The University of the State of New York

The State Education Department
State Review Officer
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No. 24-175

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

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Patrick Donohue, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gil Auslander, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for direct funding for their son's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student has received a diagnosis of a congenital condition resulting in global developmental delays (Parent Ex. B at pp. 1, 43).[1] He has attended iBrain since the fall of 2022 (Dist. Ex. 1 at p. 3). The CSE convened on April 26, 2023, to formulate the student's IEP for the 2023-24 school year (see generally Dist. Ex. 1). Finding the student eligible for special education as a student with multiple

[1] The student has received a rare diagnosis which has not been identified in this decision for confidentiality purposes (Dist. Ex. 1 at pp. 11, 14).

disabilities, the April 2023 CSE recommended a 12-month program consisting of placement in an 8:1+1 special class for 35 periods per week in a specialized school together with four 60-minute sessions per week of individual occupational therapy (OT); five 60-minute sessions per week of individual physical therapy (PT); four 60-minute sessions per week of individual speech-language therapy; one 60-minute session per week of group speech-language therapy; the support of individual full-time paraprofessional services for health and ambulation; and assistive technology devices and services consisting of a dynamic display speech generating device (SGD); and one 60-minute individual session of assistive technology services per month (Dist. Ex. 1 at pp. 35-37). In addition, the CSE included a recommendation of one 60-minute session per month of parent counseling and training for the student's parents (id. at p. 36). The CSE further recommended a coordinated set of transition activities for the student, as well as specialized transportation accommodations including door to door transportation, transportation from the closest safe curb location to school, a lift bus, and use of wheelchair (id. at pp. 38-39, 41-42).

In a letter, dated June 20, 2023, the parents disagreed with the recommendations contained in the April 2023 IEP, as well as with the particular public-school site to which the district assigned the student to attend for the 2023-24 school year and, as a result, notified the district of their intent to unilaterally place the student at iBrain for the 2023-24 school year and seek public funding for their placement (see Parent Ex. H).

On June 27, 2023, the parents entered into an enrollment contract with iBrain for the student's attendance for the 2023-2024 school year beginning on July 5, 2023 and ending on June 21, 2024 (see Parent Ex. D).[2] In addition, on July 5, 2023 the parents entered into an annual service agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for transportation of the student to and from iBrain for the period of July 1, 2023 through June 30, 2024 (see Parent Ex. E).[3]

In a prior proceeding, the parents filed a due process complaint notice, dated November 22, 2022, alleging that the district failed to offer the student a FAPE for the 2021-22 and 2022-23 school years and sought direct funding of the costs of the student's tuition at iBrain for the 2022-23 school year (Parent Ex. C at p. 2). In a decision dated August 2, 2023, the IHO in that case found that the district failed to offer the student a FAPE for both the 2021-22 and 2022-23 school years, that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year, and that equitable considerations weighed in favor of an award of direct funding of tuition at iBrain and associated transportation costs (id. at pp. 5-7).

In a due process complaint notice, dated December 8, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents alleged that the student required "1:1 direct and small group instruction" from a placement other than a district specialized school and that the student should have been classified as a student with a traumatic brain injury and not as a student with

[2] According to the enrollment contract, the base tuition fee was in the amount of $190,000 and the supplemental tuition fees were in the amount of $89,208 for a total tuition in the amount of $279,208 (Parent Ex. D at pp. 1-2).

[3] The Sisters Travel agreement stated that the total fees for the 2023-24 school year were in the amount of $128,620 (Parent Ex. E at p. 2).

multiple disabilities (Parent Ex. A at p. 5). In addition, the parents alleged that the CSE failed to recommend music therapy for the student; predetermined the program recommendation; denied the parents meaningful participation in the CSE process; failed to timely send a prior written notice and school location letter; failed to evaluate the student in all areas of suspected disability; failed to recommend an appropriate school location; and failed to recommend appropriate special education transportation services including limited travel time and an air conditioned bus (id. at pp. 5-7). The parents also claimed that iBrain was an appropriate unilateral placement and that equitable considerations would not bar relief as the parents cooperated with the CSE (id.). As relief, the parents requested findings that the district denied the student a FAPE for the 2023-24 school year and that iBrain was an appropriate unilateral placement (id. at p. 8). The parents further requested direct funding for the student's tuition and related services costs at iBrain and direct funding of special transportation of the student to and from iBrain (id.). Lastly, the parents requested an independent neuropsychological evaluation (id.). The district submitted a response to the due process complaint notice generally denying the material allegations contained therein.

After the matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH), a prehearing conference was held on January 12, 2024 and an impartial hearing convened on February 29, 2024, and concluded on March 8, 2024, after three days of hearings (Tr. pp. 1-467).[4] On March 1, 2024, the IHO issued an Order on Pendency finding that pendency consisted of tuition and related services at iBrain together with funding of the student's transportation costs based on the unappealed IHO decision dated August 2, 2023 (see Interim IHO Decision; see Parent Ex. C). In a decision dated March 25, 2024, the IHO determined that the district offered the student a FAPE for the 2023-24 school year, that iBrain was not an appropriate unilateral placement for the student, and that equitable considerations would not fully support the requested relief; the IHO also found that the parents were not entitled to an independent educational evaluation at district expense as they did not request one prior to filing the due process complaint notice (IHO Decision at pp. 22-37). Accordingly, the IHO denied the parents' request for funding of the costs of the student's tuition at iBrain and special transportation costs for the 2023-24 school year and funding for an independent neuropsychological evaluation (id. at pp. 36-37).

IV. Appeal for State-Level Review

The parents appeal. The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto is also presumed and, therefore, the allegations and arguments will not be repeated. Generally, the parents appeal the IHO's findings that the district offered the student a FAPE for the 2023-24 school year; that iBrain was not an appropriate unilateral placement for the student; that equitable considerations did not favor the parents; and the IHO's failure to recuse herself from the matter. As relief, the parents seek funding of the costs of the student's tuition at iBrain and transportation for the 2023-24 school year.

[4] After the January 12, 2024 prehearing conference, the IHO provided the parties with a prehearing conference summary and order (see generally IHO Ex. 7).

In an answer the district generally denies the material allegations contained in the request for review. The district asserts that the IHO correctly found that it offered the student a FAPE for the 2023-24 school year. The district claims that the CSE correctly classified the student as a student with multiple disabilities and adequately explained the reasons the student was not classified as a student with a traumatic brain injury. The district further argues that there was no evidence in the hearing record that the student required music therapy to receive an educational benefit. The district argues that the parents' claims of predetermination were speculative, and the district provided a timely prior written notice and school location letter to the parents. Further, the district asserts that iBrain was not an appropriate unilateral placement and equitable considerations did not favor the parents. The parents submit a reply to the district's answer.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

[5] 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).

