruction using the most effective strategies from evidence-based practices (id. at ¶ 7).[5] The deputy director testified that at the time of the hearing, the student was attending a 6:1+1 special class with the related services of four sessions per week of individual occupational therapy (OT), five sessions per week of individual physical therapy (PT), four individual and one group session per week of speech-language therapy, three sessions per week of vision education services, one session per week of assistive technology services, and two individual and one group session per week of music therapy, all delivered in 60-minute sessions (Parent Ex.. J at ¶ 13).[6]

The iBrain education plan described the student as semi-verbal, semi-ambulatory, and legally blind with diagnoses of acquired brain injury, global developmental delays, cerebral palsy, hydrocephalus, dystonia, and seizure disorder; the plan reported that the student required use of a gastrostomy tube (g-tube) for feeding (Parent Ex. C at p. 1, 41; Parent Ex. J ¶ 9). The student had undergone multiple surgeries that included placement of a shunt, a 2020 revisit to provide maintenance of the shunt, 2019 hip surgery, and eye surgery at birth as a result of retinopathy (Parent Ex. C at pp. 1, 2, 20). The iBrain education plan stated that the student had a stroke in 2013 that made him physically regress, primarily on his left side (id. at p. 1). Further, the iBrain education plan reported that the student was dependent for all self-care, hygiene tasks, transfers, mobility, dressing, feeding, and all ADLs and had a 1:1 paraprofessional within a 6:1+1 classroom setting (id.). The iBrain education plan recommended that the student receive 1:1 nursing services to meet the student's needs, which included feeding and monitoring the student's seizure activity (id. at pp. 2, 49).

In the area of cognitive ability, the iBrain education plan reported that the student demonstrated awareness of his environment in that he knew he would receive a break or end a task if he pressed "all done" or "break [on his communication device]," understood that if his ankle foot orthoses (AFOs) were on he would go to PT or for a walk, and noted that the student persisted even if frustrated in requesting and completing preferred activities; however, for nonpreferred activities he stopped trying (Parent Ex. C at p. 2).

With respect to speech and language functioning, the iBrain education plan stated that the student communicated through a combination of methods, including facial expression, body language, gestures and behaviors, in addition to use of augmentative and alternative communication (AAC) devices (Parent Ex. C at pp. 1, 24). The iBrain education plan reported that the student smiled and vocalized when happy, and, when upset, he exhibited behaviors such as a facial grimace, with vocalizations of increased volume and frequent rocking in his chair (id.

[5] While the deputy director refers to the iBrain education plan as an "IEP," it bears noting that private unilateral placements do not have the same statutory and regulatory obligation as the district to develop an IEP for a student (see Carter, 510 U.S. at 13-14).

[6] The iBrain education plan indicated both that the student received five individual sessions of speech-language therapy per week and that the student received four individual and one group session of speech-language therapy per week (Parent Ex. C at pp. 37, 64, 75). Although not indicated in the summary of recommended services, the iBrain plan noted that the student had been receiving hearing services during the 2022-23 school year within the present levels of performance, with the related goal continuing during the following academic school year (compare Parent Ex. C at p. 75, with Parent Ex. C at pp. 38, 57-59).

at p. 2). The student sometimes indicated acceptance by smiling, or rejection by turning away; however, he did not answer yes/no questions reliably (id. at p. 24). The student needed "moderate verbal, visual and tactile support" to activate the appropriate icon on his communication device provided in a field of two in order to greet ("hello," "goodbye"), or comment ("yes/no, more/all done") (id. at p. 3). The iBrain education plan reported that the student had used verbalizations in the past, primarily at home, such as the words "no," "hi," "ma," and "pa" noting that he reportedly said "no" three times that year at school and "hi" one time (id. at p. 1). As related to communication of his daily and routine needs, the iBrain education plan reported that the student "require[d] assistance in most situations" and a communication partner "familiar with interpreting his vocalizations, behaviors, and attempts at icon activation" to support understanding of his needs (id. at p. 4). Additionally, as related to his oral motor mechanism, the student presented with "grossly low-tone and poor mandibular control," poor secretion management, with pooling in his oral cavity, and frequently used a large towel in his mouth to fulfill sensory needs (id. at p. 35). In the area of feeding, the student did not receive any nutrition by mouth and received all nutrition, hydration, and medication via g-tube (id. at p. 36).

