The University of the State of New York

The State Education Department
State Review Officer
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No. 24-107

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Brian Gauthier, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondent, by Anna Hallam, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for the tuition and transportation costs associated with the student's unilateral placement at the International Academy for the Brain (iBrain) for the 2023-24 school year.[1] The parent cross-appeals from the IHO's failure to address issues raised in the due process complaint notice. The appeal must be sustained in part. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school

[1] Based on the evidence in the hearing record, the student's grandmother was described as her guardian; therefore, consistent with State regulation, the grandmother will be referred to as the "parent" throughout this decision (see Tr. p. 17; Parent Ex. A at p. 1; see also 8 NYCRR 200.1[ii][1]).

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[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

Given the limited issues on appeal, a complete recitation of the student's educational history is unwarranted. Briefly, the student—who is eligible for special education and related services as

a student with a traumatic brain injury—has attended iBrain since fall 2021 (see Parent Ex. K ¶ 11; Dist. Ex. 1 at p. 1).[2, 3]

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 and to seek public funding from the district (see Parent Ex. E at p. 1).

On June 24, 2023, the parent executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year, from July 5, 2023 through June 21, 2024 (see Parent Ex. F at pp. 1, 6). The parent also executed a "School Transportation Annual Service Agreement" with "Sisters Travel and Transportation Services, LLC" (Sisters Travel) for the 2023-24 school year effective from July 1, 2023 through June 30, 2024 (Parent Ex. G at pp. 1, 6).[4]

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, 7-9). As relief, the parent sought an order directing the district to fund the costs of the student's tuition, related services, 1:1 nursing services, 1:1 paraprofessional services, and transportation services for the 2023-24 school year (id. at pp. 9-10). In addition, the parent requested an interim order directing the district to fund an independent educational evaluation of the student (neuropsychological) by a provider selected by the parent and for the district to "conduct any other necessary evaluations" of the student (id. at p. 10).

On August 11, 2023, the IHO conducted a prehearing conference; on September 14, 2023, the impartial hearing resumed and concluded on January 12, 2024, after six days of proceedings (see Tr. pp. 1-558). In a decision dated February 19, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, iBrain was an appropriate unilateral placement, and equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 4-7). With respect to the student's unilateral placement, the IHO described iBrain as an "adequately-designed program that was tailored to her complex and intensive needs" (id. at p. 7). In addition, the IHO found that the transportation services obtained by the parent were appropriate for the student (id.). With regard to equitable considerations, the IHO noted that, although the district asserted that iBrain's tuition and transportation costs were excessive, the district failed to "present evidence showing that such costs [we]re unreasonable and excessive," despite having the opportunity to do so at the impartial hearing (id.). As a result, the IHO declined to reduce the amounts awarded to the parent for tuition and transportation costs on equitable grounds (id.).

[2] 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].

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

[4] The transportation agreement does not bear a date identifying when the parent executed the contract (see generally Parent Ex. G).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by awarding full reimbursement for the costs of the student's iBrain tuition and Sisters Travel transportation services for the 2023-24 school year. In particular, the district argues that the IHO erred in finding that the parent met her burden to prove that iBrain offered the student specially designed instruction and in finding that equitable considerations weighed in favor of an award of tuition funding. As relief, the district seeks to overturn the tuition and transportation relief awarded by the IHO.[5]

The parent interposes an answer and cross-appeal. In the answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. As a cross-appeal, the parent asserts that the IHO failed to address all of the issues raised in the due process complaint notice. In addition, the parent asserts that the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year should be affirmed.

In an answer to the parent's cross-appeal, the district responds to the allegations and generally argues that the parent was not aggrieved by the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year—a determination that the district is not appealing as the aggrieved party—and therefore, the IHO's alleged failure to address all of the issues in the due process complaint notice is of no consequence in this proceeding.[6]

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]).

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[5] The district affirmatively asserts that it is not appealing the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year (see Req. for Rev. ¶ 1). Consequently, the IHO's determination 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]).

[6] Given that the district has not appealed the IHO's finding that the district failed to offer the student a FAPE for the 2023-24 school year, it is not necessary to reach the issues raised in the parent's cross-appeal as alternative bases upon which to conclude that the district failed to offer the student a FAPE for the 2023-24 school year, and as such, the issues raised in the parent's cross-appeal will not be further addressed in this decision.

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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). 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 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. Unilateral Placement at iBrain

The crux of the district's appeal with regard to the student's unilateral placement at iBrain is that the parent failed to establish that the student received specially designed instruction. More specifically, the district contends that the IHO erred by failing to consider evidence elicited from the parent at the impartial hearing indicating that the student slept during the school day at iBrain and that iBrain staff continued to deliver hands-on related services to the student while she slept. The district argues that the IHO should have found iBrain was not appropriate because the hearing record failed to contain any evidence demonstrating how services delivered to the student while she slept constituted specially designed instruction.