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. Preliminary Matters

1. Request for Recusal

The parent contends that the IHO should have recused herself because of her alleged "inability to be impartial" in this matter (Req. for Rev. ¶¶ 44-45). In connection therewith, the parents seek the introduction of additional evidence (id. ¶ 45; see SRO Exs. A-G). Parents argue that the IHO "focused almost exclusively on an analysis of [district] witness testimony" and "barely" considered the witness testimony on behalf of the parents (Req. for Rev. ¶ 48). Further, the parents argue that the IHO "stepped back into her long-standing role as an attorney [for the district] and litigated the case for the [district]" (id. ¶ 49).

The district asserts that there is "no basis in fact or law" which would have required the IHO to recuse herself beyond the parents' disagreement with the IHO's "rulings and handling of the administrative hearing" (Answer ¶ 32). With respect to the proffered additional evidence, the district contends that all but one exhibit is unrelated to this matter (id. ¶ 33). Additionally, the district references the fact that the parents commenced a special proceeding in the Supreme Court of the State of New York to compel enforcement of their subpoenas and the IHO's refusal to recuse herself from the matter, which application was denied (id. ¶ 36). Lastly, the district argues that the parents' argument that the IHO cannot be fair and impartial because of her prior employment as an attorney for the district is without merit (id. ¶ 37).

Initially, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

Unless specifically prohibited by regulations, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, with how they conduct an impartial

hearing, in order that they may "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46704 [Aug. 14, 2006]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

During a prehearing conference on January 12, 2024 a non-attorney representative from the parents' attorneys' law firm appeared on behalf of the parents and discussed dates for the impartial hearing (see Tr. pp. 1-26). The IHO stated that the compliance date was February 24, 2024 and proposed February 22 or 23, 2024 for hearing dates (Tr. pp. 15-16). The parents' representative stated that she was available on February 22, 2024, but the district's counsel stated her witnesses would not be available on either proposed date (Tr. p. 16). Due to additional scheduling conflicts of both parties, it was agreed that the hearing would be held on February 29, 2024 (Tr. pp. 17-22). Since the hearing date was scheduled after the compliance date, the parents' representative requested an extension of the compliance date which the IHO granted (Tr. pp. 22-23). The IHO further stated that "as the present compliance date draws closer, I will then extend the compliance date, and you'll get notification of that" (Tr. p. 23). There were no objections to the IHO's statement (id.). Consistent with this discussion, an extension order was granted by the IHO on February 21, 2024 and the new decision due date was March 25, 2024.

Next, on February 28, 2024, one of the attorneys representing the parents emailed the IHO stating that the IHO only offered hearing dates after the compliance date of February 24, 2024; that the hearing should have already been concluded by January 22, 2024; and that pendency was not addressed during the prehearing conference (IHO Exs. 1 at p. 1; 2 at p. 1; 3 at p. 3).[6] Parents' counsel stated that the IHO "improperly, and unilaterally" issued the extension order on February 21, 2024 which was not agreed to by the parties (IHO Exs. 1 at p. 2; 2 at p. 2; 3 at p. 3). Furthermore, counsel for the parents stated that "[t]hese actions seriously call into question your judgment, integrity in adjudicating this matter in a timely and fair manner, and your ability to remain impartial" and requested that the IHO recuse herself (id.).

In response, the IHO stated that the attorney making these claims was not present for the prehearing conference on January 12th (IHO Ex. 3 at p. 1). The IHO restated the conversations held during the prehearing conference and that the parties agreed to the selected hearing date (id.). Additionally, the IHO referenced her prehearing conference order which stated that any objections to the hearing shall be made in writing and "within three (3) calendar days of the date of this [prehearing order]" (id.). The IHO stated that no objections were made until the day before the hearing and, therefore, the objection to the hearing date and compliance date were untimely and without any merit (id. at pp. 1-2). The IHO further referenced a letter sent to her by parents' counsel that indicated a motion for recusal would be made; however, such motion was not yet

[6] A pendency implementation form was signed by a district representative on December 15, 2023, the parents expressed a disagreement with the pendency implementation form in a March 1, 2024 email and the IHO addressed the parties' arguments in her March 1, 2024 interim decision (see IHO Ex. 4; IHO Exs. 14 at p. 2; 15 at p. 3; 16 at pp. 5-6; Interim IHO Decision).

made and the IHO stated that if the February 28, 2024 email from counsel for the parents constituted a motion for recusal it was denied (Tr. pp. 35-39; IHO Exs. 3 at p. 2; 9 at p. 2).

The additional evidence submitted by the parents consists of the following: SRO Exhibits A through C and F are transcripts or portions of transcripts from other impartial hearings regarding other students; SRO Exhibit D is a series of emails from August 2015 between attorneys from the district regarding the law firm representing the parents in this matter and its attorneys; SRO Exhibit E is an email dated February 8, 2024 with proposed subpoenas for the IHO's consideration; and SRO Exhibit G is a series of emails sent as part of another proceeding.[7] The parents assert that the additional evidence demonstrates the IHO's history representing the district against other parents who were represented by the same law firm that represented the parents in this matter and as an IHO in cases involving the same law firm where she "demonstrated prejudice" in favor of the district and against the law firm's clients (Parent Mem. of Law at pp. 25-27). I find that proposed SRO exhibits A-D, F-G pertain to hearings unrelated to the underlying hearing in this appeal and, as such, they are not relevant to the issue of the IHO's conduct in the instant matter and will not be admitted as additional evidence. As for proposed SRO Exhibit E, the series of emails, letter, and subpoenas contained therein are already admitted into the hearing record as IHO Exhibits 9-11 and will not be admitted as duplicative exhibits.

The parents also assert that the IHO's failure to sign three subpoenas relating to the IHO's potential recusal "makes it clear that the IHO cannot remain impartial in this matter or any matter that involves" iBrain or the law firm representing clients seeking tuition funding for iBrain (Parent Mem. of Law at pp. 27-28). Lastly, the parents claim that the IHO denied the parents due process by denying them the right in other cases to present evidence and confront witnesses which demonstrates that she is not impartial (id. at pp. 28-30).

To the extent that the parents' claims could be read as a disagreement with the conclusions reached by the IHO in her previous rulings, such disagreement alone does not provide a basis for finding actual or apparent bias by the IHO (see Chen v. Chen Qualified Settlement Fund, 552 F.3d 218, 227 [2d Cir. 2009] [finding that "[g]enerally, claims of judicial bias must be based on

[7] Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the additional evidence from withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). On the other hand, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]).

extrajudicial matters, and adverse rulings, without more, will rarely suffice to provide a reasonable basis for questioning a judge's impartiality"]; see also Liteky v. United States, 510 U.S. 540, 555 [1994] [identifying that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion"]; Application of a Student with a Disability, Appeal No. 13-083).

