The University of the State of New York

The State Education Department

State Review Officer

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No. 23-302

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

Liz Vladeck, General Counsel, attorneys for respondent, by Michael Gindi, 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 the decision of an impartial hearing officer (IHO) which denied her request to be fully reimbursed for the costs of the student's tuition at the International Academy for the Brain (iBrain) for the 2023-24 school year.[1] Respondent (the district) cross-appeals from the IHO's determination that it failed to offer an appropriate educational program to the student 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

[1] The student's grandmother is his legal guardian; therefore, consistent with State regulation, the grandmother will be referred to as the "parent" throughout this decision (see Parent Ex. J ¶ 1; see also 8 NYCRR 200.1[ii][1]).

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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case began attending iBrain during the 2018-19 school year; since that time, the student has been the subject of two prior State-level administrative proceedings related to the student's educational programming for the 2018-19 and 2019-20 school years and the parent's previous unilateral placement of the student at iBrain (see Parent Ex. J ¶ 9; see Application of a Student with a Disability, Appeal No. 21-012; Application of a Student with a Disability,

Appeal No. 19-060).[2, 3] Accordingly, the parties' familiarity with the facts and procedural history preceding the current matter—as well as the student's educational history—is presumed and will not be repeated here unless necessary to resolve the issues in this matter.[4]

As relevant to the parties' current dispute, a CSE convened on February 15, 2023 to conduct the student's annual review and to develop an IEP for the 2023-24 school year (see Parent Ex. B at pp. 1, 73). The February 2023 IEP identified February 27, 2023 as the projected implementation date of the IEP (id. at p. 1). After the February 2023 CSE meeting, the district school psychologist who attended the CSE meeting sent the parent an email on the same day, which identified the special education program recommendations and transportation accommodations for the student (see Dist. Ex. 13 at pp. 1-2). In the email, the school psychologist explained that the parent would receive a copy of the IEP when it was finalized (id. at p. 1). The school psychologist attached "medical administration forms" to the email for the parent so that she could "have the doctor re complete (sic) them to update the changes in medical needs discussed in the meeting" (id.). The school psychologist also noted that the parent could "submit a letter from the neurologist" (id.). Finally, the school psychologist explained that she had attached the student's transportation accommodations "in case consideration [wa]s needed in that area" (id.).

In an email dated March 10, 2023, the district school psychologist sent the parent a copy of the student's finalized IEP for the 2023-24 school year (see Dist. Ex. 13 at p. 1).

On May 31, 2023, the district school psychologist sent an email to the director of special education at iBrain (director), indicating that the district was in the "process of developing routes and establishing transportation for extended school year students" (Dist. Ex. 16 at p. 3). The school psychologist noted that while iBrain "typically used [their] own transportation for iBrain students," the district wanted to "reach out to confirm if Brain w[ould] be seeking for the [district] to create

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

[3] In addition, the parent challenged the district's recommended special education program for the 2022-23 school year, and in a decision dated October 20, 2022 (October 2022 IHO decision), an IHO found that the district failed to offer the student a FAPE, that iBrain was an appropriate unilateral placement, and that the parent was entitled to an independent educational evaluation (IEE) of the student consisting of a neuropsychological evaluation (see Parent Pendency Ex. B at pp. 6, 40). In the October 2022 IHO decision, the IHO also ordered the district to fund the costs of the student's tuition, related services, 1:1 nursing services, and transportation services pursuant to the contractual agreements in that matter for his attendance at iBrain for the 2022-23 school year (12-month programming) (id. at p. 40). Neither party appealed the October 2022 IHO decision (see Interim IHO Decision at pp. 1-2). Based on the October 2022 IHO decision, it appears that the parties had also engaged in another impartial hearing, which resulted in an IHO decision, dated January 6, 2022 (January 2022 IHO decision); however, it is unclear from the evidence in the hearing record what school year the parties were litigating in that proceeding as the January 2022 IHO decision was not entered into the hearing record as evidence (see Parent Pendency Ex. B at p. 5; see generally Tr. pp. 1-160; Parent Pendency Exs. A-B; Parent Exs. A-D; E-K; Dist. Exs. 1-17; Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.).

[4] Prior to the 2018-19 school year, the student attended the International Academy of Hope (iHope) for the 2015-16, 2016-17, and 2017-18 school years (see Application of a Student with a Disability, Appeal No. 19-060).

a code for [iBrain] to allow for [the] initiation of special education transportation for [their] students" (id.).