The iBrain education plan noted that, physically, the student required a wheelchair for mobility throughout his school day, two person transfers, and he needed to wear bilateral AFOs for standing, gait training and all weight bearing and ambulation activities (Parent Ex. C at pp. 8, 11). In the area of fine motor skills, the student had a right-hand dominance, initiated reaching for items with his right hand, and demonstrated manipulation of items such as Play-Doh, markers and grasping paper; however, the student required assistance to complete tasks and demonstrated decreased speed during movements (id. at p. 7). The student required access to switch adapted or loop adapted scissors and low-tech assistive devices such as slant boards and build up handles to support writing tasks (id. at p. 40). The iBrain education plan indicated the student's quality of movements was typical of a student with cerebral palsy as he often demonstrated impulsive and non-purposeful movements (id. at p. 10). Additionally, the student presented with a limb length discrepancy due to his hip surgery and he had orthopedic shoes for compensation (id. at p. 11). Due to the student's visual needs, the student required "enlarged, sharp contrast and multi-sensory materials" and benefitted from a vertical work surface and materials placed in his right, central, visual field (id. at p. 14).

With regard to assistive technology, the iBrain education plan indicated that the student accessed one to two single voice output switches, primarily used a hightech AAC device, and had the motor abilities adequate to access and select an icon with "guided access" by reaching with his finger isolated on his left hand (Parent Ex. C at p. 21). The iBrain education plan noted that the intentionality of the student' responses was not always evident (id.). The iBrain education plan reported that the student, on good days, activated his switch or AAC device when provided with moderate to maximal verbal, visual, and tactile cues and engaged during a 20-minute period with various e-books, music, and other activities when provided with "consistent maximal multimodal cueing and assistance" (id. at p. 22).

The iBrain education plan indicated that the student appeared to benefit from the presence of music therapy as he demonstrated engagement by looking at instruments and "use[ed] music to regulate and relax" (Parent Ex. C at p. 43). As related to the effects of the student's needs on involvement in the general education curriculum, the iBrain education plan stated that "[d]ue to the student's significant impairments in cognition; language; memory; attention; reasoning;

abstract thinking; judgment; problem-solving; sensory, perceptual, vision, and motor abilities; psycho-social behavior; physical functions; information processing; and speech," the student required an individualized curriculum that met his high management needs and addressed skills to support increased participation, independence, and quality of life (id. at pp. 45-46).

To address the student's identified needs, the iBrain education plan recommended a 12-month program in a 6:1+1 special class with both 1:1 nursing and 1:1 paraprofessional services throughout the day, and assistive technology devices and services (Parent Exs. C at pp. 75-76; see J at ¶¶ 13-14). The recommended related services included four 60-minute individual sessions per week of OT, five 60-minute individual sessions per week of PT, five 60-minute individual sessions per week of speech-language therapy, three 60-minute individual sessions per week of vision education services, one 60-minute session per week of individual assistive technology services, two 60-minute individual and one 60-minute group session per week of music therapy, and one 60-minute session per month of parent counseling and training (Parent Ex. C at pp. 70, 75). To further support the student's identified needs, the March 2023 iBrain education plan recommended transportation accommodations, including adult supervision by a nurse, a vehicle with a wheelchair lift, ramp and air conditioning, and limited travel time of 60 minutes (id. at p. 74). The iBrain education plan also included numerous goals and corresponding objectives or benchmarks targeting the student's needs as identified in the iBrain education plan (id. at pp. 45, 49-73).

Turning to the district's argument that the parents failed to present evidence of the student's class schedule, attendance, or progress reports during the school year at issue, it is noted that the final date of the impartial hearing occurred on September 20, 2023, less than three months into the 12-month 2023-24 school year. Accordingly, it is not clear that a great deal of evidence was available to the parent at the time of the hearing specific to the 2023-24 school year although some information should have been available regarding the 12-month portion of the 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]).

In this instance, while the hearing record is limited to the first few months of the 2023-24 school year with respect to the student's functioning in the recommended program at iBrain, the hearing record nonetheless contains the iBrain education plan which sufficiently describes the elements of the program recommended for the student, which align with the student's needs as