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Overall, the student's needs are not in dispute.[7] However, a brief description thereof provides context for a determination of whether iBrain is an appropriate unilateral placement for

[7] Upon review and comparison, it appears that the March 2023 CSE relied primarily on the student's iBrain report and education plan, dated March 21, 2023 (March 2023 iBrain plan) to generate the student's March 2023 IEP for

the student. Generally, the student has been diagnosed as having spastic quadriplegic cerebral palsy, global developmental delays, scoliosis, encephalitis, and cortical visual impairment (see Parent Exs. D at p. 1; K ¶ 9). The evidence in the hearing record also reflects that the student receives "nutrition through G-tube," is nonambulatory and nonverbal, and requires "extensive supports for mobility throughout her school day" (Parent Ex. D at p. 1; see Parent Ex. K ¶ 10). In addition, the student is "dependent on caregivers to assist in all daily living activities such as eating, toileting, and hygiene" (Parent Ex. D at p. 1). According to the March 2023 iBrain plan, the student "expresses herself through facial expressions (smiles) which [are] interpreted as agreement by her communication partners" (id.). When presented with objects and manipulatives, the student is given "verbal descriptions and repeated prompts," as well as "additional response time within her environment" (id.). To explore objects, the student requires "hand-under-hand facilitation" and she "benefits from a quiet environment" (id.). As noted in the March 2023 iBrain plan, "[w]hen alert, [the student] relies upon [an alternative augmentative communication (AAC) device] for explicit communication" and she made choices by using a "switch located either [o]n her right or left side of her head with the recorded message 'that's my choice'" (id.).

According to the March 2023 iBrain plan, the student could "participate in 1:1 academic session[s], as well as small group activities and whole class activities" (Parent Ex. D at p. 3). In order to participate in the classroom, the student required "highly intensive multimodal support and a 1:1 paraprofessional," as well as "highly intensive support and a similar group of peers to support her social interactions" (id.). The plan further noted that the student required "total assistance" for all self-care skills, such as dressing, managing fasteners, toileting, grooming, feeding, and transfers (id.). With regard to fine motor skills, the student demonstrated some reaching skills with hand-over-hand assistance and minimal functional grasp patterns but only with the use of assistive devices; however, for many fine motor skills, she required either "total assistance" ("MACS," bilateral coordination) or, at that time, she was unable to demonstrate the skill (hand dominance, pinch pattern, finger isolation, and manipulation) (id. at p. 4). Overall, the student required "maximal assistance for completion of all activities of daily living (ADLs), and support throughout the day to aid in attention to tasks, use adapted devices and assistive technology, don/doff orthotics, position changes, behavior and impulsivity management, and overall safety" (id. at pp. 4-5). The student also required the use of a "stroller and an activity chair for all mobility needs in the community and at school," with total assistance to propel (id. at p. 5). The student also used a "stander for a minimum of one hour per day to promote prolonged stretch to her bilateral lower extremities, improved bone density and hip alignment, improved digestion and trunk and head strengthening"; the use of the stander further provided the student with opportunities to aide her social development by allowing her to be "at eye-level with her ambulatory peers" (id.).

Within the classroom, the March 2023 iBrain plan indicated that the student benefited from engaging in a multisensory environment to "increase attention, body awareness, and motivation for participation in functional activities" (Parent Ex. D at p. 5). The student often required breaks to maintain attention, the use of assistive technology, and "extended time to aid in motor planning and cognitive processing during all activities" (id. at pp. 5-6). Because the student was easily distracted, she required a "quiet, isolated environment to work towards skill acquisition before

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the 2023-24 school year (compare Parent Ex. B, with Parent Ex. D).

generalizing to the classroom environment" (id. at p. 6). According to the March 2023 iBrain plan, the student demonstrated strengths, such as having a "physical reaction to sensory stimuli place in front of her," and she "communicate[d] discomfort by crying, resisting movement, grinding her teeth, and making grunting noises" (id.). The student could tolerate various positioning with maximal assistance; and it was noted that she had a "very supportive family" (id.).

In the March 2023 iBrain plan, it was noted that the student required "consistent maximal verbal and tactile cueing and maximal physical assistance to engage in tasks due to low arousal, limitations in active range of motion in her extremities, and limitations in motor control, strength, and endurance" (Parent Ex. D at p. 6).