In a prior written notice dated June 19, 2023, the district summarized the special education program recommended in the student's February 2023 IEP (see Dist. Ex. 9 at pp. 1-2). In a school location letter dated June 19, 2023, the district identified the public school assigned to implement the student's February 2023 IEP (see Dist. Ex. 10 at p. 1). Evidence reflects that the district sent the June 2023 prior written notice and the June 2023 school location letter to the parent on June 19, 2023 via attachments to an email (see generally Dist. Ex. 11).

In a letter dated June 20, 2023, the parent notified the district of her intentions to unilaterally place the student at iBrain for the 2023-24 school year (12-month programming) and to seek public funding for the costs of the student's attendance therein (see Parent Ex. E at p. 1). The parent indicated that she was rejecting the special education program recommended in the February 2023 IEP and that she had not received a school location letter for the 2023-24 school year (id.). The parent reminded the district that if the same assigned public school site was offered "as last year," she had "previously rejected that location because it was not appropriate" for the student (id.).

On June 27, 2023, the district school psychologist sent the iBrain director an email to follow up on the May 31, 2023 inquiry about district transportation services for iBrain students (see Dist. Ex. 16 at p. 2). The iBrain director responded via email the same day, indicating that she was "not aware of any iBrain students who w[ould] be seeking transportation through the [district]" (id. at p. 1).

A. Due Process Complaint Notice

By 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 based on various procedural and substantive violations (see Parent Ex. A at pp. 1, 4-6). As relevant to this appeal, the parent asserted that the student's February 2023 IEP failed to include a recommendation for 1:1 nursing services, air conditioning as an accommodation for transportation, and the district failed to timely provide the parent with a school location letter (id.). As relief, the parent sought an order directing the district to directly pay iBrain for the costs of the student's tuition, related services, 1:1 nursing services, and 1:1 paraprofessional services (id. at pp. 6-7). In addition, the parent sought an order directing the district to directly or prospectively pay for the student's transportation costs, which included the accommodations of limited travel time, the services of a 1:1 transportation nurse and/or paraprofessional, air conditioning, a lift bus, a regular-sized wheelchair, and porter service (id. at p. 7). The parent also requested that a CSE reconvene to address any changes, if necessary, and for the district to fund an IEE (neuropsychological) (id.).

B. Events Post-Dating the Due Process Complaint Notice

On July 6, 2023, the parent executed an enrollment contract with iBrain for the student's attendance at iBrain for the 2023-24 school year from July 5, 2023 through June 21, 2024 (see Parent Ex. F at pp. 1, 6).[5]

B. Impartial Hearing Officer Decision

On August 30, 2023, the parties proceeded to an impartial hearing, which concluded on October 11, 2023, after three days of proceedings (see Tr. pp. 1-160).[6] In a decision dated November 8, 2023, the IHO ultimately determined that the district failed to offer the student a FAPE (see IHO Decision at p. 12). In support of this finding, the IHO concluded that the district failed to provide the parent with a timely prior written notice and school location letter, which denied the parent "meaningful participation in the placement process," and the district failed to recommend 1:1 nursing services for the student in the February 2023 IEP (id. at pp. 9-12).

With respect to the appropriateness of the student's unilateral placement at iBrain for the 2023-24 school year, the IHO found that the parent sustained her burden and that the special education programming, including related services, provided to the student at iBrain was individualized to meet the student's needs (see IHO Decision at pp. 13-16). The IHO also found that, absent any rebuttal evidence presented by the district, the hearing record included sufficient evidence to find that the student required 1:1 nursing services, as well as special transportation services (id. at pp. 14-15). Nevertheless, the IHO noted that the hearing record lacked evidence of the "identities" and "credentials" of those individuals at iBrain who delivered instruction or related services to the student (id. at pp. 16-17).