identified therein.[7] Moreover, the hearing record is not devoid of evidence of the student's progress in the program, although such evidence is generally stated. In affidavit testimony, sworn to as part of the hearing on September 20, 2023, the deputy director of iBrain stated that " [o]ver the past school year, [the student] ha[d] made progress in skills across academic and related service domains in his educational program at iBrain" (Parent Ex. J ¶ 15; see Tr. pp. 89-90). The deputy director further reported that he anticipated the student would continue to build on progress already made, as "long as he [wa]s provided with continuity in regard to his educational program" (id.).[8] The deputy director testified that the student has "attended" iBrain since 2019 and, at the time of his testimony in September 2023, he affirmed that the student "currently attend[ed] a small 6:1:1 class" at iBrain and received related services including four sessions per week of OT, five sessions per week of PT, four individual and one group session per week of speech-language therapy, three sessions per week of vision education services, one session per week of assistive technology services, two individual and one group session per week of music therapy, as well as the support of 1:1 paraprofessional services and 1:1 nursing services throughout the day (Parent Ex. J ¶¶ 11, 13-14; see Tr. pp. 65, 87-90). Additionally, the parent testified by affidavit that the student "had made progress at his placement at iBrain," but she offered no specifics (Parent Ex. I ¶ 11). The district did not enter any evidence into the hearing record with respect to the appropriateness of iBrain and did not cross examine the parent's witnesses on any topic (see Tr. pp. 85-90).[9] Thus, the evidence in the hearing record, including the iBrain education plan developed for the student for the 2023-24 school year, and the deputy director's testimony that the student was attending iBrain in the recommended program at the time of the impartial hearing, is adequate to demonstrate that iBrain was an appropriate unilateral placement for the student and the district has not identified any evidence in the hearing record to rebut the evidence proffered by the parents during the hearing or to challenge the finding of the IHO as to appropriateness. Accordingly, I find that there is no basis in the hearing record to disturb the IHO's finding that iBrain's program was individualized

[7] The hearing record did not include a class schedule or related service or attendance records for the student's 2023-24 school year at iBrain (see generally Parent Exs. A-J).

[8] The iBrain education plan included statements of progress as related to goals addressing academics, "progress toward most of his receptive, expressive, pragmatic language and oral motor goals," vision goals, assistive technology goals, AAC, self-care goals, self-regulation skills, standing tolerance, and "substantial motor-related and functional improvements in the last few months during [p]hysical [t]herapy" (Parent Ex. C at pp. 18, 20, 23, 29, 34, 39-40, 41). The education plan also included graphs that purport to show the student's progress for the 2022-23 school year in academics, social skills, self-care, and ambulation, and for the 2021-22 school year in music therapy (see id. at pp. 18, 19, 39-40, 42, 43). The y-axis for each of the graphs is labeled "progress" and the x-axis for each of the graphs lists a series of dates (id.). Except for PT, it is unclear from looking at the graphs or reading the corresponding narrative what exact skills were being measured, and therefore it is unclear what the recorded data points represent (id.). In any event, even if the iBrain education plan could be construed to reflect that the student made some progress during the 2020-21 and 2022-23 school years, it does not similarly contain evidence of progress for the 2023-24 school year, the school year at issue.

[9] There was some discussion during the impartial hearing regarding the district's intention to issue a subpoena to iBrain and the private transportation company the parents contracted with to provide transportation for the student, but there was no evidence entered into the hearing record associated with any discovery conducted by the district in this matter (see Tr. pp. 7-16, 45).

for the student and provided the student with instruction specially designed to meet his unique needs.

1. 1:1 Nursing Services

In her decision, the IHO awarded the parent direct funding of the 1:1 nursing services provided to the student at school and did not reduce the funding on equitable grounds. In its cross-appeal, the district argues that there was insufficient evidence to conclude that the student required both 1:1 nursing and 1:1 paraprofessional services for the whole school day and that the cost of the student's 1:1 nursing services—as provided for in a contract executed by the parent in addition to the student's enrollment contract with iBrain—was excessive.

The March 2023 iBrain education plan indicated that the student "ha[d] a 1:1 nurse that wa[s] essential for his daily needs of feeding, seizure protocol" in addition to monitoring his medical needs including his g-tube management (Parent Ex. C at pp. 2, 10). Further, the iBrain plan documented the student's 1:1 nurse as "essential in monitoring his health needs" during related service sessions (id. at p. 26).

The iBrain education plan noted that the student required a 1:1 paraprofessional to support the student's needs "throughout the day to aid in attention to tasks, use adapted devices and assistive technology, don/doff orthotics, complete position changes, and manage overall safety" (Parent Ex. C at p. 40). In addition, the student's paraprofessional supported the student's generalization of skills, especially those related to communication, outside of therapy sessions (id. at p. 26).

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 (Parent Ex. C at p. 75). The iBrain education plan stated that the student "required [a]1:1 paraprofessional and 1:1 nurse to support his medical, physical, cognitive, and sensory needs throughout the day" (id. at p. 8). Further the iBrain education plan detailed that the student "require[d] [two]-person transfers, maximal support for functional mobility and navigation of all environments, [and] maximal assistance for completion of all activities of daily living [ADL's]" (id.).