To address the student's needs, the March 2023 iBrain plan included recommendations for 12-month programming, which consisted of a 6:1+1 special class placement along with the following related services: individual OT, PT, and speech-language therapy, each at a frequency and duration of five 60-minute sessions per week; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual hearing education services; one 60-minute session per week of assistive technology services; two 60-minute sessions per week of individual music therapy and one 60-minute session per week of music therapy in a group; and one 60-minute session per month of parent counseling and training (see Parent Ex. D at pp. 48, 53-54). Further, the iBrain plan included recommendations for the services of a 1:1 paraprofessional and a 1:1 nurse throughout the school day, transportation services, assistive technology devices, and training for school personnel in the areas of feeding, lifting and positioning, seizure safety, and use of an AAC device (id. at pp. 54-55).

In addition to the aforementioned recommendations, the March 2023 iBrain plan included annual goals to address the student's needs in the areas of academics (literacy, mathematics, cognition, and social skills), vision, assistive technology, speech-language (receptive and expressive language, pragmatic skills, and feeding and swallowing), PT, OT (academics, play skills, and self-care), music therapy (sensorimotor skills, cognition, and communication), parent counseling and training, and paraprofessional support (see Parent Ex. D at pp. 34-51).[8] An individualized health plan (IHP), included within the iBrain plan, outlined the student's nursing diagnosis, goals, nursing interventions, and expected outcomes related to needs associated with the student's diagnoses and listed the 1:1 paraprofessional and 1:1 nurse as individuals responsible for coordination of intervention as needed (id. at pp. 29-32).

The March 2023 iBrain plan also identified strategies to address the student's management needs, including, in part, 1:1 instruction, a highly structured classroom or corner room with less stimulus from visual and auditory distractions, rest breaks as needed to "sustain energy and attention," adaptive equipment, the support of a 1:1 paraprofessional and a 1:1 nurse, adaptive equipment, access to an AAC device, and verbal and tactile cueing (see Parent Ex. D at pp. 27-29).

[8] The March 2023 iBrain plan indicated that, at that time, the student's annual goals related to feeding had been "placed on pause . . . due to lack of medical clearance for [the student] to consume solids and liquids by mouth" (Parent Ex. D at p. 20).

At the impartial hearing, the parent and the iBrain deputy director of special education testified (see Tr. pp. 205-310, 331-477; Parent Ex. K). In describing the student, the parent testified that, as her initial medical conditions improved, the student's g-tube had been retained, to date, to continue to provide her with nutrition and hydration because the student slept for 24 to 48 hour periods at a time (see Tr. pp. 336-37, 342-43). The parent explained that the student would receive her nutrition via the g-tube when she was sleeping, but, when awake, the student was fed by mouth (Tr. p. 343). The parent testified at one point during the impartial hearing that when the student first began attending iBrain, she slept for "six days a week, six out of seven" days per week (Tr. pp. 446-47). When describing the student's progress at iBrain since she began attending in fall 2021, the parent testified at another point that, initially, the student would "sleep for like three or four days during the week," but currently, as already mentioned, the student only slept for "two days out of a seven-day week" (Tr. pp. 356-57). According to the parent, these "sleeping stints" were related to the student's traumatic brain injury, but she would still send the student to iBrain even if she was asleep; the parent explained that this occurred "once or twice a week" (Tr. pp. 357, 441-43).

With regard to the student's program at iBrain, the parent testified that she was receiving several therapies, including vision therapy, assistive technology, OT, PT, yoga, music therapy, and speech-language therapy, in addition to instruction (see Tr. pp. 351-52, 436).[9]

During cross-examination, the parent reported that she sent the student to school while she was asleep (Tr. pp. 441-42). The parent explained that the student continued to receive "her therapy" at iBrain even if she was asleep "because it's very important for her limbs to move" and for the student to "get her weight bearing" (Tr. p. 441). She also testified that the student did "a lot in her sleep" and, in some ways, it was "interesting" and "pretty cool," as the student did not "fight as much" (Tr. p. 441-42). The parent testified that it was "very, very good for [the student's] bones and her body because she [did not] fight as much" or "tense up as much" when asleep (Tr. p. 442). According to the parent, the student could do a variety of things in her sleep, including walking, sitting, feeling things with her fingers, stretching, and accessing music (see Tr. p. 442). In addition, the parent reported that it was "therapeutic" for the student because when she woke up, she was "better able to function," as she was "more limber and able to move better" (Tr. pp. 442-43). The parent noted that, even while asleep, the student got "everything that she need[ed]" and that the student was a "very unique case," "not typical," and that she did not "follow protocol" (Tr. p. 443).