Moreover, the parents have failed to put forth sufficient evidence to demonstrate any bias on the part of the IHO during the conduct of the impartial hearing at issue on appeal. Overall, a review of the IHO's decision and the hearing record supports a finding that the IHO's decision was not biased against the parents. Rather, the IHO conducted the hearing within the bounds of standard legal practice and the hearing record does not support a finding of bias. Moreover, an independent review of the hearing record demonstrates that the parents had a full and fair opportunity to present their case at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see Educ. Law § 4404[2]; 34 CFR 300.514 [b][2][i], [ii]; 8 NYCRR 200.5 [j]). Similarly, the IHO's conduct in response to the parents' counsel's efforts to have her recuse herself, including her decision not to issue certain requested subpoenas, fell within the bounds of standard legal practice and requirements of due process and was otherwise supported by the lack of any facially sufficient grounds asserted by parents' counsel that would compel her recusal from this matter. Accordingly, I find that the IHO's declination to recuse herself was reasonable under the circumstances. Accordingly, the parents' request for the IHO's recusal in this matter is dismissed.

2. Scope of the Impartial Hearing

In discussing that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year, the parents contend that the CSE failed to recommend nursing services for the student (Req. for Rev. ¶ 27). The parents assert that the IHO further erred in accepting the district's argument that the CSE could not recommend nursing services without the parents' completion of medical forms (id.).

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA and its implementing regulations provide that a party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).

Here, the due process complaint notice does not make any allegations or references to the district's failure to recommend nursing services for the student (see generally Parent Ex. A). Moreover, the IHO specifically asked parents' representative whether she was requesting nursing services and she said the parents were not requesting nursing services (Tr. p. 8).

Further, to the extent that the Second Circuit has held that issues not included in a due process complaint notice may be ruled on by an administrative hearing officer when the district "opens the door" to such issues with the purpose of defeating a claim that was raised in the due

process complaint notice (M.H., 685 F.3d at 250-51; see B.M., 569 Fed. App'x at 59; N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 585 [S.D.N.Y. 2013]; A.M. v. New York City Dep't of Educ., 964 F. Supp. 2d 270, 282-84 [S.D.N.Y. 2013]; J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9 [Aug. 5, 2013]), here, the district did not open the door to the issue of whether the student required nursing services (R.E., 694 F.3d 167 at 187-88 n.4).

Based on the above, the issue of nursing services was not properly raised within the due process complaint notice, and was specifically excluded as an issue in the impartial hearing by the parents' representative, and as such was beyond the scope of the impartial hearing (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[i][7][i][a]; [j][1][ii]); see also B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]"]). . Accordingly, the issue of nursing services will not be further addressed herein.

B. FAPE

Upon careful review, I find that the following determinations by the IHO were well-reasoned and supported by the evidence in the hearing record: that there was no evidence in the hearing record that classification of the student as a student with a traumatic brain injury instead of as a student with multiple disabilities would have changed the recommended program and services nor did the parents show why a traumatic brain injury classification was more appropriate for the student; [8] that the IEP included "appropriate annual and short-term goals that [we]re specifically tailored to the [s]tudent's needs and measurable;" that there was no evidence in the hearing record that the student could not receive educational benefits without music therapy; that the parents' claims that the assigned school could not implement the IEP were speculative as the student did not attend the recommended school placement; and that the CSE contemplated and recommended assistive technology devices and services for the student (see IHO Decision at pp.

[8] "Traumatic brain injury" is defined as "an acquired injury to the brain caused by an external physical force or by certain medical conditions such as stroke, encephalitis, aneurysm, anoxia or brain tumors with resulting impairments that adversely affect educational performance. The term includes open or closed head injuries or brain injuries from certain medical conditions resulting in mild, moderate or severe impairments in one or more areas, including cognition, language, memory, attention, reasoning, abstract thinking, judgement, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not include injuries that are congenital or caused by birth trauma" (see 8 NYCRR 200.1[zz][12]). "Multiple disabilities means concomitant impairments (such as intellectual disability-blindness, intellectual disability-orthopedic impairment, etc.), the combination of which cause such severe educational needs that they cannot be accommodated in a special education program solely for one of the impairments. The term does not include deaf-blindness" (see 8 NYCRR 200.1 [zz][8]). At this juncture, when the student's eligibility for special education is not in dispute, the significance of the disability category label is more relevant to the LEA and State reporting requirements than it is to determine an appropriate IEP for the individual student. CSEs are not supposed to rely on the disability category to determine the needs, goals, accommodations, and special education services in a student's IEP. That is the purpose of the evaluation and annual review process, and this is why an evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (see 34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]). Once a student has been found eligible for special education, the present levels of performance sections of the IEP for each student is where the focus should be placed, not the label that is used when a student meets the criteria for one or more of the disability categories.

22, 25-28). As to these issues, the IHO accurately recounted the relevant facts of the case and set forth the proper legal standards to determine whether the district offered the student a FAPE for the 2023-24 school year and applied those standards to the facts as presented in this proceeding (IHO Decision at pp. 10-29). A review of the IHO decision shows that, for these issues, the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that she weighed the evidence and properly supported her conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify these determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Accordingly, I will adopt the conclusions of the IHO as described above.

However, the district's failure to recommend a travel paraprofessional for the student for the 2023-24 school year constituted a denial of FAPE to the student, and, accordingly, the IHO's ultimate finding that the district offered the student a FAPE for the 2023-24 school year must be reversed.

The IDEA specifically includes transportation, as well as any modifications or accommodations necessary in order to assist a student to benefit from his or her special education, in its definition of related services (20 U.S.C. § 1401[26]; see 34 CFR 300.34[a], [c][16]). In addition, State law defines special education as "specially designed instruction . . . and transportation, provided at no cost to the parents to meet the unique needs of a child with a disability," and requires school districts to provide disabled students with "suitable transportation to and from special classes or programs" (Educ. Law §§ 4401[1]; 4402[4][a]; see Educ. Law § 4401[2]; 8 NYCRR 200.1[ww]). Specialized forms of transportation must be provided to a student with a disability if necessary for the student to benefit from special education, a determination which must be made on a case-by-case basis by the CSE (Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883, 891, 894 [1984]; Dist. of Columbia v. Ramirez, 377 F. Supp. 2d 63 [D.D.C. 2005]; see Transportation, 71 Fed. Reg. 46576 [Aug. 14, 2006]; "Questions and Answers on Serving Children with Disabilities Eligible for Transportation," 53 IDELR 268 [OSERS 2009]; Letter to Hamilton, 25 IDELR 520 [OSEP 1996]; Letter to Anonymous, 23 IDELR 832 [OSEP 1995]; Letter to Smith, 23 IDELR 344 [OSEP 1995]). If the student cannot access his or her special education without provision of a related service such as transportation, the district is obligated to provide the service, "even if that child has no ambulatory impairment that directly causes a 'unique need' for some form of specialized transport" (Donald B. v. Bd. of Sch. Commrs., 117 F.3d 1371, 1374-75 [11th Cir. 1997] [emphasis in original]). The transportation must also be "reasonable when all of the facts are considered" (Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 [5th Cir. 1986]).