Next, the IHO addressed equitable considerations (see IHO Decision at pp. 17-19). While noting that a determination on this point largely focused on whether the parent cooperated with the CSE, the IHO indicated that the district's arguments were limited to complaints about the costs of services and the adequacy of the parent's 10-day notice (id. at p. 17). The IHO found that, with regard to the excessiveness of the costs, the district's repeated assertion that funding should be limited to the "'[M]edicaid' rate" lacked any "authority for the proposition that [M]edicaid-rate funding [wa]s required under the IDEA"; as a result, the IHO rejected this argument (id.). The

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[5] The parent also executed a school transportation annual service agreement with "Sisters Travel and Transportation Services" (Sisters Travel), which was effective from July 1, 2023 through June 30, 2024 (Parent Ex. G at pp. 1, 6). She also executed an annual nursing service agreement with "B&H Health Care, Inc." (B&H), which was effective from July 5, 2023 through June 21, 2024 (Parent Ex. I at pp. 1, 6). The nursing service agreement provided the student with the services of a 1:1 nurse in school and a 1:1 nurse for transportation purposes (id. at pp. 1-2). However, neither the Sisters Travel agreement nor the B&H agreement reflected a date to identify when the parent actually executed each agreement (see generally Parent Exs. G; I).

[6] The IHO issued an interim order on pendency, dated August 30, 2023, which determined that the prior, unappealed October 2022 IHO decision formed the basis for the student's pendency services (see Interim IHO Decision at pp. 2, 5). As the student's pendency services, the IHO ordered the district to fund the following: the costs of the student's tuition at iBrain; the costs of the student's related services, which included OT, PT, speech-language therapy, vision education services, music therapy, and parent counseling and training; the costs of the 1:1 "private duty" nursing services; the costs of the 1:1 paraprofessional services; and the costs of transportation consistent with the rate set forth in the October 2022 IHO decision (i.e., $233.00 per hour) (id. at p. 5).

IHO similarly rejected the district's implication that "something nefarious" underscored the parent securing both the 1:1 nursing services and the transportation services through iBrain (id.). Next, the IHO found that while the district made a "general offer" to iBrain to provide transportation services, the district had conceded that it never made the offer directly to the parent (id. at p. 18). Thus, the IHO rejected this argument (id.). However, the IHO agreed with the district's position that it should only pay for transportation services "on days when such transportation took place" and that the district should only pay for nursing services "on days when nursing services were provided" (id.).

Next, the IHO examined the district's argument about the excessive cost of iBrain's tuition, which was a "separate charge from the nursing, related services and transportation services" (IHO Decision at p. 18). Here, the IHO found that, based on the student's classroom schedule, the "only classroom instruction for which $190,000 [wa]s being charged" correlated to approximately two hours per day (id.). The IHO found this to be excessive, "especially in light of the lack of evidence about the credentials" of the student's teachers (id.). Finally, the IHO found the district's argument with regard to the parent's 10-day notice was without merit, noting that it "need not mirror a subsequent due process complaint" notice (id.).

In light of the foregoing determinations, the IHO exercised his discretion and reduced the amount awarded to the parent for the costs of the student's base tuition at iBrain to 69 percent of the total costs, for a total of $ 131,000.00 for the 12-month program the student attended during the 2023-24 school year (IHO Decision at pp. 17, 19-21). With regard to the supplemental fees charged for related services at iBrain, the IHO similarly reduced the amount awarded to the parent by 50 percent, for a total of $ 58,272.00 (id. at pp. 20-21). For transportation services, the IHO awarded the parent a total of $ 111,180.00, less a "proportional amount for any school days for which transportation was not provided" (id. at pp. 20-21). For nursing services, the IHO awarded the parent a total of $ 265,960.00, less a "proportional amount for any school days for which nursing services were not provided" (id.). The IHO also found that the parent was entitled to an IEE at district expense (neuropsychological) and ordered the district to convene a CSE meeting to review the completed IEE (id. at p. 22). The IHO conditioned the funding awarded for the supplemental fees, the nursing services, and the transportation services upon the presentation of the names and credentials of the student's related services' providers, and the provision of invoice details concerning the school days the student was transported to iBrain and for the school days the student received 1:1 nursing services (id. at pp. 21-22). With regard to the reduced award for the student's base tuition costs, the IHO directed the district to fund the same within 30 days of receipt of an invoice from iBrain (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred by reducing the amounts awarded for the costs of the student's tuition, related services, nursing services, and transportation costs. As relief, the parent seeks an order directing the district to fully fund the costs of the student's educational expenses consistent with the respective contractual language governing the student's base tuition, supplemental fees, nursing services, and transportation services.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's reductions of costs awarded with regard to iBrain's base tuition and supplemental fees