When asked during cross-examination how the student received speech-language therapy or education services at iBrain when she was asleep, the parent testified that the "education services [we]re actually pretty simple, because they use beading and things like that" so the student could "hold, actually she grasp[ed] better in her sleep" (Tr. p. 443). Or, according to the parent, iBrain had the student "outline or trace the letter B or something like that" (Tr. p. 443). The parent added

[9] Although the hearing record did not include a copy of the student's schedule of classes at iBrain for the 2023-24 school year, the parent testified that the student generally got picked up for school between 8:00 and 8:30 a.m. and arrived back home from school between 4:30 and 5:00 p.m. (see Tr. pp. 435-36). She also testified that the student received an extended school day at iBrain and that the majority of the student's school day consisted of related services (see Tr. pp. 436-37).

that the student "gain[ed] a lot by osmosis, because even in [the student's] sleep, her heartrate" would increase or "jump up" when she heard the parent's voice or when she was told something, and she "could kind of follow directions" (Tr. p. 443). The parent testified that the student did not receive vision therapy or assistive technology when sleeping (see Tr. pp. 443-44). According to the parent, the student could, however, receive OT and PT while she slept and she could do the "walking," "standing," and "education," and noted that, when she slept, it was an "excellent time to introduce concepts to her" (Tr. p. 444).

When asked if the student had medical documentation to support the provision of services to the student while she slept, the parent responded that she did not have "any documentation saying" the student should not receive services while sleeping (Tr. p. 444). When asked if she had executed a release to allow iBrain to provide services to the student while she was asleep, the parent responded that she "insisted on it" but could not specifically recall if she signed anything (Tr. pp. 444-45). In addition, the parent noted that, "we all know that this is the way [the student] works"; moreover, the parent indicated that the student had "zero restrictions" from her medical doctors (Tr. p. 445).

When asked how the student's "frequent sleeping" affected her "arousal levels during other sessions," the parent replied that when the student was sleeping, "she's sleeping'"; and on the days when the student is not sleeping, "she's not sleeping" (Tr. p. 446). The parent could not explain it any differently, noting, however, that they could not just wait to provide services to the student when she was not sleeping (see Tr. p. 446). According to the parent, if they "rel[ied] on her pattern, [the student] would never get therapy" (Tr. pp. 446-47).

When asked how the student participates in music therapy at iBrain, the parent testified that it was "pretty passive," and, as reflected in the March 2023 iBrain plan, the student received hand-over-hand assistance to participate when she was asleep (Tr. pp. 450-53). The parent explained that, at times, the providers put the student's hands on their throats to sing or talk (see Tr. pp. 452-53). According to the parent, the student could vocalize while asleep, such as crying, saying "no," and making "uh" sounds (Tr. p. 453). The parent reported that doing all of these things a number of times while the student was sleeping had an impact on the student when she was awake, as she could do certain things on her own volition (see Tr. p. 453).

With respect to the vision therapy and assistive technology services that could not be delivered to the student while she was asleep, the parent confirmed that iBrain offered make-up sessions when the student was awake (see Tr. pp. 453-54).

A review of the March 2023 iBrain plan corroborates the parent's testimony about the student sleeping while at iBrain. For example, in describing the student's physical presentation, the March 2023 iBrain plan indicated the student tended to "present with low arousal for 24 hours, then be awake and alert for the next 24 hours" (Parent Ex. D at p. 5). The plan indicated that, while the student could be "awoken from her sleep," she was "typically 'fussy' with crying or whining" (id.). In describing the student's needs, the March 2023 iBrain plan reflected that the student was "in a state of low arousal [two to three] days per week and require[d] extensive sensory

input and changes in position to attempt to stimulate and increase arousal (weight bearing, vibration plate, and music)" (id. at p. 6).

With regard to the student's present level of visual performance, the March 2023 iBrain plan noted that, "over the past year," "[t]here seem[ed] to have been some physiological changes . . . that cause[d] [the student] to need more sleep and as a result, she may be lethargic throughout one or two vision sessions per week" (Parent Ex. D at p. 9). According to the iBrain plan, "[t]his tendency negatively impact[ed] [iBrain's] ability to assess her functional vision skills on a regular basis" (id.). With respect to the student's vision education services, it was also noted that, "[d]ue to [the student's] inclination to sleep for lengthy periods during the school day, she [wa]s often lethargic upon arrival to Vision sessions" (id. at p. 12). Notably, when the student was "lethargic," she "tolerate[d] full, physical support at her forearms, hands and fingertips for assistance in all activities such as opening the sensory box, retrieving toys and manipulation of them" (id.). According to the March 2023 iBrain plan, when the student was lethargic, she benefited from "detailed auditory description and that repeated practice of motor-planning routines may positively impact [the student's] ability to use her hands and fingers in these activities while wakeful and able to use her vision to attend" (id.).