For school aged children, according to State guidance, the CSE should consider a student's mobility, behavior, communication, physical, and health needs when determining whether or not a student requires transportation as a related service, and the IEP "must include specific transportation recommendations to address each of the student's needs, as appropriate," which may include special seating, vehicle and/or equipment needs, adult supervision, type of transportation, and other accommodations ("Special Transportation for Students with Disabilities," VESID Mem. [Mar. 2005], available at http://www.p12.nysed.gov/specialed/publications/policy/specialtrans.pdf). Other relevant considerations may include the student's age, ability to follow directions, ability to function without special transportation, the distance to be traveled, the nature

of the area, and the availability of private or public assistance (see Donald B., 117 F.3d at 1375; Malehorn v. Hill City Sch. Dist., 987 F. Supp. 772, 775 [D.S.D. 1997]).

Here, the April 2023 CSE noted the student used a regular size wheelchair and recommended the following transportation accommodations for the student: transportation from the closest safe curb location to school, a lift bus, and door to door accommodations (Dist. Ex. 1 at pp. 41-42). The April 2023 IEP noted the student "need[ed] constant supervision through all the activities due to [a] lack of safety awareness" and also stated that the student "require[d] a 1:1 paraprofessional to support his medical, physical, cognitive, and sensory needs throughout the day" (id. at p. 12). The IEP also noted that the student "w[ould] be regularly accompanied by a 1:1 paraprofessional to assist in all forms of functional mobility (transfers, transportation, safety, and positional adjustments)" (id. at p. 17). The school psychologist testified that new special transportation accommodations, such as air conditioning in this case, "ha[d] to go through a process, which [was] through [the] Office of Student Health" and involved "a transportation form that the parent [wa]s required to fill out" and submit to the district's Office of Student Health (Tr. pp. 154-55, 387-88, 393-94). Then, "[t]he DOE doctor review[ed] it, and then ma[de] that determination if air conditioning [wa]s warranted" (Tr. pp. 155, 393-94). The IEP also reflected that forms were required to be submitted annually to the office of student health in order for transportation accommodations to be added to the student's IEP (Dist. Ex. 1 at p. 8). According to the school psychologist, once the decision was made, the CSE would reconvene and formally recommend that the accommodation be made part of the student's IEP (Tr. p. 155). The district's school psychologist opined that the student would have benefitted from a 1:1 travel paraprofessional and that "it would be unsafe for him to travel without a one-to-one paraprofessional" (Tr. pp. 387-88, 390).

In connection with transportation services, the iBrain education plan recommended busing with a paraprofessional (Parent Ex. B at p. 67). With respect to the student's physical development, the iBrain education plan noted that although the student presented with generalized weakness in his trunk and all extremities, he had independent head control and volitional movement in all extremities (id. at p. 6). The iBrain education plan also indicated that the student demonstrated "head stimming from side to side when seated in his wheelchair" (id.). The iBrain deputy director testified that the student required a 1:1 travel paraprofessional since he was "nonverbal, nonambulatory, and [like] all [] students [at iBrain] need[ed] [1:1] paraprofessional[l] [assistance] for transferring [and] changing" as well as for his "regulation needs" (Tr. pp. 424-25, 434-35).

The district asserts that the IHO correctly found that the parents "failure to provide requested transportation and medical documents stimmed [sic] the ability to include nursing and transportation accommodations on the IEP" (Answer ¶¶ 16-17). However, requiring the parents to provide the district with specific paperwork which the district would examine at another time through a separate "Office of Student Health," and then, perhaps, decide if the student's IEP would be amended to include a 1:1 travel paraprofessional is a scenario that bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings. . . . Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—

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

This is not the process called for under IDEA because it is the CSE that is required to make the determination of which services should be placed on a student's IEP and it is the district's responsibility to ensure that the CSE has sufficient information about the student's needs and that individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parent, rather than the district, to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]). The district members of the CSE in this case failed to appreciate that they were the individuals responsible to determine whether the student needed a 1:1 travel paraprofessional in order to receive a FAPE. A district is authorized to conduct necessary medical assessments in order to provide appropriate special education programming to a student with a disability (see Shelby S v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 [5th Cir. 2006]).[9]

Accordingly, the IHO erred in accepting the district's explanation that a 1:1 travel paraprofessional could not be placed on the IEP by the CSE and that the parents were required to send medical documentation to another office for a later determination of whether the student required a 1:1 travel paraprofessional. The district improperly placed the burden to obtain medical forms on the parents. Here, the evidence in the hearing record—particularly the iBrain education plan and the testimony of the district psychologist, but also the description of the student contained within the April 2023 IEP itself—reflects that the April 2023 CSE had sufficient information about the student's physical development and safety needs during transportation l but nonetheless failed to take the necessary steps to insure that the April 2023 IEP recommended a 1:1 travel paraprofessional for the student. As the hearing record reflects that it would be unsafe for the student to be transported without the support of a 1:1 travel paraprofessional, the failure to recommend the service would have prevented the student from accessing what would have otherwise been an appropriate special education program and accordingly, the lack of paraprofessional services during transportation requires reversal of the IHO's finding that the district offered the student a FAPE for the 2023-24 school year.

C. Unilateral Placement

The parents next contend that the IHO erred by finding that iBrain was not an appropriate unilateral placement for the student, asserting that the IHO failed to consider the iBrain education plan that set forth the student's academic instruction, related services, and transportation services; discussed the student's 8:1+1 class size; and referenced the students' progress in quarterly reports (Req. for Rev. ¶ 32). The parents further contend that the IHO failed to consider the testimony of the iBrain deputy director about what the student required in a special education program and what he received at iBrain (Req. for Rev. ¶ 34). Conversely, the district argues that the parents failed to present a witness to testify as to the instruction and transportation provided to the student

[9] This does not mean that medical assessments must always be conducted by a district under all circumstances to provide the parent with free medical diagnoses whenever they seek it. The thrust of the requirement is to ensure compliance with the educational objectives of the IDEA and "[i]f alternative assessment methods meet the evaluation criteria [required under Part B], then these methods may be used in lieu of a medical assessment" (Letter to Williams, 21 IDELR 73 [OSEP 1994]).