The student's iBrain individualized health plan (IHP) identified the following nursing interventions: refer for and coordinate therapy services; observe fall and seizure precautions; administer antiepileptic medications as per seizure action plan; monitor seizure episodes; document seizure activities; document any injuries incurred during seizure; maintain safe environment for student such as wearing safety harness on seating device; assess need for assistance with technology; develop and implement an emergency evacuation plan; observe aspiration precaution; provide suctioning as needed; observe incontinence precaution; provide perineal care, use of barrier cream, frequent skin check and repositioning; monitor food and fluid intake via g-tube; monitor bowel movements; 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. 49-53).[10] The student's parent, within her affidavit testimony reported that the student

[10] The parents' contract for nursing services indicates that the student will be provided with "a 1:1 Private Duty Nurse" during school hours and there is also a section of the iBrain education plan that refers to a "private duty nurse" rather than the term "1:1 nurse," which appears more commonly in the document, or individual school

had a clear need for a 1:1 nurse and had received 1:1 nursing services at iBrain since the 2018-19 school year (Parent Ex. I ¶7). In affidavit testimony, the deputy director at iBrain indicated that the student required the assistance of both a 1:1 paraprofessional and a 1:1 nurse, although he did not articulate a reason for this need (Parent Ex. J ¶¶ 1, 5, 14).

Further, although the district argues that the student did not have medical needs that required 1:1 nursing services in addition to a 1:1 paraprofessional, the March 2023 CSE created an IEP mirroring the student's March 2023 iBrain education plan, which, within the student's present levels of performance, indicated the student's 1:1 nurse was essential for his daily needs of feeding and seizure protocol, needed to attend to his physical and medical needs, and was "essential in monitoring his health needs" during therapy sessions (compare Parent Ex. C at pp. 2, 25, 26, with Parent Ex. D at pp. 3, 7). The IEP also noted, in a number of areas, that the student required a 1:1 paraprofessional; for example, the management needs indicates that the student "requires a one-to-one paraprofessional in order to benefit from participation in an educational setting" (Parent Ex. D at p. 31; see Parent Ex. D at pp. 21, 29, 30, 32). Accordingly, without explaining the district's acceptance of the student's needs for both 1:1 nursing services and 1:1 paraprofessional services, as reported in the March 2023 IEP, the district's assertion, on appeal, that the student did not require both services simultaneously or throughout the day is without merit.

Turning to the district's allegation that the "astronomical and unsupported amount" charged for 1:1 nursing services "simply shocks the conscience," I can point to no evidence in the hearing record demonstrating that the amount charged is outside of a typical range for such services (Answer ¶ 3). The nursing services contract, like the transportation contract, set forth an annual rate and provided that the fees in the contract were based on 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 (Parent Ex. H at p. 2). While the amount charged under the contract may appear high, on its face, there is no evidence in the hearing record, such as a cost comparison with other similar providers in the same geographic area, upon which to base a finding that as an equitable matter the amount is excessive or unreasonable.

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 while at school in addition to the 1:1 paraprofessional, and the evidence in the hearing record does not support a finding that the nursing services provided to the student as part of the unilateral placement were demonstrably excessive such that they should be entirely excluded, as an equitable matter, from the relief awarded. Accordingly, I decline to disturb the IHO's determination that the unilaterally obtained 1:1 nursing services were appropriate for the student or her award to the parents of direct funding of the 1:1 nursing services without any reduction based on equitable considerations.

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nurse services as indicated in the district's IEP for the student (see Parent Ex. C at pp. 2, 25, 40; D at p. 57; H at pp. 1, 2). It is possible that the term is a reference to a type of nursing service defined under federal and State regulations, although it is unclear why it is being used to describe nursing services delivered at school during school days (see 42 CFR § 440.80; 10 NYCRR 85.33).

C. Equitable Considerations

The IHO effectively reduced the relief awarded for district funding of privately obtained 1:1 transportation 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. Although the IHO found that no equitable considerations limited tuition reimbursement, she nonetheless determined that the third party contracts for nursing and transportation were in the hearing record, but no testimony showed the need for the student or the district to incur such costs if the student does not utilize the services or transportation when the student does not attend school and that "equities support" finding that district should directly pay or reimburse the parent for nursing transportation services and transportation services when "services are actually utilized" (IHO Decision at pp. 10-11).[11]

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the

[11] The private nursing services contract set out that the student would be provided with 1:1 nursing support both during the school day and during special transportation of the student between the student's home and iBrain without separating the costs of either service (see Parent Ex. H at pp. 1-2). The parent's appeal concerns the IHO's limitation on district funding of both the private transportation and the private 1:1 transportation nursing.

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).

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"]).