With regard to the student's present levels of social development, the March 2023 iBrain plan indicated that, "[a]s a result of her brain-based disorder, her arousal [wa]s low, [and] she frequently sle[pt] during the school day even when she d[id] any type of sensory assistance (verbal, tactical, visual, auditory)" (Parent Ex. D at p. 11).

With regard to the student's present levels of speech, the March 2023 iBrain plan noted that, "[o]n occasion, [the student] display[ed] low motivation, arousal, and attention and she require[d] maximal multimodal cues and/or physical support to use any form of communication" and "[o]n these days, the majority of the session consist[ed] of elevating arousal levels" (Parent Ex. D at p. 17). It was also noted that the student's rate of progress fluctuated from "day to day depending on her level of arousal, alertness, motivation, energy, and interest in activities/objects" (id.).

In reporting on the student's speech-language skills, the March 2023 iBrain plan noted that "her progress toward meeting her speech and language goals varie[d] from session to session due to her overall state of alertness, arousal, motivation and interest in speech sessions" (Parent Ex. D at p. 21). It was further noted that the student "depend[ed] on numerous breaks, trials and repetitions to engage throughout the sessions" (id.). Similarly, in reporting on the student's performance in OT, the March 2023 iBrain plan indicated that the student's "arousal level varie[d] from day to day, but she present[ed] with low arousal and eyes shut between two and three days a week" (id.). Additionally, "[m]inimal changes in arousal occur[red] after stretching, changes in positioning, or when provided with sensory input" (id.). It was also noted that the student's "arousal levels fluctuate[d] and her performance [wa]s dependent on the day" (id. at p. 22). With respect to the student's performance in PT, the March 2023 iBrain plan indicated that, similar to OT, her progress therein depended on "several factors including her endurance, arousal level, emotional and physical status during the day" (id. at p. 25). It was also noted that in PT, "[s]ignificant time [wa]s spent on stretching, sensory regulation and passive range of motion to help her body regulate and increase arousal to participate in her school day"; "[o]n such days, [the student] present[ed] with crying or low arousal during most or all activities" (id.).

Next, with regard to the student's performance in music therapy, the March 2023 iBrain plan described her participation as "inconsistent" (Parent Ex. D at p. 26). As noted, the student's "alertness range[d] from unarousable sleep to active participation through body movements, localizing, and vocalizations" (id.). According to the March 2023 iBrain plan, "[o]n days that [the student wa]s asleep and unarousable, [the] family and guardian had reported they prefer[red] for [the student's] therapies to move forward passively," which, during music therapy, consisted of the student "passively . . . tolerating stimulus and positioning" (id.).

Based on the foregoing evidence, the district's concerns about the student receiving services at iBrain while she slept are well-founded. The IHO's analysis of the unilateral placement at iBrain consisted of three sentences which provided little to no reasoning regarding his determination (IHO Decision at p. 7). Moreover, a review of the IHO's decision reflects that, in reaching the determination that the parent sustained her burden to establish that iBrain was an appropriate unilateral placement for the 2023-24 school year, the IHO did not consider this information regarding the district's concerns during extended periods of time in which she slept, as this aspect of the student's functioning or need is not mentioned anywhere in the decision (see generally IHO Decision). Notably, the parent testified with complete candor about the student receiving services while asleep; in contrast, the March 2023 iBrain plan appeared, at times, to downplay the student's ability to actively engage in her overall program and related services by referring more generically to her low state of arousal or lethargy or level of alertness. Nevertheless, the iBrain plan also, at times, reports with the same candor as the parent with respect to the student sleeping for lengths of time during the school day. But none of the evidence was discussed by the IHO at all.

Given the validity of the district's concerns, the next inquiry focuses on whether, in light of this evidence, the parent sustained her burden to establish that iBrain was an appropriate unilateral placement for the 2023-24 school year. On appeal, the district's arguments on this point—even when considering this evidence—are not sufficient to find that iBrain was an inappropriate setting for the student.[10] Initially, the district contends that the iBrain plan fails to identify how the student's teachers or related services' providers accommodated or continued to work with the student while she was asleep, which, according to the district, was in stark contrast to the parent's testimony describing the student's attendance at iBrain when she was asleep and her continued receipt of most of her related services. Relatedly, the district contends that the testimony elicited from iBrain's deputy director of special education did not mention that iBrain staff continued to work with the student while she was asleep. In addition, the district asserts that the hearing record failed to contain any medical evidence to support the parent's position that the student could or should receive therapies or instruction while asleep.