(Answer ¶ 19). The district further asserts that the parents "erroneously" argue that the information pertaining to the student's academics and related services are contained in the iBrain education plan without submitting further evidence regarding the student's program (id. ¶¶ 24-26).

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

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

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

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

1. Student's Needs

Here, the student's needs are not in dispute, and the April 2023 CSE adopted many of the recommendations from the iBrain education plan; however, a brief description of the student's needs provides context to analyze whether iBrain was an appropriate unilateral placement (compare Dist. Ex. 1, with Parent Ex. B).

Initially, the April 2023 IEP reflected the results of the Vineland Adaptive Behavior Scales – Third Edition (Vineland -3) and school assessments. The IEP indicated that based on the parents' responses on the Vineland-3 the student's "[o]verall [s]ummary [s]core" was "[l]ow (Dist. Ex. 1 at p. 1). In addition, administration of the Quality of Upper Extremity Skills Test (QUEST) to the student yielded a total score of 86.4 (id. at pp. 1-2).[10]

According to the April 2023 IEP, in literacy, the student was working on increasing his reading comprehension skills, was able to identify characters, setting, and major events in a story evidenced by responses to "wh" and "yes/no" questions, and was able to explain the sequence of events in a story (Dist. Ex. 1 at p. 2). The April 2023 IEP also noted that the student was able to read some basic sight words, identify letters, and read short stories, and he demonstrated "strong comprehension skills of age-appropriate books which he [wa]s able to read on his own" (id. at p. 2). The April 2023 IEP noted that, according to parent report, the student liked to read and was able to read at a fifth-grade level (id. at pp. 7, 42). In terms of mathematics, the April 2023 IEP noted that the student was able to write number sentences on his augmentative alternative communication (AAC) device, identify "more[,] less[, or] equal [to]," and compare quantities; further, he was working on double digit addition and subtraction (id. at p. 2). The April 2023 IEP indicated that the student was learning about money management, how to exchange cash, and how to do multiplication and division (id. at p. 7). Specifically, the April 2023 IEP reported that the student's instructional/functional level in math was at a third-grade level (id. at p. 42).

With regard to speech-language, the April 2023 IEP indicated that the student was a proficient multimodal communicator with familiar people, and he was able to express his wants and needs using his high-tech speech generating device set to 64-grid and an iPad with symbol-based speech generating software which allowed him to type words and phrases, and he supplemented his communication through facial expressions, vocalizations, behaviors/gestures, and signs (Dist. Ex. 1 at pp. 3, 5, 13). The April 2023 iBrain education plan noted that the student often typed one to two words to communicate or used picture symbols (Parent Ex. B at p. 7). The April 2023 IEP further noted that the student typically participated in 1 to 2 conversational turns per interaction unless prompted to ask follow-up questions, but he tended to become shyer and needed encouragement to speak in larger group speech sessions (Dist. Ex. 1 at p. 9). The April 2023 IEP indicated that the student accessed his AAC device using direct selection with finger isolation, and indicated the parents were "happy with his progress using the device and software, and they want[ed] him to continue utilizing it" (id. at pp. 5-6). The April 2023 IEP specified that

[10] The April 2023 IEP noted QUEST was an assessment tool designed to be used with children who exhibit neuromotor dysfunction with spasticity to measure the quality of upper extremity function in four domains: dissociated movement, grasp, protective extension, and weight bearing (Dist. Ex. 1 at p. 1).

the student was able to "chain multiple icons and use his keyboard to request", i.e., "I want Garfield episode 41" when motivated by preferred activities (id. at p. 5). According to the April 2023 IEP, the student demonstrated "the ability to sustain joint attention to familiar persons and activities, but benefit[ed] from redirection attempts, frequent breaks, and a quiet environment (id.).

Turning to the student's social development, the April 2023 IEP indicated he was a very sweet and sociable student who enjoyed social interactions with familiar and unfamiliar peers and adults (Dist. Ex. 1 at p. 8). The April 2023 IEP noted the student was often observed greeting classmates and adults, smiling, and waving to others (id.). In addition, the April 2023 IEP revealed that the student's results on the Communication Function Classification System (CFCS) reflected that his skills were at a "level III" which classified him as an effective sender and effective receiver with familiar partners; however, the IEP noted the student showed scattered skills at "l[e]vel II" "effective, but slower-paced sender and receiver with unfamiliar and familiar partners" (id. at pp. 8-9, 24). Specifically, the April 2023 IEP indicated that when the student communicated with unfamiliar people or during novel tasks, he required more prompting and repetition along with extra time for most effective communication (id. at p. 9).

In terms of physical development, the April 2023 iBrain education plan stated that the student presented with generalized weakness in his trunk and all extremities, demonstrated full passive range of motion in all joints in all extremities, and independent head control and volitional movement in all extremities (Parent Ex. B at p. 6). Additionally, the iBrain education plan reported that the student presented with full active range of motion against minimal resistance in his bilateral upper extremities and was able to perform reaching and stepping "slowly secondary to generalized weakness and poor coordination" (id.). According to the iBrain education plan, due to the student's brain-based disability, he was at "[h]igh risk for falls and injury" (id. at p. 44). The student used a wheelchair as his main form of functional mobility (Dist. Ex. 1 at p. 11).[11] The April 2023 IEP reported the student's quality of movement was typical of child with spastic diplegic cerebral palsy with skills at Gross Motor Function Classification System (GMFCS) "level 4" which indicated he walked with limitations in all settings, easily maintained his head alignment, seating, standing, and mobility, and effectively transferred from his wheelchair to a mat (id. at p. 12). The April 2023 IEP indicated that the student traveled in his wheelchair; used a Rifton toilet chair, as well as a variety of flexible seating equipment; and wore ankle foot orthoses (AFOs) to support his physical development needs (id. at pp. 12-13).

2. iBrain

The IHO also determined that if she were to reach the issue of whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year, she would have found that the parents did not meet their burden of proof that the student received specially designed

[11] The April 2023 IEP indicated that the student presented with increased tone in his lower extremities, decreased trunk balance while sitting unsupported, and tended to lean forwards or on a support and showed difficulty with maintaining upright posture (Dist. Ex. 1 at p. 11). The April 2023 IEP reported that the student stood with a wide base of support, presented with good trunk control, "grade 3+ muscle strength," decreased bilateral ankle mobility, significant weakness of dorsiflexors and ataxia, loss of spinal curvature at the thoracic and lumbar levels with increased tightness in the muscles of the neck and forward head posture, a navicular drop with inversion of the forefoot and pronation of the ankle, and a limited range of ankle dorsiflexion (id. at pp. 11, 12).

instruction that met his unique special education needs. Specifically, the IHO noted that no witnesses from iBrain who provided instruction or related services to the student testified at the hearing (IHO Decision at p. 30). The IHO also stated that no one from Sisters Travel testified and neither of the parents testified (id.).With regard to the testimony of the iBrain deputy director, the IHO found that his testimony was "not instructive as to how [iBrain] met the individual needs of the [s]tudent" (id.).The IHO also found that the iBrain deputy director failed to provide testimony about the student's schedule at iBrain or why an extended school day was necessary for the student (id.).