as an alternative to granting the district's cross-appeal. As a cross-appeal, the district argues that the IHO erred by finding that the district failed to offer the student a FAPE for the 2023-24 school year. The district also cross-appeals from the IHO's finding that the parent sustained her burden to demonstrate that iBrain was an appropriate unilateral placement, and more specifically asserts that the parent failed to sustain her burden to establish that the student required 1:1 nursing services and the IHO should have wholly denied the parent's request for tuition funding given the inadequate showing with respect to the credentialing information. The district also asserts that the parent failed to sustain her burden to establish that the student was actually receiving nursing and transportation services. In addition, the district argues that the costs for both the nursing and transportation services were excessive, and therefore, must be reduced based on equitable considerations. Alternatively, the district contends that the IHO's reductions for both the nursing and transportation services should be upheld, or, if necessary, remanded to the IHO for further development of the hearing record.[7]

In an answer to the district's cross-appeal, the parent responds to the district's allegations and generally argues to uphold the IHO's finding that the district failed to offer the student a FAPE and that iBrain was an appropriate unilateral placement. As a reply to the district's answer, the parent continues to argue the points in her request for review in support of reversing the IHO's decision with regard to the reduced amounts awarded for the student's tuition, related services, nursing services, and transportation services.

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

[7] To the extent that the district does not cross-appeal or otherwise challenge the IHO's decision to award the parent an IEE of the student at public expense (neuropsychological) and for a CSE to convene to review the completed evaluation—both of which constitute findings adverse to the district—these determinations have 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]). However, it must be noted that in the October 2022 IHO decision, that IHO ordered the district to fund a neuropsychological IEE of the student (see Parent Pendency Ex. B at p. 40).

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]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. February 2023 IEP—Nursing Services

Turning first to the cross-appeal, the district argues that the IHO erred by finding that the February 2023 IEP failed to offer the student a FAPE because the evidence in the hearing record did not support the CSE's decision to recommended school nurse services rather than 1:1 nursing services to address the student's needs. The parent argues to uphold the IHO's finding, as the district's evidence was insufficient to sustain its burden.

Generally, a student who needs school health services[9] or school nurse services[10] to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526

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[8] 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).

[9] "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][1]).

[10] "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][2]).

U.S. 66, 79 [1999] [indicating that school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). Instead, the guidance document instructs that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by a R[egistered] N[urse] (RN) [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" (id. at p. 4).[11] For administration of medication in school, provider orders must be obtained, and, according to State guidance, "[i]f a school has concerns or questions regarding a provider's order, the school's medical director or school nurse should call the provider to resolve concerns and/or clarify the order" ("Guidelines for Medication Management in Schools," at p. 20, Office of Student Support Servs. [Oct. 2022], available at https://www.p12.nysed.gov/sss/documents/medication-management.pdf).

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

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

- The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;

- The qualifications required to meet the student's health needs;

- The student's proximity to a nurse;

- The building nurse's student case load; and,

- The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf).

With this as a backdrop, a review of the evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year by recommending school nurse services to meet the student's health and medical needs.

Based on the district's prior written notice and the district school psychologist's testimony, the February 2023 CSE relied on the following evaluative information to develop the student's IEP: a January 2022 social history update, a February 2022 classroom observation, a February 2022 psychoeducational evaluation, September 2022 medication administration forms, a January 2023 iBrain quarterly progress report, and a February 2023 iBrain report and education plan (February 2023 iBrain education plan), as well as input from the parent and the student's iBrain providers who attended the February 2023 CSE meeting (see Dist. Exs. 9 at p. 2; 12 ¶ 8; see also Dist. Ex. 1 at pp. 5, 19-21, 23, 39, 75-77).[12] Based on the "medical forms submitted," the February 2023 IEP reflected that the student had received diagnoses of cerebral palsy, an intellectual disability, a seizure disorder, and reflux, and he received nutrition through a "g-tube" (Dist. Ex. 1 at p. 23). In addition, the February 2023 IEP noted that the student required "medication administered daily, g-tube feeding, and suctioning" (id.).