These arguments, however, are not dispositive as to whether iBrain was an appropriate unilateral placement or, more specifically, whether iBrain provided the student with specially designed instruction. Significantly, the district's arguments do not challenge the student's program

[10] To be clear, if properly State-licensed related services providers at iBrain (as either iBrain employees or independent contractors) deliver their respective services to the student while she is asleep and the provision of such services is, in fact, "potentially dangerous" as asserted by the district, the instant administrative proceeding is not the proper forum to address such concerns as it relates to a matters such as standards of care in a professional misconduct proceeding (see 8 NYCRR Part 29).

at iBrain, which included 12-month programming in a 6:1+1 special class placement and related services, consisting of the following: individual OT, PT, and speech-language therapy, each for five 60-minute sessions per week of; three 60-minute sessions per week of individual vision education services; two 60-minute sessions per week of individual hearing education services; one 60-minute session per week of assistive technology services; two 60-minute sessions per week of individual music therapy and one 60-minute session per week of music therapy in a group; and one 60-minute session per month of parent counseling and training (see Parent Ex. D at pp. 48, 53-54). Nor do the district's arguments challenge the additional recommendations in the March 2023 iBrain plan for the services of a 1:1 paraprofessional and a 1:1 nurse throughout the school day, transportation services, assistive technology devices, and training for school personnel in the areas of feeding, lifting and positioning, seizure safety, and use of an AAC device (id. at pp. 54-55).

It is difficult to see how the district would successfully challenge the services as designed in the March 2023 iBrain plan when taking into account that at least some of the services can in fact be delivered. Notably, the district has not disavowed its own programming recommendations for the student for the 2023-24 school year, which were virtually identical to iBrain's, with the exceptions of the music therapy and 1:1 nursing services recommended by iBrain. Further the district does not dispute that the special education and related services at iBrain—when delivered to the student when she was awake—were appropriate to meet her needs.[11]

Instead, the district's arguments on appeal relate to whether, as discussed below, the district is obligated to publicly fund the student's special education program and related services delivered to the student when she was asleep. While there is very little, if any, legal authority directly on point, the District Court's decision in Wenger v. Canastota Central School District, 979 F. Supp. 147 (N.D.N.Y. 1997), as well as the administrative proceedings leading up to the decision, are somewhat analogous to this context. In Wenger, the student with a disability had sustained serious injuries as a result of a motor vehicle accident, which left him in a coma and resulted in an initial hospitalization followed by a more lengthy admission to an out-of-State rehabilitation facility (979 F. Supp. at 149). After finding the student eligible to receive special education and related services, the Canastota Central School District sent individuals to evaluate the student at his out-of-State facility and later developed an IEP that included recommendations for, among other things, OT, PT, and speech-language therapy services (id.). The parents accepted the IEP, and thereafter, the district attempted to arrange for the delivery of those services to the student while he remained admitted in the out-of-State facility (id.). Shortly thereafter, however, the student returned to an in-State hospital and another in-State rehabilitation facility; in the meantime, the student's out-of-State and in-State doctors approved the delivery of the student's services recommended in the IEP and the district began delivering some, but not all, of the services recommended in the IEP to the student (id.). As a result, the parents initiated an administrative proceeding, but due to the student's changing medical condition, the district ceased the delivery of services to the student until it

[11] To the extent that the district asserts that the hearing record does not identify the qualifications or credentials of the student's providers at iBrain as a basis upon which to conclude that iBrain was not an appropriate unilateral placement, the district is reminded that this is not a determinative factor when analyzing the appropriateness of a unilateral placement. The district does not allege that iBrain has facilitated individuals/employees in engaging in the unauthorized practice of a licensed profession and, under Carter, it is not sufficient to allege that its teachers do not meet State educational standards.

received information about the student's medical condition and "how services could be provided at optimum conditions" (id.).

Following an impartial hearing, an IHO found that the student's September 1994 IEP was appropriate given the student's unique needs, which, according to the IHO, were "primarily medical, rather than educational," based on the evidence in the hearing record, which consisted, in part, of two neuropsychological evaluations of the student that had been conducted at two different rehabilitation facilities, as well as special education teacher and related services reports (Application of a Child with a Disability, Appeal No. 95-010). Nevertheless, the IHO ordered the district to provide certain special education services to the student "'as tolerated,'" but found that the district appropriately "restrict[ed] the delivery of educational services to occasions" defined by the particular medical parameters set forth in the September 1994 IEP (id.). The IHO also found, however, that the annual goals for speech-language therapy and OT were unnecessarily duplicative of the special education teacher's annual goals, which provided the student with "sensory stimulation," and therefore, the district need not deliver speech-language therapy or OT services to the student (id.). The IHO denied the parents' request for compensatory educational services, as the hearing record lacked evidence that the district's failure to provide the student with all of the services in the IEP had resulted in any deficiencies (id.).