As previously noted, the hearing record did include a detailed April 26, 2023 iBrain education plan which, among other things, identified the student's present levels of performance and rate of progress, evaluations administered to the student, annual goals, management needs, a summary of the student's special education program and services, and a summary of supplementary aids and services, program modifications, and accommodations (see generally Parent Ex. B).[12]

The iBrain deputy director described iBrain as a private school that serves students that have moderate to severe brain-based impairments, are nonverbal and non-ambulatory, and require a 1:1 paraprofessional (Tr. p. 411).

To address the student's identified needs, as discussed above, the iBrain education plan recommended that the student attend a 12-month program in an 8:1+1 special class along with the support of 1:1 paraprofessional services throughout the day, school nurse services as needed, and assistive technology devices and services (Parent Ex. B at pp. 67-68). In addition, the plan recommended related services of four 60-minute individual sessions per week of OT, five 60-minute individual sessions per week of PT, four 60-minute individual sessions per week of speech-language therapy, three 60-minute individual and one 60-minute group session per week of music therapy, one 60-minute session per month of individual assistive technology services, and one 60-minute session per month of parent counseling and training (id.).

The iBrain education plan also included numerous goals and corresponding objectives or benchmarks targeting the student's needs as previously discussed (Parent Ex. B at pp. 47-64). For example, with regard to academics, the iBrain education plan indicated the student was working on a goal to develop and demonstrate functional math concepts using a preferred method of communication, e.g., high technology, low technology, and manipulatives (id. at pp. 47-48). With respect to reading comprehension, the iBrain education plan noted a goal to integrate and build background knowledge and develop reading strategies using a preferred method of communication (id. at p. 47). The plan included short-term benchmarks for the student that targeted his ability to

[12] The iBrain deputy director of special education testified that the iBrain education plan was "a living, breathing document" which was "always being updated" and elaborated that he played a role in the development of the student's iBrain education plan "to a degree" (Tr. pp. 432-33). According to his testimony, the iBrain education plan encompassed all the changes from April 2023 through December 2023 (Tr. p. 438). He testified that the iBrain education plan was modified since December 15, 2023 because iBrain "assess[ed] [its] students every quarter" and changes were made to the iBrain education plan accordingly to reflect students' progress, but he did not know when the plan that is in evidence was last updated (Tr. pp. 443-44). The plan itself indicates it was updated on December 15, 2023 (Parent Ex. B at p. 1); however, the specific parts that were updated are not specifically identified, accordingly it is impossible to determine if progress identified in the education plan occurred during the 2023-24 school year or earlier.

identify characters, setting, and major events in a story using multiple means of communication; to answer "wh" and yes or no questions using multiple means of communication; and to explain the sequence of events using preferred methods of communication (id.).

With respect to the student's speech-language development, the iBrain education plan indicated the student was working on a goal to increase his receptive and expressive communication through vocalizations (Parent Ex. B at p. 60). To address the student's receptive language skills, the iBrain education plan included a goal to follow two-step directions, respond to "wh" comprehension questions, sequence events, and identify present tense verbs, by using total communication given moderate multimodal cues (id. at p. 49). The iBrain education plan included a goal to increase the student's expressive language skills by using total communication to increase the length and variety of his utterances, to request, comment, ask questions, and participate in social contexts when provided with moderate multimodal cues across all environments (id. at p. 50). According to the iBrain education plan, the student was working on a goal to increase social/pragmatic communication skills through consistent use of high-tech AAC, facial expressions/gestures, and vocalizations to participate in social activities, e.g., greet peers/teachers, comment in class, and take turns (id. at pp. 50-51). Also, the iBrain education plan noted an oral motor goal to tolerate the highest level of oral intake with the use of safe swallow strategies (id. at p. 51).

With respect to expressive, receptive, and pragmatic language skills, the iBrain education plan stated that the student's speech-language provider reported he made significant progress in all areas of speech-language therapy and showed "consistent improvements" on his goals (Parent Ex. B at pp. 19-21). According to the iBrain education plan, the student demonstrated fast, steady progress towards a goal to initiate and end a conversation, to identify and express his feelings, and to comment and ask questions (id. at p. 3). The iBrain education plan further noted the student had made improvements with using his AAC device to request breaks when needed with minimal to moderate prompting (id. at p. 9). The iBrain education plan indicated the student had shown significant improvement in his ability to engage in unfamiliar activities such as community outings and in his ability to communicate with unfamiliar people (id. at p. 23).

With respect to social skills, overall, the iBrain education plan indicated the student made progress in his social skills and had shown steady consistency in his social and interpersonal skills (Parent Ex. B at pp. 3, 32). For example, the student was able to respond to questions about "how he ha[d] been" with appropriate answers using his AAC device (id. at p. 32). Regarding adaptive skill development, the iBrain education plan indicated the student demonstrated consistent progress in all self-care areas, i.e., improvements to visually attending to dressing tasks and initiation of next steps in a task sequence (id. at p. 10). The iBrain education plan reflected the student demonstrated improvements with cleaning up with no prompting to minimal prompting when asked to transition to the next activity (id.). According to the iBrain education plan, the student demonstrated improved safety awareness evidenced by appropriate interactions with peers, being mindful of others in hallways and safely navigating obstacles (id.).

Regarding fine motor development, the iBrain education plan included a goal to improve the student's participation during academic tasks, e.g., imitate vertical, horizontal, and diagonal lines, sustain attention to tabletop tasks for 15 consecutive minutes, and provide currency during a transaction when requesting a preferred item (Parent Ex. B at p. 56). The iBrain education plan

also included a goal that targeted the student's ability to participate in a catch and throw activity from every direction while sitting on a bench with close supervision (id. at pp. 54-55). To further address the student's physical development, the iBrain education plan included a goal for the student to ambulate for 300 feet with handheld assistance and minimal verbal and tactile cueing (id. at p. 53). With respect to the student's social skills and expressive communication skills, the iBrain education plan included a goal to improve the student's communication and expression in the classroom environment to increase peer interaction and participation in academic activities (id. at p. 48). In terms of the student's adaptive skills, the iBrain education plan identified a goal to increase the student's functional independence in the school environment (id. at p. 57).