Turning to the reasonableness of the transportation contract, the evidence in the hearing record shows that iBrain did not deliver the special transportation services or 1:1 transportation

nursing services to the student but that, instead, the services were delivered by other private companies (see Parent Exs. F; G; H). The parents 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. G). 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 parents also entered into a nursing services contract for the 2023-24 school year with Park Avenue Home Care for the provision of a "nurse during the school day and during transportation to and from iBrain (Parent Ex. H). The nursing services contract, like the transportation contract, set forth an annual rate and provided that the fees in the contract were based on 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).

I am not persuaded by the district's contention that the parents have not shown that they "incurred a financial obligation for transportation or tuition" or that the parents' signatures on the contracts are somehow invalid as not being "authorized e-signatures" (Answer ¶7). The parent testified that she disagreed with the CSE's recommendations for the student and the lack of a school location recommendation, that she provided the district of notice of her intention to unilaterally place the student at iBrain and seek public funding for the placement, and that it would be very difficult for her family to pay for the cost of iBrain, transportation and nursing for the student "upfront" and then wait for reimbursement (Parent Ex. I at ¶¶ 7-9, 12). The district had the opportunity to cross-examine the parent as to her testimony or her signature on the contracts but did not appear for the hearing (Tr. pp. 86-87).

The IHO's reduction of an award to the parents of direct funding for only those 1:1 transportation nursing services and special transportation services that were actually provided to the student during the 2023-24 school year presupposes without evidence that the parents 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 at the lowest possible cost when assessing whether the unilateral placement is appropriate or that equitable considerations favor the parent.[12] During the impartial hearing, the district did not offer any evidence that other 1:1 transportation nursing services or special 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 parents could have contracted that would not have charged for the days when the student did not utilize the services.[13]

[12] There is no indication in the hearing record that the parents could have elected to use district provided transportation for the student for the 2023-24 school year; in fact, while the parents believed the student required 1:1 nursing services during transportation, in recommending special transportation for the student in the March 2023 IEP, the CSE did not include a recommendation for 1:1 nursing services during transportation (Parent Ex. D at pp. 62-63). Accordingly, this is not a situation where the district was recommending the same special transportation services that the parents obtained unilaterally.

[13] As the parents note, 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

Rather, the district did not appear on the hearing date during which the parent and deputy director testified and, therefore, it failed to avail itself of the opportunity to cross-examine the witnesses as to the reasonableness of the contract's terms or the costs of the special transportation services (Tr. pp. 72-72, 76-77, 80). Accordingly, the evidence in the hearing record does not support the IHO's order to require the district to fund only those 1:1 transportation nursing services and special transportation services actually delivered notwithstanding the parents' financial obligation to fund the entire amount due under the contracts.

As a further note, 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 1:1 transportation nursing services and special transportation services that were not delivered to the student despite the parents' contract with the providers is without support in the evidentiary record. Accordingly, the parents' appeal on this point is sustained.

D. Independent Educational Evaluation

The IHO also ordered the district to "pay and/or reimburse the parent[s] for costs related to an independent neuropsychological evaluation" (IHO Decision at p. 11). The district contends that the IHO erred in this order, because the parents requested an IEE for the first time in the July 2023 due process complaint notice. The parents did not address the district's cross appeal on this point in their reply.

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]).

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 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]).

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).

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 the July 2023 due process complaint notice, the parents requested an IEE in the form of an independent neuropsychological evaluation (Parent Ex. A at p. 7). The due process complaint notice does not identify what district evaluation, if any, the parents disagreed with, but does state that the parents "disagree with [the district's] evaluations, or lack thereof" (id. at p. 6). The parents do not allege that there was any request for an IEE made to the district prior to the due process complaint notice.

In past decisions SROs 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, SROs 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 observed 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];[14] Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; 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 (Trumbull, 975 F.3d 152, 168-69 [2d Cir.

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

2020]).[15] Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed the 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 (see, e.g., Application of a Student with a Disability, Appeal No. 23-081). I see no reason to depart from this trend.

Thus, I will sustain the district's cross appeal on this point and reverse the IHO's order for the district to fund an IEE.

VII. Conclusion

The hearing record demonstrates that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year and that the district did not present adequate evidence to refute the parents' evidence that equitable considerations did not warrant a reduction or denial of the costs of the unilateral placement including the 1:1 transportation nursing services and special transportation services sought by the parent.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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 unilaterally obtained 1:1 transportation nursing services and special transportation services for the 2023-24 school year; and

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

IT IS FURTHER ORDERED that the IHO's decision, dated November 4, 2023, is modified by reversing those portions which ordered the district to pay and/or reimburse the parent for costs related to an independent neuropsychological evaluation.

Dated: **Albany, New York**
February 16, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

[15] 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" (975 F.3d at 169).