The parents appealed the IHO's decision to the Office of State Review, wherein an SRO upheld the IHO's determinations that, although the district had failed to offer the student a FAPE, the student was not entitled to compensatory educational services as relief because the hearing record lacked sufficient evidence to establish that the district's failure to provide the student with all of the services recommended in his IEP resulted in a deficiency or regressions attributable to the absence of such services (see Application of a Child with a Disability, Appeal No. 95-010; see also Wenger, 979 F. Supp. at 149-50; Application of a Child with a Disability, Appeal No. 94-28; Application of a Child with a Disability, Appeal No. 93-034). However, the SRO in Application of a Child with a Disability, Appeal No. 95-010 ordered the district to continue to provide the student with OT services consistent with the rationale set forth in the decision, which indicated that the OT provided the student with sensory stimulation and maintained a functional range of motion in the student's upper extremities (see Application of a Child with a Disability, Appeal No. 95-010). The District Court in Wenger upheld the SRO's decision in Application of a Child with a Disability, Appeal No. 95-010 (see 979 F. Supp. at 150-51).

As to the appropriateness of iBrain, the Wenger case is instructive insofar as, in that case, a school district's delivery of some services to a student in a coma was deemed appropriate and lapses in the delivery of services due to the student's lack of consciousness did not support a finding that the program was inappropriate. Likewise, here, based on the totality of the circumstances, iBrain was not an inappropriate unilateral placement due to factors relating to the delivery or non-delivery of some of the services recommended for the student due to the student's lack of adequate arousal and/or sleeping. With that said, similar to the outcome that compensatory education or make-up services were not warranted in the Wenger case, the corollary in this matter is that iBrain's delivery of make-up services and/or delivery of certain services to the student while sleeping that were not of the type that would likely confer benefit may have been in excess of what the district would have been required to provide in order to confer a FAPE. This question is an equitable consideration regarding appropriate level of relief, which I will discuss further below.

Based on the foregoing, I find that the IHO failed to meaningfully address the evidence or engage in an analysis of the question of whether iBrain was an appropriate unilateral placement; however, there is insufficient basis in the hearing record to disturb the IHO's ultimate conclusion that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year.

B. Equitable Considerations

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"]).

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 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"]).

1. Segregable Services

An examination of the district's claims concerning services delivered to the student at iBrain while she slept within the context of equitable considerations results in a determination that the district is not obligated to publicly fund all of such services, as the evidence supports a finding that such costs are segregable and above those which a district would be required to provide to a student in a public school setting. Initially, the iBrain enrollment contract executed by the parent reflects that the costs of related services, as relevant to this proceeding, includes PT, OT, speech-language therapy, vision education services, assistive technology services, and music therapy—all of which are charged as supplemental tuition fees, separate and apart from the base tuition fees that cover the costs, in this case, of the student's 1:1 paraprofessional and her academic programming (see Parent Ex. F at pp. 1-2). iBrain's approach of charging for related services under a fee-for-service model leaves the services vulnerable to the argument that they are segregable and exceed the level that the student required to receive a FAPE (see L.K., 2016 WL 899321, at *7; Application of a Student with a Disability, Appeal No. 23-054).

In contrast to the Wenger decisions, summarized above, the hearing record in the present matter does not include sufficient evidence to support a finding that all of the related services delivered to the student at iBrain while she was asleep—to wit, the music therapy or speech-language therapy—had any medical or educational rationale, other than the parent's testimony that she favored an approach of iBrain delivering services to the student while she slept. On the one hand, it is plausible that the student received benefit from the delivery of services delivered while slept such as PT and OT, for the purposes of getting the student's "limbs to move" and "get her weight bearing" as the parent described (Tr. pp. 441, 444; see also Parent Ex. D at pp. 21-22, 25). Less convincing is the parent's description of the delivery of "education services," speech-language therapy, and music therapy, with references to the student receiving the service passively or through "osmosis" (Tr. p. 443, 450, 452-53; Parent Ex. D at p. 26). The descriptions of the latter services in this manner supports the view that the delivery of the services while the student slept exceeded the services required to address the student's educational needs.

Additionally, the hearing record reflects that the student did not receive vision therapy or assistive technology services while asleep but had been given the opportunity to make-up those services when she was awake as part of her extended day program (see Tr. pp. 443-44, 453-54). Yet, the hearing record does not include any evidence reflecting when the student received those make-up services or how many sessions had been provided to the student. Moreover, delivery of services that the student missed while sleeping as make-up services on top of a program that is intensive and already spans a full extended school day is excessive and beyond what the district would be required to provide as a part of a FAPE (see M.M. v. New York City Dep't of Educ.,

2017 WL 1194685, at *8 [S.D.N.Y. Mar. 30, 2017] ["Common sense and experience teaches that services that may be valuable for, or even critical to, a child's educational achievement when provided in small to moderate amounts may become close to useless, or even burdensome, if provided in overwhelming quantity"]). Similar to the rationale in Wenger, I find it is not necessary for the student to make up all services simply because the services were called for by the March 2023 plan designed by iBrain. The fact that this is a tuition reimbursement case does not require a different result because "[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; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). The parent was not permitted to maximize services to the student, especially at times when there was no educational benefit to be derived due to her low state of arousal and/or unconsciousness.