In terms of fine motor development, the iBrain education plan reflected the student demonstrated progress with initiating lines in all directions (Parent Ex. B at p. 9). For gross motor skills, the iBrain education plan revealed the student made steady progress towards his PT goals, i.e., mastered one benchmark to walk 50 feet towards the classroom (id. at p. 12). The iBrain education plan further noted the student had shown improvement in self-sensory regulation and the ability to maintain static positions for a longer duration with decreased verbal cueing (id. at p. 14). Next, the iBrain education plan revealed the student achieved one of his benchmarks to transition from the floor to half kneeling with contact guard assistant while pulling onto a stable surface (id. at pp. 13- 14).

With respect to vocational skills, the iBrain education plan reflected the student demonstrated improved impulsivity control evidenced by the ability to wait to take an item after paying for it in the community (Parent Ex. B at p. 9). Further, regarding vocational goals, the iBrain education plan revealed the student demonstrated progress with activity tolerance, trying new activities, being safe and participating in community outings (id. at p. 10). According to the iBrain education plan, the student had shown great improvement in the majority of his mat transitions and higher participation in activities of daily living (id. at p. 13). Next, the iBrain education plan reflected the student demonstrated improvements with being able to follow a grocery list of three to five items via word lists and/or pictures of items with moderate verbal cueing (id. at p. 10). The iBrain education plan included a vocational goal for the student to improve his participation in vocational tasks, e.g., locating five items on grocery store list given visual support as needed and placing them in a cart given moderate verbal and visual prompting (id. at pp. 56-57).

According to the district school psychologist, the student's teachers and related service providers from iBrain indicated that he was doing well in an 8:1+1 special class, and, taking into account the progress the student had been making with the supports he had been receiving, the CSE determined that an 8:1+1 special class ratio was appropriate (Tr. pp. 124-25). The school psychologist testified that based on reviewing the teacher reports and discussions with staff at the CSE meeting, the student made progress at iBrain and received specially designed instruction which met his unique needs (Tr. p. 184). The April 2023 IEP indicated that at the CSE meeting, the student's parents reported he had made "a lot of progress at iBrain" as he had been communicating better, liked to sing, and had a keen interest in reading comic books (Dist. Ex. 1 at p. 8).

Overall, the hearing record reflects that iBrain provided the student with specially designed instruction that addressed his identified special education needs. Although, the IHO noted the

hearing record reflected that the student received two and a half hours per week of academic instruction at iBrain during the 2023-24 school year, the goals included in the iBrain education plan to address the student's developmental, academic, functional, and physical needs indicate that the student was working on expressive, receptive, and pragmatic language goals, fine motor goals, and social skills goals during the school day which suggests that the related services the student received at iBrain were integrated with his academics and the student was receiving instruction targeting his need areas. To the extent the IHO would have preferred, for instance, testimony from the student's providers or parents or the submission into evidence of a class schedule, there is no requirement that parents must present particular forms of evidence in order to meet their burden under the Burlington-Carter standard. Rather, as previously discussed, a "totality of the evidence" standard should be employed when determining the appropriateness of a unilateral placement. Here, in order to meet their evidentiary burden, the parents relied on the iBrain education plan, a detailed and comprehensive document which included descriptions of every area of the student's needs and the instruction and related services being used to address those needs at iBrain, as well as the unrebutted testimony of iBrain's deputy director of special education as corroboration that the iBrain education plan was being implemented for the student during the 2023-24 school year (Tr. pp. 411-12, 413-14). Moreover, the transportation contract with Sisters Travel reflects that the parents also unilaterally-obtained special transportation services that provided a 1:1 transportation paraprofessional for the student to address his need for that level of support during his transportation to and from iBrain (see Parent Ex. E). Based on the foregoing, there is a sufficient basis in the hearing record to reverse the IHO's finding that iBrain was not an appropriate unilateral placement for the student.

D. Equitable Considerations

Turning to equitable considerations, the parents contend that the IHO erred in finding that had he addressed equitable considerations they would not have weighed in favor of granting the full relief requested. The parents assert that they attended CSE meetings, provided a timely ten-day notice, raised their concerns to the CSE, and made themselves and their son available to the CSE. Additionally, the parents argue that the iBrain and Sisters Travel contracts were clear on their face and reasonable. The district, on the other hand, argues that equitable considerations disfavor the parents as their ten-day notice failed to detail their disagreement with the April 2023 IEP and the parents never intended to enroll their son at a public school.

Here, the IHO found that certain reductions were warranted under the circumstances but based on the limited information in the hearing record was unable to determine the specific amount of such reduction in the event that tuition and transportation costs were awarded (IHO Decision at pp. 33-34).[13] For the reasons that follow, I find that the IHO erroneously determined that equitable

[13] The IHO discussed the parents' requested relief for direct funding of the special transportation services in the section of her decision which addressed the appropriateness of the unilateral placement instead of in the portion of her decision which addressed equitable considerations. Her discussion of the parents' unilaterally-obtained special transportation, however, did not address the appropriateness of the special transportation services but rather aspects of the transportation contract itself which the IHO found to be unreasonable or unreliable (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any."]). Accordingly, I consider the IHO's findings with respect to the parents' unilaterally-obtained transportation services as primarily

considerations weighed against the parents and, therefore, that a reduction in the district's funding of the tuition and transportation costs for the student's attendance at iBrain for the 2023-24 school year should be reduced.

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

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

The IHO found that the parents failed to give "due consideration" to the recommended program and placement and failed to contact the assigned school for information or a tour of the program (IHO Decision at p. 33). However, I note that the IHO's finding that the parents never considered placing the student in the district public school is not itself a legally sufficient reason

related to equitable considerations.

to reduce or deny reimbursement when determining whether to deny a parent's request for tuition reimbursement because it is inconsistent with the controlling law of this circuit. The Second Circuit has held that when considering equities, even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). Accordingly, the IHO's finding that the parents' failed to consider the public-school program and that a failure to visit the assigned school constituted an equitable consideration that weighed against an award of tuition funding was made in error.

Next, the IHO stated that the June 20, 2023 ten-day notice letter "did not cite any specific concerns and did not give the [district] an opportunity to resolve the issues before the filing of a due process complaint" (IHO Decision at p. 33). Again, the IHO references that the ten-day notice letter raises issues pertaining to implementation but that the parents did not consider the assigned school (id.). The June 2023 letter states that the parents were "rejecting" the district's recommended program and placement and that the district failed to provide them with a school location letter (Parent Ex. H at p. 1). The letter also indicated that the parents "expressed their concerns, disagreements, and rejection of the [CSE's] recommendations at the most recent [IEP] meeting" (id.). The IEP noted parental concerns, noting the parents agreed to provide forms for transportation accommodations, and also noting that the April 2023 CSE reviewed the parents' prior due process complaint notice (Dist. Ex. 1 at pp. 44-45).

The Second Circuit has emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools"]). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171). There is no requirement that the parents specifically describe each and every disagreement with the recommended program (see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]).[14] Additionally, a written 10-day notice is not required where parents have provided notice at the most recent CSE meeting prior to their removal of the student from public school.

[14] An SRO has held, in another matter, that there was no requirement under the IDEA that the parent correctly identify the specific unilateral placement in which the student would be placed (see Application of a Student with a Disability, Appeal No. 24-006). In that matter, the SRO found no notification requirements in the ten-day notice other than that parents notify the district "they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (id.; see 20 U.S.C. § 1412[a][10][C][iii][I]).

Considering all of the above, the parents timely expressed their objections to the recommended program for the 2023-24 school set to begin in July 2023 and their intent to enroll the student in a private school at public expense. Therefore, the parents complied with the 10-day notice requirements and the IHO's finding that the parents' 10-day notice was insufficient and weighed against the parents in terms of equitable considerations was in error.

The IHO also found that the iBrain enrollment contract and the Sisters Travel contract were not reliable as they were electronically signed by the parents but not authenticated through testimonial evidence (IHO Decision at pp. 31-32, 34). Here, "the contracts' essential terms—namely, the educational services to be provided and the amount of tuition as well as the transportation services and fees—were plainly set out in the written agreements, and we cannot agree that the contracts, read as a whole, are so vague or indefinite as to make them unenforceable as a matter of law" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 458 [2d Cir. 2014]; see Parent Exs. D-E). I find that both the iBrain and Sisters Travel contracts contained the essential terms and were enforceable without testimonial evidence. The fact that the signatures on both contracts were electronic and somewhat different in style is not a basis on which to invalidate either contract and, in fact, finding that such factors demonstrate "unreasonableness" sufficient to weigh against the parent in the contest of equitable considerations runs the risk of imposing authentication requirements in the administrative hearing process which are not otherwise required in this type of administrative proceeding, especially without notice to the parties of such a requirement and where the opposing party did not object to the IHO admitting either of the exhibits into evidence (see Tr. pp. 64-97; Parent Exs. D; E).[15]

Also, the IHO found no evidence of the student's attendance at iBrain and also found that this weighed against the parent in terms of equitable considerations (IHO Decision at p. 34). However, as previously discussed, the iBrain education plan set forth the educational programming to be provided to the student, including academic instruction, related services and the recommended classroom setting, and the iBrain deputy director of special education testified that the program contained therein was being implemented for the student during the 2023-24 school year. Having already found that the IHO erred by finding that iBrain was an inappropriate unilateral placement for the student, I also find that the IHO's determination that the lack of attendance records somehow weighs against the parent in the context of equitable considerations to be similarly erroneous.

Lastly, the IHO found the costs associated with the iBrain tuition "to be unreasonable" (IHO Decision at p. 34). The IHO held that it was unreasonable to "charge $190,000 for what may be limited academic classroom instruction per week (2 ½ hours per week), a paraprofessional,

[15] Indeed, the formal rules of evidence applicable in civil actions generally do not apply in impartial hearings (see H.C. v. Katonah-Lewisboro Union Free Sch. Dist., 528 Fed. App'x 64, 68 [2d Cir. June 24, 2013] [citing Richardson v. Perales, 402 U.S. 389, 400 (1971) for the proposition that the strict rules of evidence do not apply in an administrative proceeding and noting that application of the Daubert gatekeeper requirement is highly questionable in IDEA proceedings]; Council Rock Sch. Dist. v. M.W., 2012 WL 3055686, at *6 [E.D. Pa. July 26, 2012]; Matos v. Hove, 940 F. Supp. 67, 72 [S.D.N.Y. Sept. 25, 1996], citing Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 [7th Cir. 1977]; Cowan v. Mills, 34 A.D.3d 1166, 1167 [3d Dep't 2006]; Tonette E. v. New York State Office of Children and Family Servs., 25 A.D.3d 994, 995-96 [3d Dep't 2006]). This is in part because the "IDEA hearings are deliberately informal and intended to give [hearing officers] the flexibility that they need to ensure that each side can fairly present its evidence" (Schaffer, 546 U.S. at 61).

access to a 'school nurse'" (id.). The district asserted in its closing brief that the rates charged by iBrain and Sisters Travel were "unreasonable and excessive" which should limit the parents requested relief (IHO Ex. 22 at pp. 1, 11-12). However, the hearing record is not sufficiently developed in this matter to find that such arguments succeed as grounds for reducing tuition at iBrain or transportation costs under an equitable considerations analysis.

Among other 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).

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. 1-467; Parent Exs. A-F; H; Dist. Exs. 1-5).

In this instance, although the hearing record includes the contracted for amounts for the costs of the student's tuition at iBrain and transportation, the hearing record lacks any evidence of what a reasonable rate for either tuition, related services, or transportation would be. Accordingly, the IHO's finding that equitable considerations weighed against the parents and, therefore, an unspecified reduction in the district's funding of the tuition and transportation costs for iBrain during the 2023-24 school year must be reversed.

VII. Conclusion

Having determined that the IHO erred in finding that the district offered the student a FAPE for the 2023-24 school year and that iBrain was not an appropriate unilateral placement, and no equitable considerations weigh against an award of the parent's requested relief, the decision must be modified to provide direct funding for the tuition costs at iBrain and the transportation services provided by Sisters Travel for the 2023-24 school year as reflected in the applicable contracts.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 25, 2024, is modified by reversing that portion that found that the district offered the student a FAPE for the 2023-24 school year;

IT IS FURTHER ORDERED that the IHO's decision, dated March 25, 2024, is modified by reversing that portion that found iBrain was not an appropriate unilateral placement;

IT IS FURTHER ORDERED that the IHO's decision, dated March 25, 2024, is modified by reversing those portions which reduced the amount of funding to be paid by the district for the student's tuition costs at iBrain and special transportation services for the 2023-24 school year; and

IT IS FURTHER ORDERED that the district shall fully fund the costs of the student's tuition at iBrain and special transportation for the 2023-24 school year for the period the student attended iBrain as set forth in the iBrain enrollment contract, from July 5, 2023 through June 21, 2024.[16]

Dated: **Albany, New York**
July 5, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

[16] Although it is not clear in the hearing record, to the extent that the transportation agreement may be read to include a period of time greater than the period set forth in the iBrain enrollment agreement, the parent was aware, when entering into the contract with Sisters Travel, that the student would not be in school from July 1 through July 4, 2023 and from June 22 through June 30, 2023, accordingly, funding for transportation will be limited to the period of the enrollment contract the parents entered into with iBrain (see Parent Exs. D-E). Entering into a contract for services the parents knew the student would not receive is the type of unreasonable action that would require a reduction on an equitable basis.