At the impartial hearing, the district school psychologist who attended the February 2023 CSE meeting testified that, in reaching the decision to recommend school nurse services "as needed" in the nurse's office for the student, she had "deferred" to the recommendation to other unnamed decisionmaker(s) in the district's "Office of Student Health—Central Office Nursing" (Dist. Ex. 12 ¶ 13; see Dist. Ex. 1 at p. 67). She also testified that she understood that the Office of Student Health had "reviewed the medical information and [had] declined to recommend a 1:1 nurse on the documentation submitted" (Dist. Ex. 12 ¶ 13). On cross-examination, the school

[12] The medication administration forms consist of five separate documents: a "Medical Accommodations Request Form Addendum 2022-2023," a "General Medication Administration Form," a "Request for Provision of Medically Prescribed Treatment (Non-Medication)," a "Seizure Medication Administration Form," and "Medical Accommodations Request Form" (Dist. Ex. 7 at pp. 1-5). For ease of reference, the combined document will be referred to as "medical forms" throughout this decision.

psychologist testified that she "believed" the February 2023 CSE had a "conversation about nursing," and she acknowledged that it was the CSE's responsibility to recommend nursing services for students (Tr. p. 94). In addition, the school psychologist testified that the February 2023 CSE had sufficient information about the student's needs and had "received a plethora of information from the [iBrain] team that had up-to-date assessments, levels of progress, and current levels of functioning well documented" (Tr. pp. 104-05). She further testified that after she received the medical forms completed by the student's physician, she submitted the forms to the "nursing unit" (Tr. p. 107).

At the impartial hearing, the district presented a staff nurse employed by the Office of School Health who worked with the special education student information system (SESIS) department as a "SESIS support nurse" (support nurse) for the district (see Tr. pp. 56-58). She testified that, as a support nurse, she was responsible for "review[ing] nursing referrals that c[a]me into [the] unit" (Tr. p. 58). She was also responsible for reviewing "medication administration forms, which [we]re written orders from a student's provider, medical provider" submitted to the nursing unit through SESIS; according to the support nurse, based on that "medical information," her unit would make recommendations for the "level of nursing services that the student should receive in school" (Tr. pp. 58-59). After making such recommendation, the support nurse would then enter the information into SESIS where a CSE could view it (see Tr. p. 59).

With respect to the student in this case, the support nurse testified that, in February 2023, the "IEP team sent in a nursing referral," which meant that the "nursing referral was ready for a review" (Tr. p. 60). She recalled that the nursing referral received for this student was for "non-one-to-one"—or "school nurse services"—and that that was "what the team created" (id.).[13] The support nurse explained that the unit could also receive a "one-to-one nurse referral, which mean[t] that the student require[d] more skilled nursing services" (Tr. pp. 61-62).[14] For this student, the nursing referral included his completed medical forms reflecting his need for two medications to be administered "as needed for fever or pain," a seizure medication to be administered "as needed," and that the student had a "gastronomy tube" (g-tube) (Tr. pp. 60-63; see generally Dist. Ex. 7). In addition, the support nurse testified that, based on the student's documentation, he required a "daily [g-tube] medication for [g-tube] feeding" (Tr. p. 61). Given the information that she reviewed, the support nurse testified that she recommended "[s]chool nurse services" because "it appeared that the student c[ould] be safely managed by the school nurse" (Tr. pp. 62-63).

To determine whether a student required one-to-one nursing services versus school nurse services, the support nurse testified that, for a school nurse, she looked at the "acuity of the medications," meaning whether the student required medication on a daily basis or on an as-needed basis, and if the student required "more acute care or continuous support from a nurse, then a one-

[13] The district school psychologist who attended the February 2023 CSE meeting testified that, after the student's physician or providers completed the medication administration forms and sent the completed forms to her, she submitted the completed forms to the Office of School Health (see Tr. p. 107).

[14] The support nurse testified that regardless of the form of the referral—that is, whether it was for a "non-one-to-one or a one-to-one" nurse—she could change the recommendation based on the medical information submitted (Tr. pp. 64-65).

to-one [nurse] would be recommended" (Tr. p. 63).[15] The support nurse testified that she felt she had sufficient information to make the student's nursing recommendation, and based on the frequency of the required medications, "it appeared the student [could] be safely managed by the school nurse" (Tr. pp. 65-66; see generally Dist. Ex. 7).

However, on cross-examination the support nurse testified that she did not participate in the February 2023 CSE and had never met the student (see Tr. p. 68). She explained that she and the nursing unit were "normally not part of [the] IEP meeting" or "invited to" attend (Tr. pp. 68-69). The support nurse testified that the nursing unit gave a recommendation, which was then given to the CSE, and the CSE made the decision to present to the family at the meeting (see Tr. p. 69). The support nurse further testified that she believed that she reviewed the student's nursing referral on February 15, 2023, and the only documents she used to make her recommendation were the medical forms completed by the student's physician (see Tr. pp. 69-70). The recommendation for a school nurse was based "solely" on the information presented on the student's medical forms, as written by his physician (Tr. pp. 77-78).

According to the medical forms submitted to the Office of School Health, the student had generalized primary seizures, which lasted from 10 seconds to one minute and occurred one to two times per week (Dist. Ex. 7 at pp. 1, 4). The medical forms noted that the student required pump feeding via g-tube at 9:30 and 1:30 each day, as well as a g-tube "[f]lush with water" before and after feeding (id. at p. 3). The medical forms also noted that the student required "[o]ral/[p]haryngeal suctioning" (id.). In addition, the student's physician noted on the medical forms that the student required "close monitoring due to risk of seizure, physical disabilities" (id. at p. 6).

As noted above, in addition to the student's medical forms, the February 2023 CSE had additional evaluative information to rely on to develop the student's IEP for the 2023-24 school year, which included the student's iBrain education plan for the 2023-24 school year. A review of the February 2023 IEP indicates that the CSE imported the IHP from the student's 2023 iBrain education plan into the February 2023 IEP; according to the IHP—and as reflected, in part, in the IEP—the student had "mild persistent asthma"; an "acquired brain injury (cerebral palsy, seizure disorder)"; "global developmental delays"; and he used a "g-tube for nutrition, hydration and medication administration" (compare Dist. Ex. 1 at pp. 41-45, with Parent Ex. C at pp. 43-47). The IHP in the February 2023 IEP identified the same "Goals," "Nursing Interventions," and "Expected Outcomes" as reported in the IHP in the iBrain education plan for issues that included the following: "mild persistent asthma;" risk of aspiration; g-tube feeding; risk of injury related to seizure activity; activities of daily living; mobility and wheelchair access; and communication and independence (compare Dist. Ex. 1 at pp. 41-45, with Parent Ex. C at pp. 43-47). Additionally, the February 2023 IEP reflected that the student experienced issues with leakage at the g-tube site and required a nurse to manage his medical needs "at all times," including for frequent feedings, maintenance of his g-tube site, and assisting with management of oral secretions; this language was consistent with the iBrain education plan but for iBrain's determination that the student required "a 1:1 nurse" to meet those needs (compare Dist. Ex. 1 at p. 28, with Parent Ex. C at pp.

[15] According to the support nurse, her use of the term "acute" referred to the "extent and complexity of the student's need," such as if a student required "constant monitoring" for a "ventilator" or "pulse oximetry" (Tr. p. 64).

8-10). However, the support nurse was not provided with the iBrain education plan—or any other information about the student and his needs, including information reported by the parent and his iBrain providers at the February 2023 CSE—to rely on to fully understand the student's health and medical needs when making the recommendation for nursing services.

At the impartial hearing, the parent testified that the student "often suffer[ed] physical discomfort related to his feeding tube and/or [gastrointestinal] issues" and as a result, he required "additional support from his nurse to remain an active participant in class or during related service sessions" (Parent Ex. J ¶ 6). On cross-examination, the parent testified that, for the past two years, the student has experienced issues with his g-tube site, such as "constant leakage," which required "constantly [] changing the dressing," "three [or] four times a day" (Tr. pp. 145-46). She further testified that the student needed a 1:1 nurse to "constantly be on top of it," "[o]therwise, the leakage from inside his stomach br[oke] down his skin" (Tr. p. 146).

Here, the evidence in the hearing record shows that the February 2023 CSE had additional information about the student's health and medical needs during the school day that were not included in the medical information submitted by the student's physician and were not reviewed and considered by the support nurse. This appeared to be the result of a cookie cutter process that lacked sufficient attention to the individual needs of the student. As one court put it "Here, [the district's] policies never required [Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings (J.L. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464 [S.D.N.Y. 2018]). In this case, the support nurse was not part of the CSE process and reviewed the only the medical forms sent to the nursing unit, and perhaps, had she participated in the February 2023 CSE meeting, the support nurse would have had access to the same information available to the CSE upon which to base her nursing recommendation for the student. However, even assuming that the support nurse was not required to participate in the CSE meeting, she should have reviewed and considered the same information the CSE had available to it to determine the student's nursing needs. As a result, the evidence in the hearing record supports the IHO's finding that the district failed to sustain its burden to establish that the recommendation for school nurse services was appropriate to meet the student's needs, and overall, that the district failed to offer the student a FAPE for the 2023-24 school year.[16]

VII. Unilateral Placement

Having determined that the district failed to offer the student a FAPE for the 2023-24 school year, the IHO then examined the parent's evidence and concluded that she sustained her burden to establish that iBrain was an appropriate unilateral placement for the student. In the cross-appeal, the district contends that the IHO erred in reaching this conclusion, arguing that the parent failed to establish the student's need for 1:1 nursing services, the credentials or licensing of the providers, and whether the nursing or transportation services were actually implemented.

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

[16] In light of this determination, there is no need to reach the issue raised by the district concerning the school location letter.

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).

With respect to the district's contention that the parent failed to present sufficient evidence about the credentialing or licensing of the student's iBrain teachers and related services provides, it is well settled that a unilateral placement need not employ certified teachers or develop IEPs for

its students (Carter, 510 U.S. at 13-14). Thus, whether the student's classroom teacher(s) were State certified is not critical to the analysis of the appropriateness of iBrain in this case. Similarly, the credentials of the related services providers, while potentially concerning, is not dispositive to the analysis of the appropriateness of iBrain and the district does not point to any legal authority to the contrary (see Answer & Cr. App. ¶¶ 21-22).[17] With regard to the credentials of the student's related services providers—and contrary to the IHO's finding and the district's argument—the iBrain education plan in evidence for the 2023-24 school year reflects all of the credentials of those who participated in the development of the student's plan, with the exception of the physical therapist and the individual from the assistive technology department (see Parent Ex. C at p. 68). In addition, the district does not point to any evidence in the hearing record wherein the district attempted to develop the hearing record on this issue or otherwise asserted that iBrain was not an appropriate unilateral placement because the student's teachers lacked State certification or that the student's related services providers were unlicensed and therefore engaged in unauthorized practice (see Tr. pp. 50-51). Under the totality of the circumstances, the district did not rebut the evidence that the student's teachers and related service providers at iBrain failed to provide appropriate programming to the student due to a lack of adequate qualifications. Thus, the district's argument must be dismissed, and the IHO's decision to reduce the amount awarded for the costs of the student's related services at iBrain for the 2023-24 school year by 50 percent on this basis must be reversed.

With regard to the district's contentions in its cross-appeal concerning the student's 1:1 nursing services and transportation services, these arguments pertain to whether these services are excessive in cost or segregable (i.e., the services are beyond what the student needs to make progress), and not to whether the parent sustained her burden to establish the student's need for 1:1 nursing services or transportation services. Therefore, these arguments will be addressed below, and the IHO's finding that the parent sustained her burden to establish that iBrain was an appropriate unilateral placement for the 2023-24 school year will not be disturbed.

VIII. Equitable Considerations

Turning next to equitable considerations, the parent argues that the IHO erred by reducing the amounts awarded to fund the student's tuition at iBrain (base tuition and supplemental fees for related services), the student's 1:1 nursing services, and the student's transportation services. The district asserts, as part of its cross-appeal, that the transportation and nursing awards must be reduced on equitable grounds. The district contends that it offered to provide transportation services prior to the start of the school year, but iBrain informed the district that no families were interested. The district also contends that at least one district court decision pointed to the close relationship between the iBrain founder and the transportation company's director, which hinted at the possibility of waste, fraud, and abuse. The district further argues that the transportation and nursing costs are excessive, and must be reduced on this basis.

[17] Assuming for the sake of argument that iBrain chose to use related service providers who were not properly credentialed by the State, it is unclear if the use of an unlicensed or improperly certified related service provider would necessarily preclude reimbursement under the IDEA; however, the unauthorized practice of a licensed profession could result in potential criminal and/or civil liability under State law. However, those issues are not within the jurisdiction of this forum.

The final criterion for a reimbursement award is that the parent's 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"]).[18]

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see 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 agency was unreasonable or regarding any segregable costs charged by the private 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 specifically, 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

[18] In support of the parent's contention that the IHO erred by failing to award the parent the full cost of the transportation contract with Sisters Travel, the parent relies on a recent district court case, which reviewed similar contracts with the same transportation company and determined 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 p. *5 [S.D.N.Y. Feb. 22, 2022]). In opposition, the district relies on another holding from the same district court, Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023), to support its position that the IHO properly limited the award of transportation costs to be within the range of fair market rates, as opposed to the amount the parent contracted to pay in the transportation agreement. In further support, the district points to a similar holding in Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023). It is worth noting that none of the cases cited by the parties are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred in reducing the award of transportation funding, as all three of the matters cited by the parties involved implementation of either pendency orders or a final IHO decision and, therefore, the cases focused on enforcement and the language included in the orders that were being enforced rather than a review of the administrative decisions themselves (see Davis, 2023 WL 5917659 ["the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 ["[p]laintiffs have not met the IDEA's exhaustion requirement with respect to challenges to the [IHO's decision] itself, as opposed to [d]efendant's implementation of the [IHO's decision]]; Abrams, 2022 WL 523455 ["[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]).

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"]).

Generally, an excessive cost argument focuses on whether the rate charged for service was reasonable and requires, at a minimum, evidence of not only the rate charged by the unilateral placement, but evidence of reasonable market rates for the same or similar services. Overall, the IHO erred by conducting a cost analysis without any fact evidence to support it. For example, the base tuition cost for iBrain is reflected in the enrollment contract, and the hearing record failed to contain any evidence—such as the amount that other nonpublic schools charged for similar instructional services—upon which to analyze whether iBrain's base tuition was excessive (see generally Tr. pp. 1-160; Parent Pendency Exs. A-B; Parent Exs. A-D; E-K; Dist. Exs. 1-17; Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.). Similarly, the IHO's rationale for reducing the amounts awarded for the student's 1:1 nursing services and transportation services relied on his own declaration that the taxpayers should not pay for services not provided—but absent any evidence that these services were not delivered to the student—and essentially altered the terms of the contractual language without evidence or an articulated equitable basis to do so (see IHO Decision at p. 20; see generally Tr. pp. 1-160; Parent Pendency Exs. A-B; Parent Exs. A-D; E-K; Dist. Exs. 1-17; Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.).

In addition, while the district submitted a document reflecting Medicaid reimbursement rates from March 2018, the district did not present evidence demonstrating that any private providers who contemporaneously accepted similar rates for either nursing or transportation services, or moreover, any evidence that rates as low as the 2018 Medicaid rates were paid by the district in the 2023-24 school year for nursing or transportation services for these students (see generally Tr. pp. 1-160; Parent Pendency Exs. A-B; Parent Exs. A-D; E-K; Dist. Exs. 1-17; Parent Post-Hr'g Br.; Dist. Post-Hr'g Br.). In other words, a Medicaid reimbursement rate is set by the government, which has very different bargaining power than private citizens and absent evidence that it is likely that parents can acquire services at such rates, the district's argument is unpersuasive. More plausible might be evidence of statistics presented from either the United States Bureau of Labor Statistics or New York State Department of Labor's Occupational Employment and Wage Statistics as suggested by an IHO in a recent case (see Application of a

Student with a Disability, Appeal No. 23-078), but the district in this case has not presented evidence of market-based data of this variety.[19] Therefore, the hearing record fails to contain any evidence upon which to reduce the amounts awarded to fund either the student's 1:1 nursing services or transportation services, and the IHO's reductions must be reversed.

VII. Conclusion

In summary, the evidence in the hearing record supports the IHO's findings that the district failed to offer the student a FAPE in the LRE for the 2023-24 school year and that iBrain was an appropriate unilateral placement for the student. The evidence in the hearing record does not, however, support the IHO's decision to equitably reduce the amounts awarded for the costs of the student's base tuition, supplemental fees (related services), nursing services, and transportation services; instead, the evidence supports a finding that equitable considerations weighed in favor of the parent's requested relief.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL DISMISSED.

IT IS ORDERED that the IHO's decision, dated November 20, 2023, is modified by reversing those portions which reduced the amounts awarded for the costs of the student's base tuition, supplemental fees (related services), nursing services, and transportation services; and,

IT IS FURTHER ORDERED that the district shall fund the costs of the student's unilateral placement including the base tuition of $190,000, supplemental fees (related services) of $116,544, nursing services of $265,960, and transportation services of $111,180, consistent with the contracts the parent entered into evidence to obtain such services.

Dated: **Albany, New York**
February 8, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[19] If an IHO were to take judicial notice of such government-published statistical information, it would only be appropriate to do so after disclosing to the parties the intention of doing so and providing them with an opportunity to be heard.