Based on the foregoing, I find it excessive that iBrain delivered speech-language therapy and music therapy to the student while sleeping and delivered or planned to deliver services missed because the student was sleeping as make-up services. Accordingly, the district will not be required to fund such services. In order for the parent to obtain district funding for any portion of the student's tuition and services at iBrain, she will be required to provide to the district proof from iBrain of what services were delivered to the student while sleeping and what services were not delivered because the student was sleeping that were later provided as make-up services. If necessary, the district may examine all of the student's individual session notes for the student's related services for the 2023-24 school year in order to ascertain this information and reach a determination. Upon review of such records, the district will be required to fund all aspects of the student's services except any speech-language therapy or assistive technology services delivered while the student slept or any services not delivered because the student was sleeping. In addition, the district shall not be required to fund any services delivered as make-ups for sessions missed because the student was sleeping.

2. Excessiveness of Costs

Turning to the district's remaining arguments, 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. The district argues that the IHO erred by awarding the full costs of tuition and transportation to the parent without assessing the excessiveness or reasonableness of the costs of these services. With respect to iBrain's tuition costs, the district asserts that the "'base tuition' is exorbitant," as it does not include the costs of related services, which iBrain bills separately. The district contends that, given the substantial amount of related services the student receives daily, the student has little time remaining during the day for basic instruction.

With regard to transportation, the district describes the "company's close ties to iBrain" as a factor to consider when assessing the excessiveness or reasonableness of the costs of the services. Also, the district asserts that the parent was told to sign a contract with Sisters Travel, the company that would be providing transportation for the student, and the parent did not attempt to locate another transportation provider.

In analyzing equitable considerations, the IHO characterized iBrain's tuition costs and the Sisters Travel transportation costs as "undoubtedly extraordinary" (IHO Decision at p. 7). However, the IHO also noted that, despite having the opportunity to do so, the district failed to present any evidence demonstrating that such costs were excessive or unreasonable; as a result, the IHO declined to reduce the amount of tuition and transportation costs awarded to the parent (id.). On appeal, the district's arguments essentially repeat those made to the IHO during the district's closing argument at the impartial hearing, and the district does not point to any evidence of reasonable market rates for the same or similar services. To the extent that the district relies on district court holdings in Araujo v. New York City Department of Education, 2023 WL 5097982 (S.D.N.Y. Aug. 9, 2023) and Davis v. Banks, 2023 WL 5917659 (S.D.N.Y. Sept. 11, 2023) as support for reductions in both tuition and transportation costs awarded, neither of these cases are directly relevant to the issue being addressed on appeal, i.e. whether the IHO erred by not reducing the award of transportation funding, but rather, 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 [noting that "the sole source of the [district's] reimbursement obligations in each Plaintiff's case[s] is the applicable administrative order"]; Araujo, 2023 WL 5097982 [indicating that "[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 [finding that "[t]he heart of this matter[] boils down to the [district's] legal obligations under the [p]endency [o]rders"]). As a result, there is no reason to disturb the IHO's order directing the district to fully reimburse the parent for the costs of the student's base tuition and transportation costs, and the district's arguments are dismissed.

VII. Conclusion

The parent met her burden to prove that iBrain was an appropriate unilateral placement for the student for the 2023-24 school year; however, equitable considerations support a reduction of the total award of district funding for tuition and services equal to the amount of speech-language therapy and music therapy services delivered to the student while she slept, any related services missed while the student slept, and any services delivered to make up for services missed while the student slept.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated February 19, 2024, is modified by reversing that portion which awarded the parent the full costs of the student's supplemental tuition fees for the costs of the student's related services at iBrain; and,

IT IS FURTHER ORDERED that, upon receipt of proof of services delivered to the student with documentation regarding what services were delivered while the student slept, what services were missed because the student was sleeping, and what services were provided to make-up for services that were not delivered because the student was sleeping, the district shall reimburse the parent for the costs of the student's base and supplemental tuition except that the district shall not be required to fund any speech-language therapy or music therapy services delivered to the

student while sleeping, services missed because the student was sleeping, or services provided to make up for services missed because the student was sleeping.

Dated: **Albany, New York**
May 20, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER